



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.258 OF 2015

WICLIFFE SAGARA KADAGI.....CLAIMANT

VERSUS

CHRISTOPHER WERE T/A CHAN SERVICES.....RESPONDENT

JUDGEMENT

1. The claimant's claim is that he was employed by the respondent trading as Chan Services on 2nd January, 2014 as a turn boy in Nakuru at a salary of Kshs.9, 960.00 per month and which amount he earned until he was terminated on 31st May, 2015.
2. The claim is that the respondent was underpaying the claimant contrary to Wage Orders applicable for the position he held as turn boy. The claimant was assigned work at **Shirdi Trading Stores Ltd** where he was previously employed and had been dismissed under unclear circumstances after colliding with the respondent herein. The respondent is not the owner of the shop Shirdi Trading Stores LTD but the claimant was forced to sign forms indicating that he was employed by the respondent.
3. The claim is also that the claimant was initially employed by Shirdi Trading Stores Ltd in the same shop and was dismissed without notice and contrary to sections 35, 41, 43 and 44 of the Employment Act, 2007. The respondent and the owners of Shirdi Trading Stores Ltd had colluded to put the employees in the establishment in a state of confusion and without settlement of outstanding dues.
4. The claim is also that the claimant has filed suit against Shirdi Trading Stores Ltd for unlawful dismissal.
5. The respondent also dismissed the claimant unfairly and unprocedurally. The alleged show cause notice dated 7th April, 2015 is not a true record of what transpired and was a plot by the respondent to use in effecting dismissal on flimsy grounds.
6. The claimant is seeking payment of notice for one month, underpayments for 17 months, salary unpaid for June, 2015, and compensation for 12 months.
7. The claimant testified in support of his claims. upon employment by the respondent on 2nd January, 2014 he worked as a turn boy at the wage of kshs.9, 372.00 per month and had a contract of service issued to him. the claimant was however verbally sacked by Mr Were without being given reasons or a hearing.

Defence

8. In response the respondent's case is that claimant was in their employment as a turn boy from 2nd January, 2014 at a salary of Kshs.10, 000.00 per month. The claimant was not forced to sign the employment contract or placed at Shirdi Trading Stores Ltd against his will. While the claimant was in employment, he grossly miscounted himself and was dismissed lawfully under the provisions of section 44(3) and (44) of the Employment Act, 2007 for gross misconduct after absconding his duties without any justification and for a period of two weeks. A letter was sent to the claimant asking him to explain why disciplinary action should not be taken against him but he failed to address. The claims made are without justification and should be dismissed with costs.
9. In evidence, Mr Were testified that he is a businessman in Nakuru and specialises in manpower supply. He approached Shirdi Trading Stores Ltd as his client for work supply and was given a contract to deal with employees. An agreement was done with the claimant to work at the enterprise, Shirdi Trading Stores Ltd.
10. The claimant was issued with a contract of employment setting out his duties. The claimant started well but with time he became difficult and uncooperative and the client made complaints that the claimant was not diligent in his duties. A warning was issued and then the claimant neglected his duties and for two weeks was not at work. A show cause was issued but he failed to change. The claimant had several

warnings while at work and for absconding duty he was dismissed for gross misconduct.

11. Mr Were also testified that The claims made are without justification and should be dismissed.

12. At the close of hearing, both parties filed written submissions. Such has been put into account the pleadings, and the evidence of the parties.

13. The claimant confirmed that he was under a written contract of employment to which he signed in acceptance. He was allocated work by the respondent as the employer supplying labour to his clients and which included Shirdi Trading Stores Ltd, a former employer of the claimant.

14. The contract of service submitted by the claimant as part of his records is fundamentally different from that the respondent has submitted. As the employer is bound in law to keep work records and submit the same with the court upon suit being filed, I take it the records of the respondent are the true reflection of the same. The record submitted by the claimant is suspect, the overwrites on the same demonstrate manipulation of a copy of the contract. a look with the naked eye and without an expert analysis, the same is not signed by the parties to it and therefore the manipulated terms therein are of no consequence. This however does not reflect well on the person and character of the claimant. To submit with the court records in this nature show the claimant will take any measure(s) lawful or otherwise to urge his case. To manipulate work records is tantamount to criminal conduct. I will however not dwell on this.

15. The claimant was paid a wage of Kshs.10, 000.00 per month. Such comprised a basic wage and the pay of housing was not stated. This is due as it was not part of the basic wage allocated to the claimant. However the basic wage for the portion of turn boy is above the minimum wage and this shall be put into account.

16. An employer is allowed under section 44(3) and (4) to dismiss an employee who fails to attend work a required. Where such an employee is invited to attend hearing or work and still fails to attend, the employer has effusively complied with section 41(2) of the Employment Act, 2007.

17. In this case, where the claimant failed to attend work and for whatever reasons, he was issued with a warning, a show cause notice but still failed to attend. The resulting dismissal from employment can thus not be faulted as being unfair termination of employment. The non-work attendance and when invited to show cause is not adhered to give the employer a valid reason to effect termination of employment.

18. Notice pay is not due in a case of justified dismissal from employment.

19. On the claim for underpayment, the claimant has relied on Legal Notice No.197 of 1st May, 2013 and No.117 of 1st May, 2015 where basic pay was kshs.9,372.15 and a house allowance of 15% all being Kshs.10,777.95 in gross pay. The basic pay was enhanced under Legal Notice No.117 For the period the claimant was employed by the respondent and the house allowance due was not paid; the sum of kshs.24, 518.40 is due.

20. On the pay due for 6 days, the respondent testified that such monies have since been deposited with the County Labour Officer. This was brought to the attention of the claimant.

Accordingly, judgement is entered for the claimant in the sum of Kshs.24,518.40 for underpayments due; the pay for 6 days worked shall be collected from the County Labour Officer as submitted by the respondent; each party to bear own costs. The payments made to the claimant shall be subject to the provisions of section 49(2) of the Employment Act, 2007.

Delivered in open court at Nakuru this 30th day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants: Nancy & Martin