



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 292 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PATRICK OCHIENG WASIEMA.....CLAIMANT

VERSUS

MARTHA WANJIRU NG'ANG'A T/A

KOBIL ELDORET QUICK SERVICES.....RESPONDENT

JUDGMENT

The claimant filed suit herein against the respondent alleging unfair termination of employment. He prays for the following remedies –

a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent he was not remunerated as required by law.

b) Payment of the sums of money as claimed below –

1) One month's pay in lieu of notice

Basic salary Kshs.15,350

2) Overtime dues

45 hours per week

12 hours x 6 days = 72 – 45 = 27 hours overtime

27 hours x 4 weeks = 108 hours per month

1.5 x 108 x 15,350/195 = 12,752 per month

12,752 x 89 months Kshs.1,134,928

3) Unpaid rest days

4 days per month x months worked x basic x double rate

30 days

4 days x 89 months x 15,350/30 x 2 Kshs.36,312

4) Public holiday days worked but not paid

10 days per year for 7 years

70 days x 2 x 15,350/30 Kshs.71,633

5) Loss of earnings prior to retirement age

Born 1982 worked to December 2015

27 years x 12 x 15,350 Kshs.4,973,400

6) Salary for November 2015 and 8 days December 2015

15,350 + 4,093 Kshs.19,443

7) Compensation for unfair termination

Gross pay x 12 months

17,652.5 x 12 months Kshs.211,830

TOTAL CLAIMS KSHS.6,462,896

c) Costs and interests

d) Any other reliefs the court may deem fit to grant.

The respondent filed a memorandum of response confirming that the employment relationship between the claimant and respondent commenced on 18th June 2008 and was terminated on 25th November 2015 when the claimant deserted duty. The respondent appended several letters of apology written by the claimant and avers that the claimant persisted in committing fundamental breaches of his contract of employment during the period he was in the employment of the respondent. The respondent states that the claimant having deserted duty is not entitled to notice, compensation or service pay. That the claimant was not declared redundant and is not entitled to severance pay. The respondent further states that the prayers for overtime, unpaid rest days and public holidays are not payable to the claimant as he was paid for the same while the prayer for leave is not payable as the claimant proceeded for leave and was paid in lieu of leave for years when he did not go for the leave.

The respondent further states that the prayers for overtime, rest days, public holidays and leave would in any event be time barred under Section 90 of the Employment Act. The respondent avers that the claimant was paid as a pump attendant as provided under the Regulation of Wages (General) Order as amended from time to time and was therefore not underpaid.

The respondent prays that the claim be dismissed.

At the hearing of the case the claimant testified on his behalf. The respondent however opted to rely on the pleadings and documents filed therewith and written submissions.

The claimant testified that he was employed by the respondent who operates a petrol station in Eldoret Town on 18th June 2008 and worked until 8th December 2015. He was a pump attendant and worked from 8 am to 5 pm. when on day shift and from 4 pm to 11 am when on night shift. During day shift he rarely left work at 5 pm and would sometimes work up to 7 pm. He was not paid overtime. He worked both day and night shifts. He went on leave only twice in 2013 and 2014. His last salary was Kshs.15,300 consolidated.

He prayed for payment as set out in his claim.

Under cross-examination, he admitted writing all the letters of apology annexed at pages 12 to 16 of the response.

Determination

The issues arising for determination are first whether the claimant absconded duty or was unfairly terminated and secondly if the claimant is entitled to his prayers.

1. Whether claimant absconded duty or was unfairly dismissed.

The respondent has pleaded in the defence that the claimant absconded duty and was not dismissed on 25th November 2015 as alleged in the claim. The claimant on the other hand testified that on 8th December 2015, Martha Wanjiru, the respondent went to the place of work at around 10 am and told him that his services were no longer required, that he should hand over and leave.

The respondent did not submit any evidence to prove that the claimant absconded duty on 25th November 2015 as alleged in the response. This leaves the testimony of the claimant that he was dismissed verbally unchallenged.

Having been dismissed verbally without a hearing, the dismissal was unfair as it was not in compliance with Section 41 of the Employment Act which provides for fair procedure or Section 43 of the Act which provides for proof of valid reason or termination of employment. I therefore find and declare the termination of the claimant's employment unfair.

2. Remedies

The claimant prayed for salary for October 2015 and December 2015. He is entitled to Kshs.15,300 being salary for October 2015 and Kshs.4,080 being salary for 8 days worked in November 2015. The claimant having been unfairly terminated is entitled to one month's salary in lieu of notice which I award him at shs.15,300.

The claimant did not prove that he worked overtime for which he was not paid. His evidence on the same was non-specific. He also did not prove that he was not given off days. On the contrary he testified that he had 4 days off every month as he took two days off before commencing night shift. The claimant did not prove that he worked on any specific public holiday for which he was not paid.

Loss of earnings to retirement is not payable as employment is not permanent and either the employer or the employee may terminate employment provided that it is done in the manner provided for in the contract. The law provides for compensation for unfair termination to a maximum of 12 months' salary. The payer for loss of employment to retirement age is therefore without merit and is dismissed.

The claimant having been unfairly terminated is entitled to compensation which I award him at 7 month' salary taking into account his length of service and the manner in which his employment was terminated. I award him Kshs.107,100.

The respondent shall also pay claimant's costs. The decretal sum shall attract interest from date of judgment.

In summary therefore I award the claimant the following –

- (i) Salary for October 2015 Kshs.15,300
- (ii) Salary for 5 days worked in November 2015 Kshs.4,080
- (iii) Pay in lieu of notice Kshs.15,300
- (iv) Compensation Kshs.17,100
- TOTAL KSHS.141,780**
- (v) Costs
- (vi) Interest

DATED AND SIGNED AT NAIROBI ON THIS 3RD DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 30TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE