



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 174 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

EMMANUEL OCHIENG ONYANGO.....CLAIMANT

-Versus-

METAL CANS AND CLOSURE KENYA LIMITED.....1ST RESPONDENT

LUPRA MANPOWER AND

HR MANAGEMENT SERVICES.....2ND RESPONDENT

JUDGMENT

By statement of claim dated 13th February 2014 and filed on the same date, the claimant avers that his employment was unfairly terminated by the respondents. The claimant prays for the following remedies –

1. Twelve months' salary in lieu of notice on gross income

Kshs. 11,247 x 12 months = **Kshs. 134,964/=**

2. Compensation of 114 extra hours that the respondent Director forced the claimant to work in every month 114., calculated as follows;

a.. From 7.00 a.m. to 6.30 p.m. = 11.5 hours less 8 normal hours = 3.5 extra hours

b.. From Monday to Saturday = 3.5 hours x 6 days = 21 hours x 4 weeks =

84 hours x overtime @ 1.5 = 126 hours x 6 months worked = **756 hours**

c.. All Sundays worked = 3.5 x 4 Sundays in a month = 14 hours x overtime @ 2 = 28 x 6 months = **168 hours**

d.. 756 hours + 168 hours = 924 hours x daily rate

@ Kshs. 11,247 = (Kshs.54/= per hour) = **Kshs. 49,896/=**

208 hours

3. NSSF @ 400 x 6 months = **Kshs. 2,400/=** plus penalty that will be determined by NSSF.

4. PAYE @ 703 x 6 months = **Kshs. 4,218/=** plus the penalty as will be subscribed by the Kenya Revenue Authority (**KRA**)

5. NHIF @ 320 x 6 months = **Kshs. 1,920/=** plus the penalty as will be subscribed by the NHIF.

6. Leave days @ 1.75 x 6 months = 10.5 days x 672 per day = **Kshs. 7,056/=**

7. Compensation for disturbance by terminating the service of the claimant un-procedurally.

8. Cost of this suit plus interest.

9. Any other monies that is legally due to my favour.

The respondents filed a statement of defence dated 7th November 2014 in which they only admit the descriptive parts of the claim but deny the rest of the averments therein.

The case was heard on 5th April 2017 in the absence of the respondents after the court ascertained that they were properly served by the court as the case was heard during the service week.

Claimant's Case

The claimant testified that he was employed by the respondents on 26th March 2013 in dispatch section. His duties were uploading and offloading. He worked for about 6 months.

He testified that the reason for termination of his appointment was that he did not want to work. He testified that on the material day he was sent to Crown Paints in Mogadishu Road, Industrial Area to load goods at 4.30 p.m. he was with other colleagues. They finished loading at 5.30 p.m. There was traffic jam from Likoni Road to Mogadishu Road and they arrived at 5.30- p.m. They found that Crown Paints had closed for the day and were told to leave the goods in the trailer overnight and go back the following day in the morning to offload but the respondents insisted that they off load immediately.

He testified that it took a while for the respondents and Crown Berger Paints to agree. The two did not agree and the claimant and his team went back with the trailer unloaded. When they arrived, the foreman accused them of not willing to work and dismissed them. He was issued with a certificate of service. All of them were replaced the following day.

The claimant testified that he was not given a hearing or issued with a letter of dismissal. He prayed for remedies as claimed in his statement of claim.

Determination

I have considered the pleadings and *viva voce* evidence of the claimant. The parties did not file written submissions. The issues for determination are whether the claimant was unfairly terminated as alleged and if he is entitled to the remedies sought.

Unfair Termination

Unfair termination occurs where the employer fails to establish either or both valid reason(s) for termination of employment and/or fair procedure.

In the present case, the claimant's testimony is uncontroverted, as the respondents did not attend court on the date of hearing and did not attach any documents to the statement of defence to disprove the claimant's averments.

