



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2527 OF 2012

SIMON KIBE KAHWI.....CLAIMANT

v

MMA ENGINEERING SERVICES LTD.....RESPONDENT

JUDGMENT

1. On 19 December 2012, Simon Kibe Kahwi (Claimant) instituted legal proceedings against MMA Engineering Services Ltd (Respondent) and he stated the Issue in Dispute as Declaration of redundancy of the Claimant and failure by the Respondent to pay to the Claimant his terminal and employment dues and/or benefits.
2. Apart from alleging unfair termination of employment, the Claimant also alleged breach of contract in that he worked overtime without pay, was not paid house allowance and was not granted leave.
3. The Respondent, in its Response contended that the Claimant was a casual worker, absconded from work, performed poorly and was not entitled to any of the reliefs sought.
4. The Cause was heard on 19 April 2018 when the Claimant testified and closed his case. The Respondent opted to close its case without leading evidence.
5. The Claimant's submissions were not on file by this morning while the Respondent filed its submissions on 16 May 2018.
6. The Court has considered the pleadings, evidence and submissions and identified the questions arising for determination as

Whether Claimant was a casual employee

Whether there was unfair termination of employment

Whether Claimant worked overtime without pay Whether Claimant was paid house allowance

Whether Claimant had accrued leave by time of separation and Appropriate remedies.

Nature of employment

7. The Claimant testified that he was employed by an entity called *Johnson Control Ltd* in 2006 and which entity was taken over by the Respondent in 2007.
8. He also stated that he was engaged as a painter but was not issued with a formal contract and that the Respondent issued him with a job card (produced) and paid him monthly through the bank (statement produced) until separation in 2012.
9. The Respondent admitted in its Response that the separation was in 2012.
10. It cannot therefore be disputed that the employment relationship extended beyond 5 years.

11. Considering the definition of a *casual employee* in section 2 of the Employment Act, provisions of section 9 of the Act on need to issue written contract and that the Respondent engaged the Claimant for more than 3 months, paid him by the month and in further consideration of section 10(7) of the Act, the Court finds that the Claimant was not a *casual employee* but on a contract of indefinite duration.

Abscondment or unfair termination

Abscondment

12. An employer alleging *abscondment* or desertion by an employee should discharge the burden of so proving in terms of sections 43, 45 and 47(5) of the Employment Act, 2007.

13. The Respondent did not lead any evidence at all and the Court therefore discounts the line of justification that the Claimant *absconded* from work.

Separation

14. On his part, the Claimant testified that on 23 August 2012, a Supervisor notified the employees that those whose names would be missing from a Notice to be put up the next day should not report to work.

15. According to the Claimant, when he reported the next day, he found his name and those of other 3 or so employees missing from the Notice.

16. Inquiries he made with a Supervisor and Directors of the Respondent, Mr. Ogutu and Mr. Munyi did not lead to any positive resolution. He was not given a letter of dismissal.

17. The Respondent did not call the Supervisor(s) and/or the directors to give their version of the circumstances of the separation. The failure was also not explained.

18. The Claimant's testimony therefore remains unrebutted, and the Court can conclude that he discharged the obligation placed upon him by section 47(5) of the Employment Act, 2007.

19. The Court finds that there was unfair termination of employment.

Overtime

20. The Claimant did not disclose the contractually agreed working hours or the prescribed minimum working hours beyond which he would be entitled to payment of overtime.

21. He also did not disclose the sector/industry the Respondent operated in to enable the Court determine which particular *Regulation of Wages Order* would have applied.

22. The Court finds that the Claimant did not lay sufficient evidential basis for this head of claim.

House allowance

23. On this head of claim, the Claimant merely stated that he was not paid house allowance.

24. In the view of the Court, that mere statement was not sufficient to prove that the Respondent had not complied with the provisions of section 31 of the Employment Act, 2007.

Leave

25. The Claimant sought commuted leave for the 6 or so years he served the Respondent. He quantified the same as Kshs 133,794/-.

26. He did not indicate whether he sought leave and he was denied.

27. By dint of section 28(4) of the Employment Act, 2007, the Claimant may validly claim leave for the 18 months prior to separation on 24 August 2012.

28. Given the testimony by the Claimant, the Court does not have material to enable calculate how much the Claimant's commuted leave for 18 months should or ought to be.

Appropriate remedies

Pay in lieu of notice

29. Having concluded that there was unfair termination of employment and in terms of section 35(1)(c) of the Employment Act, 2007, the Court finds the Claimant is entitled to the equivalent of 1 month pay in lieu of notice (he stated the monthly wage was Kshs 22,299/-).

Severance pay

30. Severance pay is a remedy in cases of redundancy. It is not available in this case.

Compensation

31. The Claimant served for about 5 years and in consideration of the length of service and that the Court has been unable to assess *pay in lieu of leave*, the Court is of the view that the equivalent of 6 months wages as compensation would be appropriate.

Conclusion and Orders

32. The Court finds and holds that the Claimant's employment was unfairly terminated, and awards him and orders the Respondent to pay him

(i) Pay in lieu of notice Kshs 22,299/-

(ii) Compensation Kshs 133,794/-

TOTAL **Kshs 156,093/-**

33. Claimant is denied costs for failing to file submissions.

Delivered, dated and signed in open Court in Nairobi on this 21st day of May 2018.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Mr. Wachira instructed by E.M. Wachira & Co. Advocates

For Respondent Mrs. Njehia instructed by Punja & Kagongona Advocates

Court Assistant Lindsey