



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 229 OF 2014

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

JOSEPH GOR ATHIAMBO.....CLAIMANT

-VERSUS-

AZICON KENYA LIMITED.....RESPONDENT

JUDGMENT

By Memorandum of Claim dated and filed on 28th August 2014 the Claimant avers that he was employed by the Respondent at its office in Kisumu as a night watchman from 30th September 2009 at a salary of Kshs.8,250 which was reviewed on yearly basis. He avers that the Respondent terminated his employment on grounds of redundancy without basis on 15th September 2011. At the time of termination his salary was Kshs. 9,150. He avers that the Respondent failed to pay his terminal dues. The Claimant further avers that he was underpaid for the entire period he worked for the Respondent.

The Claimant prays for judgment against the Respondent as follows-

- | | | |
|--|---|-----------------|
| 1. One month salary in lieu of notice | = | Kshs. 12,183 |
| 2. House allowance = 4,061 x 23 months | = | Kshs. 93,403 |
| 3. Leave allowance for two years | = | Kshs. 24,366 |
| 4. Underpayment, statutory (328.30 x 133 days) from 21 st November 2009 to 1 st April 2010 less what was paid (275 x 133 days) | = | Kshs. 7,075.60 |
| 5. Underpayment, statutory (361 x 306 days) from 1 st May 2010 to 1 st April 2011 less what was paid (275 x 306 days) | = | Kshs. 26,316 |
| 6. Underpayment, statutory (406.10 x 118 days) from 1 st May 2011 to 15 th September 2011 less what was paid (305 x 118 days) | = | Kshs. 11,929.80 |
| 7. Redundancy severance pay | = | Kshs. 24,366 |
| 8. 12 months' salary for unfair termination of services | = | Kshs. 146,196 |

9. Service pay calculated at 15 days for each year worked = Kshs. 12,183

Total Kshs. 358,018.40

10. A certificate of service

11. Costs of the suit

12. Interest on total above

13. Any other further relief that the court may deem just and fit to grant.

The Respondent filed a Response to the Memorandum of Claim on 8th July 2016 after being granted leave to file the same out of time. In the Response the Respondent admits employing the Claimant as a night watchman but on a contractual weekly wage of Kshs. 8250 from 30th September 2009. The Respondent further admits terminating the Claimant's contract on grounds of redundancy after complying with the law.

The Respondent denies that the Claimant was underpaid or that it refused to pay the Claimant's terminal benefits as alleged and further denies that the termination was unfair.

The Respondent filed a witness statement of LILLIANNE BERU who states that she was employed as a secretary cum cashier by the Respondent during the period that the Claimant worked with the Respondent. It is noted that the witness does not state when the Claimant's employment terminated.

The Respondent pleads that the Claimant's suit is time barred and it will seek the striking out thereof by preliminary objection.

The case was fixed for hearing on 18th June 2015 and 8th December 2015 when it was adjourned. On 12th July 2016 when the case came up for hearing parties agreed to proceed by way of written submissions which they subsequently filed and exchanged. The Court was however unable to determine the issue based on the written submissions as there were issues that the parties did not address in the submissions. The Claimant thereafter filed supplementary submissions and an affidavit of the Claimant.

Claimant's Submissions

In the submissions filed on behalf of the Claimant it is submitted that the Respondent admitted employing the Claimant both in the Response and in the Witness Statement. It is further submitted that there was no justification for the redundancy and further the Respondent did not comply with procedure set out in section 40 of the Employment Act rendering the redundancy an unfair termination. The Claimant relied on the case of **David Kinyua Nthumbi & Another v Travellers Petrol Point Limited [2016] eKLR** in which the court held that an employer who ignores the provisions of section 40 must be held accountable as the section provides for a soft landing for an employee declared redundant.

