



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.134 OF 2018

ROBERT NJENGA NDUATI.....CLAIMANT

VERSUS

JOSEPH KIMANI MUCHIRI.....RESPONDENT

JUDGEMENT

The claimant filed his memorandum of claim on 8th May, 2018. The respondent was served with summons but failed to enter appearance or file a defence. The court satisfied with the returns and affidavit of service filed by Arasa Kinara confirming service heard the claimant under the provisions of Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The claimant was employed by the respondent verbally and without any written records on 17th June, 2013 as a care taker and earning 12,000.00 per month which was an underpayment and claims the difference. The work hours were 6am to 6pm each day and the overtime hours were not compensated. No annual leave was allowed and the respondent failed to remit statutory deductions.

In March, 2018 the claimant received a call from the respondent who dismissed him from his employment. There was no notice, reasons given or a hearing. Despite his efforts to seek for an explanation none was forthcoming and the respondent failed to pay the due terminal dues.

The claimant is seeking the payment of notice, underpayments, and pay for leave days not taken, gratuity, salary for 4 days worked in March, 2018 and compensation for unfair termination of employment.

The claimant testified to support his claims.

The failure by the respondent to attend in these proceedings has denied the court crucial and vital records and evidence which should have assisted in the administration of justice. The court moved and the respondent served and with failure to attend the claimant must be believed in his evidence that he was employed by the respondent on verbal contract and which is recognised under the provisions of section 7 and 8 of the Employment Act, 2007.

The claimant has however attached phone records allegedly from the respondent taking place on 4th March, 2018 to the effect that his employment had been terminated and that he should remove his goods from the store. This message is not certified and seems to have been written by the claimant. This being his case, the court takes it that this message ended his employment with the respondent.

There are also Mpesa transactions records sourced from the provider, *Safaricom* giving a schedule of payments to the claimant from various sources. Some payments are from the respondent for different amounts;

12th January, 2017 the respondent deposited Ksh.12, 200;

28th November, 2017 a deposit of Ksh.14, 000;

2nd November, 2017 a deposit of 12,300;

4th September, 2017 a deposit of Ksh.12, 000;

3rd July, 2017 a deposit of Ksh.12, 000;

3rd June, 2017 a deposit of Ksh.12, 000.

These kind of payments go back to 2nd February, 2016 when the claimant was paid Ksh.12, 100.

As noted above, without the attendance of the respondent the court is denied crucial evidence and work records to challenge what the claimant has set out.

Termination of employment must be with notice, reasons and the employee must be allowed a hearing to give reasons why he employment should not be terminated and in accordance with sections 35, 41 and 43 of the Employment Act, 2007. Where the employer fails to ensure substantive and procedural justice, notice pay and compensation are due.

In this case the court denied the defence finds no material that notice and due process were accorded to the claimant. He is entitled to notice pay and compensation.

A caretaker's wage is regulated under the wage Orders. Regulation of Wages (General) Order a caretaker 9buildings) In the year 2018 the minimum wage was ksh.25,031.70 and the tabulation undertaken by the claimant in the claim is commensurate with the applicable wage orders.

The underpayments are awarded as claimed all at ksh.504, 125.00.

The claimant is only seeking leave pay for 3 years and 8 months prorated which is due under the provisions of section 28 of the Employment Act, 2007 and which should be premised on the rate of 21 days each year and 8 months prorated assessed at Ksh.58,405.60.

On the claim for overtime pay the claim is for work for 12 hours each day for the entire period of employment without a break. Despite their being no defence, these claims are an exaggeration. Such is declined.

On the claim for payment of gratuity, such right can only be secured by agreement or private treaty. Where there was no remittance of statutory dues, the remedy is not under payment of gratuity. Such is declined.

The claim for 4 days worked in March, 2018 is found justified and awarded at Ksh.4, 821.00 based on the last wage payable under the Wage orders.

As no reasons, notice or hearing has been given, following unfair termination of employment he claimant is awarded compensation equivalent to one month pay as appropriate all being ksh.25,031.70. Notice pay is also due under the provisions of section 35 of the Employment Act, 2007.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- (a) Compensation awarded at ksh.25,031.70;**
- (b) Notice pay Kshs.25,031.70;**
- (c) Underpayments Ksh.504,125.00;**
- (d) Pay for 4 days worked in March, 2018 Ksh.4,821.00**
- (e) Costs of the suit.**

Delivered at Nakuru this 14th day of November, 2019.

M. MBAR?

JUDGE

In the presence of:.....

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