



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.139 OF 2015**

**MOHAMED KAFAFA ABDUBA..... CLAIMANT**

**VERSUS**

**COLOUR CROPS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant was employed by the respondent on 14<sup>th</sup> April, 2008 as a Watchman at a wage of Kshs.4, 500.00 per month. The claimant was serving under contracts which were renewed upon lapse of term. At each end a gratuity was paid. The last such contract was issued on 23<sup>rd</sup> June, 2011 and for a term of 3 years.

2. On 13<sup>th</sup> October, 2013 the claimant suffered a work injury.

3. The claim is that on the basis of the work injury, the claimant was terminated in his employment which was wrongful and unfair. There was no notice or a valid reason given. After 5 years of service, the claimant did not take any annual leave and was not paid in lieu thereof. The overtime worked was not compensated.

4. The claim is for;

- a) Underpayments at Kshs.199, 303.20;
- b) Notice pay Kshs.9, 780.95;
- c) Annual leave Kshs.39, 500.00
- d) Overtime Kshs.158, 902.83;
- e) Work during public holidays Kshs.58, 182.12;
- f) Gratuity Kshs.11, 258.71
- g) Compensation Kshs.117, 371.40; and
- h) Costs

5. The claimant testified in support of his claims. Upon employment he claimant was issued with contracts of service the last being dated 14<sup>th</sup> March, 2011. On 13<sup>th</sup> October, 2013 the claimant got injured and he went to the office seeking assistance as he needed to undertake an x-ray on 22<sup>nd</sup> November, 2013 but instead he was dismissed. No reason was given or terminal dues paid.

6. The claimant also testified that upon his injury, he took some rest to attend to the same. When he returned to the respondent, he found his salary had been forwarded to the Labour officer. He was Paid Kshs.22, 172.00 but this did not cover all his dues.

7. The claimant also testified that the evidence by the respondent in defence that he absconded duty is not true. He never left employment for two weeks as alleged. Following injury at work the claimant filed suit Case No.1237 of 2016 before the Chief Magistrates court and when he made effort to resume work he was not allowed back.

8. Upon cross-examination, the claimant testified that upon employment his contract ended in 2011 and a new one was issued. The dues payable under the ended contract were paid. The next contract dated 14th March, 2011 had provision for annual leave but did not take it and was not paid.

9. The claimant also testified that when he got injured he called his supervisor and then left to attend to the same. Later he submitted treatment notes to the respondent.

#### Defence

10. The defence is that the claimant was lawfully terminated in his employment with the respondent and all his dues paid. The claims were heard and determined by the Labour officer and the respondent ordered to pay Kshs.22, 172.00 to the claimant in full and final payments and deposited with the Labour officer on 6th December, 2013 and the claimant has failed to collect.

11. The defence is also that the claimant was under a contract of service ending 1st April, 2011 and for the claim herein it is time barred. For the subject contract all dues were paid and upon the claimant absconding duty, his terminal dues have since been paid through the labour office.

12. In evidence, the respondents witness was Lear Wanjiku Mureu and who testified that the claimant was in the employment of the respondent as a security guard and had a contract issued to him. The claimant was given off days set out in the work records filed with the court. For every 7 days of work, the claimant had 2 days of leave and for such time he was paid. For the overtime work, the extra 2 hours were paid for. Where the claimant remained at work for over a week, there was a bonus payment of Kshs.200.00 and the records are submitted. The respondent also made payment for NSSF and NHIF.

13. Ms Mureu also testified that under the claimant's contract he had a benefit of sick leave. When the claimant got unwell, he failed to apply for sick leave or report any injury and his absence from work was absconding duty. The matter has since been addressed with the labour officer and the claimant paid his dues. When the claimant absconded duty he was paid one month's notice. He remained absent from work from 13th October, 2013. There was no notice to show because which was issued but the claimant was paid in lieu of such notice.

14. At the close of the hearing, both parties filed written submissions.

15. The claimant admits that he was issued with a written contract during his employment with the respondent. The first contract is dated 14th February, 2008 and expired on 23rd June, 2011. A new contract was issued for 3 years.

