



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.397 OF 2017

SIMON HABWE ANDAI CLAIMANT

VERSUS

MENENGAI OIL REFINERIES LIMITED.....RESPONDENT

JUDGEMENT

IN March, 2015 the claimant was employed by the respondent as a general worker in the boiler section earning ksh.460.00 per day and worked until December, 2015 when he was transferred to carpentry and joinery section in January, 2016 ad wage increased to Ksh.750.00 per days and which he earned until 21st January, 2017.

The claim is that there was underpayment of wage from 1st May, 2015 to December, 2015 where the daily rate under the Wage Orders was Ksh.484.30.

The claimant reported on duty on 21st January, 2017 and was informed that his employment had been terminated. There was no notice or hearing contrary to section 35 and 41 of the Employment Act.

The claim is for;

- a) One month notice pay;
- b) Underpayments
- c) Leave for 1 year and 10 months;
- d) Compensation and
- e) Costs.

The claimant testified in support of his claim.

The claimant testified that while working in the boiler section in the year 2015 he would be moved from place to place and his work was not consistent and when he joined the carpentry section he would work for 5 days each week. He enjoyed 2 days off each week. That the cheque attached to the defence was not issued to him and the labour officer never called him to collect it.

In defence the respondents' case is that the claimant was a general worker on a needs basis in the year 2015 to 2017 with intermittent engagement and on a needs basis. There was no underpayment as alleged and payment of wage was in accordance with agreement between the parties.

The defence is also that the claimant report to work on 20th January, 2017 and worked until close of day but failed to attend on 21st January, 2017 and there was desertion of duty without notice and efforts to trace him were not fruitful. He was called for a disciplinary hearing and when he failed to attend his terminal dues were deposited with the labour officer. The claims thus made are without basis and should be dismissed.

Peter Kinenje testified that he is the human resource officer of the respondent and the claimant was employed as a causal employee from 12th jaguar, to September, 2015 on a needs basis and when work was available. He would be paid ksh.485.00 together with NSSF and NHIF deductions. In September, 2015 the claimant left until May 2016 when he was employed in the carpentry department and paid ksh.750.00 daily rate. It was not a promotion but the due daily wage.

In May, 2016 the claimant was at work for 18 days;

June, for 20 days; and

January, 2017 he was at work for 17 days.

The claimant was not dismissed from his employment, he deserted. The respondent's core work is not in carpentry and there was partitioning to be done and thus the claimant was engaged on a needs basis but at the end he decided to abscond duty.

Mr Kinenje also testified that efforts to call and reach out to the claimant did not bear fruits. He was owed his final due and which were sent to the labour office at ksh.10,853.00 for earned leave and the other claims made are without basis and should be dismissed.

The respondent had the policy to pay for leave on a formula putting all days worked together.

Both parties filed written submissions.

The claimant is seeking the payment of underpayments. He however stated that in the year 2015 he was not at work daily. Work attendance was intermittent. He was paid ksh.484.00 daily. Under the Wage Orders Legal Notice No.117 of 1st may, 2015 a general worker was entitled to Ksh.484.30 and of which the respondent paid NSSF and NHIF dues which for a general worker engaged on causal basis was generous.

The claim for a wage of ksh.460.00 per day has no basis. Even where such wage was due, the addition of NSSF and NHIF was a generous payment for each day.

The respondent filed its work records showing the work attendance by the claimant. This record is not challenged in any material way. The time logs show the claimant was not a full time employee despite his NSSF and NHIF payments monthly. In January he was at work for 15 days;

December, 2016 for 20 days;

November, 20 days; and

From October 2015 to April, 2016 he was not at the respondent. I take it the work the claimant was doing of carpentry does not comprise the core business of the respondent. This evidence is not controverted. Work attendance was intermittent and on a needs basis and which left the claimant to source other employment elsewhere. No notice was thus required for a causal employee paid a daily rate and employed on a needs basis.

Upon end of the claimant's engagement his owing dues were sent to the labour officer meaning the claimant never attended to receive such dues.

The subject cheque is attached to the defence and the claimant cannot be found to state that he just learnt of the need to collect his owing dues while in court.

Accordingly, the claims made are found without merit and are hereby dismissed. The claimant shall pay costs of ksh.10,000.00 to the respondent.

Delivered at Nakuru this 11th day of December, 2019.

M. MBAR?

JUDGE

In the presence of: