



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 930 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

DOMINIC KERORE NYARIBO.....CLAIMANT

-Versus-

MOJUS ENTERPRISES LIMITED.....1ST RESPONDENT

EVANS MOSIGIS OMBWORI.....2ND RESPONDENT

JUDGMENT

The claimant herein, Dominic Kerore Nyaribo filed this suit against Mojus Enterprises Limited, the 1st respondent and Evans Mosigis Ombwori, the 2nd respondent.

In his memorandum of claim dated and filed ON 4th June 2014, he alleges that his employment with the 1st respondent was terminated through redundancy and the respondent failed to pay his terminal benefits. He seeks the following remedies: -

1. 12 months' wages as compensation for loss of employment as provided for under Section 49 (c) of the Employment Act 2007

= Kshs. 25,000 x 12 Kshs. 300,000

2. One month's payment in lieu of notice Kshs. 25,000

3. Leave annual for 6 years = 126 days x 962 Kshs. 121,212

4. Severance pay for 6 years = 90 days x 962 Kshs. 86,500

5. Sunday overtime 12 hours per week = 12 x 2 x 4 x 4 x 128 Kshs. 884,736

6. Public Holidays 11 days per year = 11 x 6 x 12 x 128 Kshs. 202,752

7. House allowance 15% of the basic pay

25,000 x 15 = 3,750 x 12 x 6 Kshs. 270,000

100

Total Kshs.1,890,200

8. Any other award or benefits which the Honourable court deems fit to grant in the circumstances of the case.

9. The respondents to pay the cost of the suit.

The respondents filed a memorandum of reply in which the 1st respondent admits employing the claimant on temporary terms as a semi-

trailer and prime mover truck driver on casual basis as and when there was work. The respondents deny unlawfully terminating the employment of the claimant or owing him the sums claimed or any other sum.

The case was heard on 4th April 2017 in the absence of the respondent who was served by the court through counsel on record but failed to attend court on the hearing date.

Claimant's Case

The claimant testified that he was employed by the 1st respondent on 1st September 2006 at a salary of Kshs. 8,000 which had increased to Kshs. 25,000 by the time his employment was terminated. He testified that he was paid via Mpesa.

The claimant testified that he did not have specific working hours and worked on all days including Sundays and public holidays whenever there were goods to be transported.

He testified that he left employment on 2nd September 2012, when the 2nd respondent told him to park the vehicle so that it could be taken for service. He testified that he was not paid terminal dues but was paid Kshs. 35,000 for his last salary and the 2nd respondent sent him a further Kshs. 40,000.

The claimant testified that he was not given notice or paid in lieu thereof. He testified that he reported to his union to assist him get his terminal benefits but the respondents did not respond to the union's letter of demand. He testified that he was not a member of NSSF or NHIF and was not given annual leave or paid in lieu for the entire period he worked.

The claimant prayed for judgment against the respondent as prayed in his memorandum of claim.

In the oral submission by Mr. Kandere the claimant's counsel, he submitted that the claimant was an employee of the respondent as admitted in the response to the claim but disagreed with the respondent that the claimant was employed on temporary or casual terms of employment.

Relying on the provisions of Section 35 of the Employment Act, Mr. Kandere submitted that the claimant having worked for 6 years, his terms of engagement converted to monthly contracts as provided in the Act.

On the mode of termination, Mr. Kandere submitted that there are no records to prove the claimant's termination was fair. He submitted that the respondent is obliged under Section 74, to keep records and under Section 9 to prepare a contract of service but produced no records and failed to attend court to adduce its evidence. He submitted that from the record there is no evidence that the respondent complied with Section 40 and/or 41 of the Act.

On remedies, Mr. Kandere submitted that the respondent having failed to comply with the law, the claimant is entitled to his prayers being one month's salary in lieu of notice, compensation equivalent to 12 months' salary, leave for 6 years and severance pay or in the alternative service pay. Mr. Kandere further submitted that the claimant is entitled to payment for overtime work done on Sundays and public holidays and to house allowance.

Determination

I have carefully considered the pleadings and the evidence on record. I have further considered the oral submissions by counsel for the claimant. It is not disputed that the claimant was employed by the respondent. What is disputed is whether the employment was temporary/casual or regular.

The issues for determination are therefore the nature of contract between the claimant and 1st respondent, whether the termination of the claimant's employment was unfair and whether the claimant is entitled to the prayers sought.

1. Nature of contract

The claimant's position is that his employment was converted to regular terms by operation of law under Section 37 (1) of the Employment Act. According to the claimant's evidence, he worked for the respondents continuously from 2006 to 2012 while the respondent states in the memorandum of response that the claimant worked only when there was work and was therefore on casual or temporary terms of service.

In the document attached as Appendix 11, to the claim, the respondent acknowledges employing the claimant for over 6 years. On the basis of this evidence, I find that the claimant was a regular employee of the 1st respondent and hold accordingly.

2. Whether the termination of the claimant's employment was unfair

The claimant avers in the memorandum of claim that his employment was terminated on account of redundancy. However, in his testimony the claimant testified that he was told by the 2nd respondent to park the vehicle so that it could go for service but was never called back to work. He was thereafter paid Kshs. 35,000 and a further Kshs.40,000.

From the foregoing, it is clear that the claimant was never taken through any formal process before his employment was terminated and the termination therefore did not comply with Section 41 of the Employment Act. He was further never given any valid reason for termination. The reason given being that the vehicle was being taken for service is not a valid reason for termination of employment. I therefore find the

termination unfair under Section 45 of the Act.

3. Terminal Dues

The claimant having been terminated unfairly, is entitled to one month's salary in lieu of notice. In the memorandum of claim, the claimant prayed that his last salary was Kshs. 25,000 a fact that was not denied by the respondent in its memorandum of reply. I therefore award the claimant Kshs. 25,000 on account of payment in lieu of notice.

The claimant further prayed for 6 years' annual leave. The respondent having not denied the claimant's averment that he did not take annual leave for the entire period of 6 years that he worked, the claimant is entitled the leave at 21 days per year at Kshs. 105,000 which I award him.

The claimant further prayed for severance pay. I have already held above that there is no evidence of redundancy and since severance pay is only payable in the event of redundancy, the claim fails and is dismissed.

The prayers for overtime for Sundays and public holidays must also fail because the claimant did not adduce evidence to prove which Sundays and public holidays he worked. In his testimony, he stated that he worked on Sundays and public holidays when there were goods to be transported. He did not state which Sundays or public holidays these were. I find that those prayers have not been proved and dismiss them.

The claimant further prayed for house allowance. He did not demonstrate that his salary was not consolidated. On the contrary, he testified that he was paid a consolidated salary. A consolidated salary is inclusive of house allowance. The claim for house allowance therefore fails and is dismissed.

The claimant prayed for 12 months' salary as compensation. Having worked for 6 years and taking into account all the circumstances of his case, it is my opinion that 6 months' salary is reasonable compensation and I award him the same at Kshs. 150,000.

The respondents shall pay the claimant's costs.

Conclusion

In conclusion, I enter judgment for the claimant against the 1st respondent in the sum of **Kshs. 280,000 and costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE