



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 443 OF 2017

RASHID JUMA RAMADHANI.....CLAIMANT

VS

READY CONSULTANCY COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. In this claim, the Claimant Rashid Juma Ramadhani alleges unfair termination by his former employer, Ready Consultants Limited. The claim is contained in a Memorandum of Claim dated 7th June 2017 and filed in court on even date. The Respondent’s defence is contained in a Response dated 16th October 2017 and filed in court on even date.

2. The matter came up for hearing on 12th February 2018 when the Claimant testified on his own behalf and the Respondent called its Manager, Gloria Endekwa. Both parties subsequently filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a loader at a monthly salary of Kshs. 13,780 effective 10th July 2011. He avers that on 3rd April 2017, he reported to work and while waiting to do stock taking of goods in the Respondent’s motor vehicle, the said motor vehicle was assigned a different route.

4. The Claimant made inquiries upon which he was notified by the clerk in charge, one Mr. Ben to wait until 3.00 pm. At 3.00 pm, Ben informed the Claimant that he had been directed by a Mr. Arif and a Mr. Gadavi to inform him not to work until further notice. The Claimant deemed this to be an unlawful and unfair termination of his employment.

5. The Claimant further states that during his employment with the Respondent, he was not allowed to proceed on leave, contrary to Section 28 of the Employment Act, 2007. He adds that he was not paid house allowance, contrary to Section 31 of the Act.

6. Additionally, the Claimant states that the Respondent did not remit his National Social Security Fund (NSSF) dues, contrary to Section 21. He also claims to have worked overtime without any compensation, contrary to Section 27.

7. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 13,780
- b) Leave allowance for 5 years.....68,900
- c) House allowance for 70 months.....144,690
- d) Service pay for 5 years.....68,900
- e) Overtime compensation.....964,600
- f) 12 months’ salary in compensation.....165,360
- g) Certificate of service

h) Costs plus interest

The Respondent's Case

8. In its Response dated 16th October 2017 and filed in court on even date, the Respondent admits that the Claimant was its employee but denies terminating his employment.

9. The Respondent states that the Claimant failed to report to work as earlier instructed. It is the Respondent's case therefore that the Claimant was not dismissed but rather, it is him who deserted duty.

Findings and Determination

10. There are two (2) issues for determination before the Court:

a) Whether the Claimant deserted duty or was unlawfully terminated;

b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

11. The Claimant claims that this employment was unlawfully and unfairly terminated and in its defence, the Respondent states that it is the Claimant who deserted duty.

12. Desertion of duty is a form of misconduct for which an employee may be dismissed. Nevertheless, like all other forms of misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty.

13. The Court was referred to the decision in *Philomen Kiprotich Kirui v Lesos Veterinary Suppliers Ltd (CICADA Hotel) [2015] eKLR*. In this decision, my brother, **Radido J** held that an employer relying on desertion as a ground for termination of employment must demonstrate attempts made to reach the employee and get them to explain their absence or show cause why their employment should not be terminated on account of desertion of duty.

14. I agree with the position taken by my brother Judge on this issue and add that in a proper case of termination on the ground of desertion, there must be demonstrable intention on the part of the employee not to resume duty. No such intention has been shown in this case and I must therefore find that the Claimant's employment was unlawfully and unfairly terminated.

Remedies

15. In light of this, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into consideration the Claimant's length of service and the unlawful procedure adopted by the Respondent in effecting the termination. I further award the Claimant one (1) month's salary in lieu of notice.

16. The Respondent did not produce any leave records to counter the claim for leave pay. I therefore invoke Section 10(7) of the Employment Act and allow the claim.

17. The Claimant also claims house allowance. Section 31(1)and(2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;
or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

18. The Court did not find any expressed intention of the parties that the Claimant's salary was inclusive of house allowance. I therefore allow the claim for house allowance at 15% of the basic salary and adopt the resultant figure of KShs. 15,847 as the Claimant's salary for purposes of this claim.

19. The Respondent's witness, Gloria Endekwa told the Court that the Respondent did not remit any NSSF dues on the Claimant's account, ostensibly because the Claimant was a casual employee. Endekwa did not however produce any documentary evidence to back her allegation that the Claimant was indeed a casual employee. In the circumstances, the Claimant is entitled to service pay.

20. The claim for overtime compensation was not proved and is dismissed.

21. Ultimately, I enter judgment in favour of the Claimant in the following terms:

a) 8 months' salary in compensation.....Kshs. 126,776	
b) 1 month's salary in lieu of notice.....15,847	
c) Leave pay for 5 years (15,847/30x21x5).....55,464	
d) Prorata leave for 7 months (15,847/30x1.75x7).....6,471	
e) House allowance for 67 months (2,067x67).....138,489	
f) Service pay for 5 years (15,847/30x15x5)..... <u>39,618</u>	
Total.....	382,665

22. This amount will attract interest at court rates from the date of judgment until payment in full.

23. The Claimant will have the costs of the case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL 2018

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JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Birir for the Respondent