It is further submitted that the Claimant was not paid house allowance as he was paid at a rate of Kshs. 275 a day which is below the statutory minimum wage and therefore did not include house allowance. It was further submitted that the Claimant was not paid severance pay and is entitled to the same. It is submitted that the Claimant did not confirm receiving full and final payment at the Labour Office.

In the Claimant's Supplementary Submissions, it is submitted that the Claimant's terms of employment were converted by virtue of section 37 of the Employment Act and that he is entitled to service pay under section 35 of the Act. It is further submitted that the Claimant's claim is not statutorily time barred as he was terminated verbally on 15th September 2011 as stated in the Claimant's affidavit sworn on 3rd March 2017 and as admitted in the Response to the Claim. On the recommendation letter filed together with the Respondent's submissions it is submitted that the Claimant did not request for the letter of

recommendation dated 5th April 2011 as he was still in employment. It is further submitted that the letter of recommendation was never issued to the Claimant.

Respondent's Submissions

For the Respondent it is submitted that the Claimant was engaged on a daily wage of Kshs. 275 per day and is bound by the agreement which was never superseded by any other contract. It is submitted that the Claimant did not file a reply to the Response to Claim and the averments therein together with those in the Witness Statement of LILLIANNE BERU are uncontested facts. It is further submitted that the Claimant was paid Kshs. 9,015 on 22nd November 2011 and a further Kshs. 20,000 on 18th May 2012 at the Labour Office in full and final settlement of his claim against the Respondent.

The Respondent submitted that the process for redundancy was duly followed, that the issue of underpayment does not lie as the Claimant did not make any complaint about the same and that the Claim is statute barred as the Claimant's contract was terminated on 5th April 2011 and he should have filed his claim by 4th April 2014 which he did not.

Determination

I have carefully considered the pleadings, submissions and documents on record. I have further considered the affidavit of the Claimant and the authorities cited.

In its Response to the Claim the Respondent admitted employing the Claimant at a salary of Kshs. 8,250. The Respondent specifically admitted paragraphs 1,2,3,4,5,9,10,15 and 17. It denied paragraphs 5,6,7,8,11,12,13 and 14. I take note that the Respondent has both admitted and denied paragraph 5 of the Claim. Paragraphs 1 and 2 of the of Claim are descriptive of the parties. The substance of the other paragraphs admitted are as follows:

That the claimant was at all material times relevant to this claim employed by the respondent at its Kisumu Offices as Night Watchman as from 30th September 2009 and was to work on a contractual basis earning Kshs. 8,250/= (eight thousand and two hundred and fifty shillings) per month which amount was reviewed on a yearly basis.

That the respondent without any justifiable reason unlawfully terminated his employment on account of redundancy on 15th September 2011 by which time the claimant was being paid a monthly salary of Kshs. 9,150/= (nine thousand, one hundred and fifty Kenya shillings).

That the respondent has also failed to pay the claimant his terminal dues since the date of the said unlawful termination.

That the claimant's claim is supported by the Employment Act, 2007, the substance of common law as well as other relevant wage regulations.

That in the circumstances under the provisions of the Employment Act, 2007, on the termination, the respondent's act of termination was arbitrary, unlawful, unjustified and illegal in contravention of the labour rights enshrined in the law.

That there is no other suit or proceeding before any other court that gives rise to a similar cause of action between the two parties i.e. the respondent and the claimant.

That the claim is within the exclusive jurisdiction of this Honourable Court.

Going by the admissions of the Respondent in the Response to the Memorandum of Claim, the Respondent's averment in the submissions that the suit is statute barred is invalid because a party is bound by its pleadings and cannot be allowed to approbate and reprobate.

Based on the foregoing and the Respondent having admitted that the Claimant's contract was terminated on 15th September 2011 and that he was paid a monthly wage of Kshs. 8,250 which was increased to Kshs. 9,150, the only issues for determination are therefore whether the Respondent complied with redundancy procedure, whether the Claimant's termination was unfair, whether he was underpaid and if he is entitled to the remedies sought.

