



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.136 OF 2018

Consolidated with

CAUSE NO.137 OF 2018

ABIGAEEL JEPKOSGEI YATORCLAIMANT

ANN CHERUTOCLAIMANT

VERSUS

CHINA HANAN INTERNATIONAL CO. LTD RESPONDENT

JUDGEMENT

INTRODUCTION

1. The claimants filed individual claims under ELRC Cause No.136 and 137 of 2018. Both claim are gains the respondent, China Hanan International Co. Ltd. The claims relates to similar facts and events arising out of a series of termination of employment on similar grounds. Upon perusal of the entire records in both files, the files were consolidated for determination and judgement herein. The main file being the first in Court and Cause No.136 of 2018.

2. The claimants filed the Memorandum of Claim on the 2nd March, 2018. The respondent was served with summons on 12th March, 2018. There was no appearance or defence filed. The claimants filed Request for Judgement and attended court on 8th May, 2018 to take hearing directions. The court directed the respondent be served again. 8th May, 2018 a Court Process Server issued fresh summons to the respondent and notice to attend court on 11th May, 2018. On the due date, there was no attendance by the respondent. The court allowed the claimants to proceed with her claim.

3. The claimants have filed Affidavits of Service sworn by Vincent Otieno Ogutu to confirm service upon the respondent.

Claim

4. The claimants, female adults were employed by the respondent company as Plumbers, Grade III in May, 2016. They diligently worked for the respondent and while undertaking duties were dismissed from employment by the respondent on 4th December 2017. There was no notice, reasons or any explanation given as to the termination of employment.

5. Upon termination of employment, the respondent failed to pay the claimants' terminal dues or issue a Certificate of Service. This amounted to unfair terminal as there was no justification or payment of the owing dues.

6. The claimants were paid a daily wage of Kshs.450.00 instead of Kshs.971.25 in accordance with the General Wage Orders. The underpayments were not paid at the time of termination of employment. The leave and days worked were not paid for.

The claimants worked for 11 hours per day for seven days a week. For the over hours there was no overtime pay done by the respondent.

7. At the time the claimants' employment was terminated by the respondent, they had worked for the respondent for a period of one year and seven months. There was no record of misconduct, not given notice or reasons for termination of employment. Leave days at 26 were not taken or paid in lieu thereof.

8. The claims are for;

- (a) Underpayments Kshs.23,252.50;
- (b) Compensation Kshs.103,030.00;
- (c) Overtime worked Kshs.173,368.13;
- (d) Unpaid leave Kshs.25,252.50;
- (e) Certificate of service
- (f) Prorated leave for 7 months
- (g) Service pay
- (h) Unpaid salary for 14 days in December, 2017
- (i) Costs of the suit.

9. The claimants testified in support of their claims. The claimants were employed as a Plumber Grade III earning Kshs.45.00 per hour for eleven (11) hours a day from Monday to Saturday and for 10 hours on Sunday each week. The due wages were consolidated and all paid months at kshs.14, 000.00.

10. In December, 2017 the claimants' supervisor told them that their employment had been terminated. There was no explanation save that work had reduced, but several other employees remained at work. The employees of the respondent comprised of two (2) women and 10 men and only the two women were dismissed. There was no warning, reasons or hearing conducted before the termination of employment. The owing terminal dues were not paid and the Certificate of service was not issued.

11. Upon the termination of employment, the claimants reported the matter to the Union, the Building and Construction Workers Union, they made demand upon the respondent but there was no reply. The claimants then instructed her advocates to file claim against the respondents.

12. The claimants were issued with a letter of recommendation by the respondent. The claimants relied on various documents issued to them by the respondent especially the letters of recommendations and the letter replying to the trade union upon demand.

Determination

13. By letter dated 23rd January, 2018 the respondent issued the claimants with a letter of *Recommendation*. This letter notes that the claimants had;

... Worked for China Hanan International Co. operation Group Co. Ltd under Ellegirini Pipeline and Expansion of Kapsoya Treatment Works project for the period of one year seven months, May, 2016 to January, 2018.

14. The letter also notes that the claimants had been employed as Plumbers.

15. By letter dated 15th January, 2018, the respondent in a letter to the Labour Union Eldoret Branch states as follows;

... you said that the annual leave is 26 days for them, and we disagree with you about that. Based on the labour law, the annual leave shall be 21 days. ...

What is the point of pro-rate leave in your letter: please provide proof for support that they deserve to get this.

... the ID number for Abigail Yator is wrong... we found lots of mistakes from what they claimed and some of the information was wrong by our records. ...

16. The above correspondence between the parties confirms the employment of the claimants with the respondent from May, 2016 to January, 2018. The dispute revolves around the dues payable.

17. However, it is the duty of every employer upon a claim being lodged with the court to attend and file all the work records to enable to court address the same on its merits. Section 10(6) and (7) of the Employment Act, 2007 requires that;

(6) *The employer shall keep the written particulars prescribed in subsection*

(1) for a period of five years after the termination of employment.

(7) *If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

18. An employer should keep all work records for a period of 5 years even where employment has eased as such records may become necessary and important particularly in proceedings such as these. Also, where legal proceedings are initiated by an employee, the law places the duty to produce the work records upon the employer.

19. Where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.

20. The requirement to keep work records and produce them in court once a claim has been filed is given emphasis in the case of **Gilbert Kasumali Kithi versus Nyali Beach Holiday Resort [2015] eKLR** and in **Henry Ochido versus NGO Co-ordination Board [2015] eKLR**.

21. From the evidence submitted by the claimant, it is apparent that termination of employment was as a result of reduced work.