From the testimony of the claimant, he was not subjected to a fair hearing as prescribed in Section 41 of the Employment Act. There was also no valid reason for the termination as he was not responsible for the failure to off load goods at Crown Paints, which was occasioned by the late loading and traffic jam between the respondents' premises and Crown Paints. It is the respondents who failed to agree with Crown Paints to allow off-loading of goods when the claimant and his team arrived at Crown Paints at 5.30 p.m. after closing time. There was therefore no fault on the part of the claimant.

There having been no valid reason and the claimant having not been taken through any form of disciplinary process, the termination of his employment was unfair in terms of Section 45 (2) of the Employment Act and I hold and declare accordingly.

Remedies

The claimant prayed of a number of remedies. He seeks payment of overtime for extra hours of work done on grounds that he reported for work at 7 a.m. and worked until 6.30 p.m. thus working for 3.5 extra hours per day, which he claims from Monday to Saturday at 21 hours per week for the 6 weeks that he worked.

The claimant did not testify that he worked overtime. I have further perused the payslip he filed as appendix 2 of the bundle filed with the statement of claim and noted that he was paid overtime of Kshs. 4,064 in the month of May 2013.

From the foregoing, I find that the claimant has not proved that he worked any overtime for which he was not paid and dismiss the claim.

The claimant also prayed for NSSF, PAYE and NHIF deducted from his salary and not remitted to the relevant authorities together with penalties. The claimant submitted a copy of NSSF statements which shows that there were no remittances in respect thereof yet his payslip reflects a deduction of Kshs.703 in respect of PAYE, Kshs.320 in respect of NHIF and Kshs. 1,200 in respect of NSSF. The respondent did not controvert the averments of the claimant that the deductions were not remitted to the various statutory bodies by producing evidence of

such remittance.

Section 10(6) and (7) of the Employment Act require the employer to produce all prescribed employment records failing which the burden of proof of such employment particulars shifts to the employer. Having failed to produce any records or in any way controvert the averments of the claimant, I find that the respondents have failed to prove that they remitted the statutory deductions made from the claimant's salary to the relevant stature bodies.

Under Section 19(6) of the Employment Act, an employer who fails to remit any money deducted from an employee's wages is required to refund the money to the employee, and at the same time pay the relevant body on whose account the deduction was made. Section 19 is reproduced below-

19. Deduction of wages

(1 Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

(a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;

(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance

of his work;

(d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;

(e) any amount paid to the employee in error as wages in excess of the amount of wages due to him;

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and

(i) such other amounts as the Minister may prescribe.

(2) No employer shall make a deduction from the wages payable to an employee as an advance of wages in consideration of, or as a reward for, the provision of employment for that employee, or for retaining the employee in employment.

(3) Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two-thirds of such wages or such additional or other amount as may be prescribed by the Minister either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry.

(4) An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f),

(g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.

(5) An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years, or to both.

(6) Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee's remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages and pay the intended beneficiary on behalf of the employee with the employer's own funds.

[Emphasis added]

I order refund of the monies deducted from the claimant's wages on account of NSSF, NHIF and PAYE and not remitted.

The claimant further prayed for leave days. I have noted from the payslip at annexure 2 of the claim that the claimant's salary was paid together with 1.75 days leave. I find that the claimant has not proved that he is owed any leave days by the respondents.

The claimant further prayed for compensation for disturbance by termination of his employment services unprocedurally and pay in lieu of notice. I award him one month's salary in lieu of notice and one month's salary as compensation for unfair termination of employment taking into account all the circumstances of his case. His basic salary according to the contract for the period 26th August to 25th November 2013 was Kshs. 9780 with a house allowance of Kshs. 1467.

Conclusion

In conclusion, I declare the termination of the claimant's employment by the respondents unfair and enter judgment for the claimant against the respondents jointly and severally in the sum of Kshs. 31,032.

Made up as follows -

1. NSSF, NHIF and PAYE deducted and not remitted Kshs. 8,538 to be paid with interest at court rates from date of filing suit
2. One month's salary in lieu of notice Kshs. 11,247.
3. Compensation Kshs. 11,247.

Items 2 and 3 will attract interest from date of judgment.

The Respondents shall also pay the claimant's costs.

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

MAUREEN ONYANGO

JUDGE