Section 10 (6) as read with (7) and section 74(1) require an employer to keep prescribed records, among them the date of employment and the date of termination. Subsection 10 (7) specifically provides that where an employer fails to keep and produce such records it will be the burden of the employer to disprove any allegations of an employee.

In the present case the Respondent has not produced any records except a letter addressed '**To Whom it May Concern**' and records of payments made to the Claimant at the Labour Office. The letter does not state the date when the Claimant left employment and is not in the form specified in section 51 for a certificate of service. The letter is not a letter of recommendation but more of a letter of introduction. The letter does not state that it was issued after the Claimant had left the employment of the Respondent. The wording is that "***This is to confirm that the above named person has worked with our company at the Kisumu Airport site as a watchman on casual basis since October 2009 to date.***" [Emphasis added]. The letter implies that the Claimant was still in the employment of the Respondent at the time the letter was issued.

The payment records from the labour office do not specify the purpose thereof or that it was in full and final settlement of the Claimant's claim against the Respondent. The payments were made twice, Kshs. 9,015 on 22nd November 2011 and a further Kshs. 20,000 on 18th May 2012. There is no explanation why there were two and not one payment.

No records have been produced to confirm compliance with section 40 which provides for notification of redundancy in writing to the employee and the labour officer at least a month before the redundancy is effected. There is no tabulation of the Claimant's terminal or redundancy dues. The only conclusion that may be drawn from the facts before the court is that the redundancy did not comply with the provisions of section 40 and amounts to an unfair termination.

On the underpayments, the consolidated salary of a night watchman in Kisumu from 1st May 2010 was Kshs. 8,651.45 2010 while from 1st May 2011 it was Kshs. 9,732.45 per month. This means that from May 2010 the Claimant was underpaid by (8651-8250) Kshs. 401 per month and from May 2011 he was underpaid by (9732-9150) Kshs. 582 per month. The total underpayments were therefore (401x12) + (582 x 4), making a total of Kshs. 7,140.

On severance pay the Claimant is entitled to Kshs. 9,751 being 15 days' salary per year for the two years he worked. He is also entitled to notification of redundancy under section 40(1) (b) at one month's salary and to termination notice under section 40(1)(f) being another one month's salary. The severance, notification and notice together make up Kshs. 29,253.

The Claimant is further entitled to service pay under section 35(5) at 15 days' pay per year worked at Kshs. 4,875.50x2, and leave for 2 years at 42 days (21 days per year) Kshs. 13,651.40. The Claimant is further entitled to a certificate of service. The prayer for house allowance has been included in the underpayments which was calculated on the basis of consolidated pay (basic +house allowance). Having worked for 2 years it is my opinion that 2 months' salary as compensation is reasonable taking into account all circumstances of the Claimant's case. I award him Kshs. 19,502 on account of compensation for unfair termination.

Conclusion

In conclusion I find that the redundancy of the Claimant was unprocedural and

therefore amounted to unfair termination and award him a total sum of Kshs. 74,421.90 made up as follows-

i. Pay in lieu of Notice	Kshs. 9,751.00
ii. Pay in lieu of Redundancy notification	Kshs. 9,751.00
iii. Severance pay	Kshs. 9,751.00
iv. Service pay for 2 years	Kshs. 9,751.00
v. Pay in lieu of Annual Leave	Kshs. 13,651.40
vi. Compensation	Kshs. 19,502.00
vii. Underpayments	Kshs. 7,140.00
Total	<u>Kshs. 79,297.40</u>

The Respondent shall in addition issue a certificate of service to the Claimant.

The Respondent shall pay the Claimant's costs of this suit and the decretal sum shall attract interest at court rates from date of judgment.

DATED AND SIGNED ON THIS 4TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED ON THIS 1ST DAY OF FEBRUARY 2018

MATHEWS NDERI NDUMA

JUDGE