16. The claimant has also set out under paragraph 3 of his claim that;

*The claimant had been employed by the respondent on a contract basis which was renewable. After working for 3 years, the claimant was awarded gratuity and then signed a new employment contract on 23<sup>rd</sup> June, 2011 which was to expire after 3 years of service.*

17. On this admission and noting the provisions of section 10 (3) (c) of the Employment Act, 2007 that;

*(c) Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;*

18. Each contract issued to the claimant was based on its own terms and conditions and upon end he was paid a gratuity to signify the end and commencement of a new contract. Where any claim(s) arose from the contract ending 23rd June, 2011 such claims ought to have been addressed within the meaning of section 90 of the Employment Act, 2007.

19. The suit herein was filed on 18th May, 2015 a period of over three (3) years since the end of the contract covering the period of 14th February, 2008 to 23rd June, 2011. Such claims with regard to underpayments, overtime, terminal dues are time barred.

20. The only claims that the claimant can address within the law are those which arise out of the contract

covering the period of 23rd June, 2011 to the date of termination set out as 13th October, 2013.

21. The other issue which arose within these proceedings is that the claimant was paid all his terminal dues upon computation by the Labour Officer and a sum of Kshs.22, 172.00 deposited with the office. That such payment was in final settlement of all claims the claimant had made. That such final payment(s) discharged the respondent of making any further payments.

22. In addressing the application if discharge clauses, provisions, agreement and or waiver of rights in employment and labour relations, Section 35(4) of the Employment Act, 2007 provides that;

*(4) Nothing in this section affects the right—*

*(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or*

*(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.*

23. Where a legal right(s) established in law exists, such cannot be negated through any other means. The court plain reading of the provisions cited above is that a contract of employment must terminate within the law and nothing *stops* an employee from making claim(s) for any cause recognised by law. Where there is an employment term protected in law, this cannot be invalidated by a discharge clause.

24. in the case of **Grace Wanjiku Maina versus Board of Trustees, Nanyuki Cottage Hospital [2017] eKLR** the court held that the signing of the discharge upon payment of the terminal dues and which precluded the employee from filing the suit alleging unfair termination or by having a disclaimer discharging the employer of further liability upon receipt of some terminal dues, is not a bar to the employee from urging the case of unfair termination. The court held that;

*... in Duncan Mwirigi Arithi –Versus- Jhpiego Kenya [2015]eKLR that the exit agreement and discharge of liability did not bar the claimant from urging the case of unfair termination because in any event, section 35 (4) of the Employment Act, 2007 provides that nothing in the section (on pay of service pay or pay in lieu of notice) affects the right of the employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with section 47 of the Act.*

25. Similar in the case of **Simon Muguku Gichuki versus Taifa Sacco Society Limited [2012] eKLR** the court held that;

*... [on the question of] the discharge note signed by the claimant to the effect that he had no further claims to make against the respondent. I take judicial notice that this is a common requirement by employers for departing employees. It is however expected that parties will work within the law. An employer cannot therefore circumvent their obligation to an employee by producing a form of discharge executed by an employee. If the law is not followed, no form of discharge can cure the irregularity.*

26. a discharge voucher with a term that negates rights set out in law is null and void. See **Solomon Wehe Makhotsa versus Imara Steel Mills Limited [2016] eKLR**.

27. in this case, where the claimant was paid due and noted these to be *final and in settlement of his claims* nothing prevents him from filing any claim(s) with the court within the law and on a claim for unfair termination of employment. That jurisdiction is left for the court to address.

28. In submissions the claimant has relied on the case of **Daniel Kipkurui Keter versus Securex Agencies (K) Limited [2018] eKLR** and on the ground that his was a case of unfair termination and he was not taken through due process before his employment was terminated. That despite the fact of the

claimant being absent from work, the respondent ought to have issued him with a show cause notice so that he could defend himself.