22. Reduced work has been defined in law as a redundancy. Section 2 of the Employment Act, 2007 provides that;

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

23. Where there is loss of employment by involuntary means and through no fault of the employee and the employer is therefore forced to terminate employment as the employee's services are found to be superfluous, such is regulated in law and under section 40 of the Employment Act, 2007. The employer faced with a redundancy must follow the mandatory provisions of section 40 as otherwise any termination of employment arising thereof is unfair. In

24. Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEIHA) versus Aga Khan University Hospital Nairobi [2015] eKLR, the court restated the law and held that;

24. The procedures applicable in a redundancy are therefore set out in law as above. The conditions precedent requires;

a. A notice to the union and the Labour Officer stating the reasons for, and the extent of, the intended redundancy;

b. Non-union employees should receive a personal notice together with the Labour Officer;

c. The selection criteria; and

d. Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging non-union employees.

25. Before termination of employment where there is a redundancy, an employer must issue notice to its employees and where unionised ensure such notice has been served upon the trade union and the labour officer. The notice should set out the reasons for and the extent of the intended redundancy. Selection criteria to be followed in laying off some employees and not others should also be indicated. Where there is a collective bargaining agreement, its terms and conditions should be put into account.

26. The Court of Appeal in **Thomas De La Rue (K) Ltd versus David Opondo Omutelema [2013] eKLR** had occasion to consider the construction of subsections (a) and (b) to the effect that both required different kinds of notices. It stated as follows:

It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

27. The failure by the respondent to enter appearance, failure to attend court or file any work records denies the court of crucial and relevant evidence and reason(s) for, and the extent of, the redundancy. Such should be in a notice issued to the employees or a payment made in lieu thereof.

28. The notice contemplated under section 40 of the Employment Act, 2007 is important in two respects. First where not issued, the employer fails to prove the justification for termination of employment and secondly such termination of employment is inherently unfair in view of sections 43 and 45 of the Act.

29. Section 43(1) of the Employment Act, 2007 provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

43.(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the

contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

30. In this case, where the claimants were dismissed without notice, there was no hearing and she was not given a chance to give a defence over matters that she was faced with, her evidence now not challenged, this court must agree with her. Supported by the provisions of the law, termination of employment was unfair for lack of a valid and justifiable reason.

Remedies

31. The claimants have made a case that she was underpaid and claims the amount of Kshs.254, 497.50 for the 19 months she was in the employment of the respondent. her evidence was that she was paid a monthly wage of Kshs.450.00 instead of Kshs.971.25 due under the provisions of Wage Orders, 2017. The orders attached relate to the Regulation of Wages (Agricultural Industry) Orders. The claimants testified that they were plumbers and the letter of recommendations issued by the respondent testifies to the fact.

32. The last Wage order in the building industry was issued in 2012 being the Building and Construction Industry (Wages) Order, 2012. Under the various categories of employees, a plumber is classified under the General tradesman (artisans). For the claimants being placed outside Nairobi, she was entitled to Kshs.695.00 per day as she has produced a Certificate as Plumber Pipe Fitter, Grade III. This being a schedule for 2012, the same has been enhanced over the years in wage increments and the claim for 971.25 is justified in this case.

33. For the claim for underpayments, the claimants having worked for 19 months, she is awarded the sum of **Kshs.254, 497.50** being the difference in what was paid weighed against the entitled pay. The monthly pay should have been Kshs.29, 137.50 and the award of Kshs.254, 497.50 is hereby awarded.

34. On the claim for notice pay, the failure by the respondent to abide the provisions of section 40 of the Employment Act, 2007 and where there was no notice thereto, payment in lieu therefrom is due. The claimants are awarded Kshs.29, 137.50 in notice pay.

35. On the finding there was unfair termination of employment that was not procedural, under section 49 of the Employment act, 2007 compensation is payable. The claimants worked for the respondent for a period of 19 months, a period short of two years. This does not in manner diminish her rights in employment and the fact of the finding that termination of employment was unfair. An award of 10 months gross wage is found appropriate and fair compensation. The claimants are awarded Kshs.291, 375.00 in compensation.

36. For the 14 days the claimants was at work and was not paid her wages, the sum of Kshs.13, 597.50 is due.

37. Claim for overtime is made on the basis the claimants were at work for 11 hours for 7 days a week. Without defence, any work records, this evidence with regard to number of hours worked is not challenged. There was an overtime work unpaid of 3 hours per week all being Kshs.173, 368.00. Where the claimants remained at work for 7 days in a week, there was no off/rest day taken and any work over and above a reasonable period without rest should be paid for. The award of Kshs.173, 368.00.

38. The claimants are seeking leave pay at 26 days. Without any work records, section 28 of the Employment Act, 2007 provides for 21 days all computed at kshs.20,396.25 as payment in lieu if taking annual leave.

39. A Certificate of Service is to be issued pursuant to the provisions of section 51 of the Employment Act, 2007. A Letter of recommendation is not similar to the Certificate of Service which is mandatory and the former discretionary.

Accordingly, judgement is hereby entered for the claimants against the respondent in the following terms;

- (a) The termination of employment was procedurally unfair;**
- (b) Compensation awarded at Kshs.291, 375.00;**
- (c) Notice pay at Kshs. 29,137.50;**
- (d) Unpaid salary Kshs.13, 597.50;**
- (e) Overtime work unpaid Kshs.173, 368.00;**
- (f) Leave days not taken Kshs.20, 396.25;**
- (g) Underpayment Kshs. 254,497.50;**
- (h) Certificate of Service be issued unconditionally within 14 days; and**
- (i) Costs of the suit.**

Delivered in open court at Eldoret this 31st day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Robert & Martin

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