29. The respondent relied on the case of **Joseph Njoroge Kiama versus Summer Limited [2014] eKLR** and where the court held that absence from work for ten days without permission is a good ground for summary dismissal as provided for under section 44(4) of the Employment Act, 2007.

30. In this case, the claimant testified that he got injured at work and decided to take a rest and upon return to work he produced medical notes. Such notes are attached to the filed documents.

31. Section 30 read together with section 43 of the Employment Act, 2007 gives an employee the right to take sick leave and attend treatment. However such an employee is required to inform the employer within reasonable time and through a third party. Upon return to work, the employee is required to submit a medical certificate with the employer as proof of sickness and thus the reasons for being absent from work as otherwise, absence from work is a subject for summary dismissal under section 44(4) of the Act. Where an employee thus fails to inform the employer as to the reason for absence from work, and then fails to produce a medical certificate as defined under section 43 of the Act, such absence is without good cause and invites summary dismissal.

32. The only requirement on the employer where an employee is absent from work without good cause is to address the provisions of section 41(2) of the Employment Act, 2007. In this case, Ms Mureu testified that when the claimant failed to attend work, despite having his contact details, nobody called him and no notice to show cause was issued to him. Despite the claimant allegedly absconding duty, the respondent failed to procedurally address the same within the law and proceeded to effect termination of employment. Despite the offer to pay for notice, such does not cure the illegality in failing to abide section 41(2) of the Act. Such resulted in procedural unfairness within the meaning of section 45 of the Act.

33. On the remedies sought and as set out above, the only claims the claimant can urge are those within his contract commencing 23rd June, 2011.

34. On the claims for underpayments, the claimant's case is that he was entitled to a wage of Kshs.11, 248.10 inclusive of a house allowance per month. In the subject contract of employment, the claimant was paid for;

*Average wage Kshs.3, 600.00;*

*House allowance Kshs.1, 200.00;*

***Gross wage Kshs.4, 800.00***

35. these wages as set out related to a General Worker. Both parties agree the claimant was a watchman or security guard with the respondent. the wage orders applicable for 2011 and 2012/2013 for a security guard or watchman are Kshs.428.00 and 487.90 respectively. Such amounts to Kshs.11, 248.10 inclusive of the house allowances due therefrom. Where the claimant was paid a gross wage of kshs.4, 800.00 per month, there was an underpayment. The amount of Kshs.82, 143.00 is due.

36. on the claim for overtime pay, from the records filed by the respondent, an extensive assessment of the same is that for each week at work, the claimant was recorded as off work for five (5) days. The schedule also has a record of leave days of two (2) days each month. This is in compliance to sections 28 and 27 of the Employment Act, 2007. Where the claimant was thus at work for 12 hours each day and was afforded 5 days off plus 2 days of leave, the recommended hours for his position were well addressed. The claims for overtime pay are not due.

37. claims for annual leave and work during public holidays with the above analysis thus addressed, the claimant were well compensated. Such do not arise.

38. On the gratuity pay claimed, where the claimant was paid gratuity under his ended contract the subject contract had no provision for the same. From the pay statement filed by the respondent, there was compliance with section 35 of the Employment Act, 2007. Such gratuity was not an agreed term.

39. On the finding that the respondent failed to abide the provisions of section 41(2) of the Employment Act, 2007 and in addressing the remedy thereof under section 49, an award of one month gross wage is appropriate. The claimant is awarded Kshs.11, 248.10.

**Accordingly, judgement is hereby entered for the claimant for;**

**(a) underpayment amounting to Kshs.82, 143.00;**

**(b) and compensation at kshs.11, 248.10;**

**(c) these dues to be paid less what the claimant should collect from the Labour officer and being Kshs.22,172.00 for his overtime pay, days worked, notice pay, leave days due, and attendance bonus pay;**

**(d) The payable dues are also subject to section 49(2) of the Employment Act, 2007; and**

**(e) Each party to bear own costs.**

**Delivered in open court at Nakuru this 30<sup>th</sup> day of July, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistants: Nancy & Martin

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