



**REPUBLIC OF KENYA**

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

**CAUSE NO.252 OF 2017**

**BEN KARANJA THUMBI .....CLAIMANT**

**VERSUS**

**TIM SALES COMPANY LIMITED .....RESPONDENT**

**JUDGEMENT**

The claimant filed the memorandum of Claim on 9<sup>th</sup> June, 2017 and served the respondent with summons on 15<sup>th</sup> September, 2017. Returns were filed to confirm service and Herman G Mwangi filed Affidavit of Service in this regards. The respondent did not enter appearance, file a defence or attend court on the scheduled hearing. The court heard the claimant on his case in accordance with Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The claimant, a male adult was employed by the respondent company from March, 2011 as a Machine Operator until November, 2014 when he was unfairly terminated from his employment. The claimant was paid a wage of Kshs.261.00 per day. The claimant was injured while at work and could no longer perform his duties as require din his designation and as a result the respondent proceeded to terminate his employment without notice or a valid reason.

The claim is for dues owing to the claimant I n the nature of underpayments for the period of 3 years and 8 months in the service of the respondent where he was paid a wage of Kshs.261.00 per day instead of the due legal minimum wages.

From March, 2011 to April, 2012 the claimant was entitled to a daily wage of Kshs.454.15 and a daily balance of kshs.193.15 is due all being Kshs.75, 328.50;

From May, 2012 to April, 2013 the claimant was entitled to a daily wage of Kshs.513.60 but was paid less by Kshs.252.60 all being Kshs.90, 936.00; and

From May, 2013 to November, 2014 the claimant was paid a daily wage of Kshs.585.50 and paid less by Kshs.324.50 all being Kshs.175, 230.00.

Total underpayments being kshs.341, 494.50.

The claimant is also seeking leave allowance for the period of employment as he never went on his annual leave and was not paid in lieu thereof. Based on the due legal wage the claimant is seeking;

For the period From March, 2011 to April, 2012 the claim is for Kshs.9, 537.15;

For the period From May, 2012 to April, 2013 the claim is for Kshs.10, 785.60; and

From May, 2013 to November, 2014 total 35 days leave all being Kshs.20, 492.50

Total claims for leave due all being Kshs.40, 815.25.

The claimant is also seeking payment for off days not taken or paid in lieu thereof. The basis is that the claimant was at work for 7 days a week without break or taking a rest day contrary to section 27(2) of the Employment Act and is seeking payment of kshs.91,489.200 comprised of;

In 2011 the claimant worked for 10 months and for the period had 4 rest days all being 40 days and the daily wage being Kshs.454.15 the due pay for the rest days worked is Kshs.18,166.00;

For 2012 the claimant worked the full year without rest and had 48 rest days at a daily wage of kshs.454.15 all being kshs.21, 799.20;

In 2013 the claimant is entitled to Kshs.28, 104.00; and

In 2013 the claimant is entitled to Kshs.23, 420.00.

The claimant also asserts that he was not given notice before termination of employment of paid for notice and this is due. The claim is for Kshs.17, 565.00.

The claimant also testified in support of his claims that following his employment by the respondent, he got injured and his employment was terminated. Such was without a valid reason and thus unfair and he should be compensated. That his due wages for the month were not paid; the due leave allowances, the underpayments over the years not paid; the due off days; and severance pay for time served and costs of the suit.

The claimant also filed his witness statement.

As set out above, where a respondent is served with summons and failed to enter appearance or file a defence and attend at the hearing, the court is mandated under the Rules of the court to proceed and hear the claimant in his evidence and make an award. The claimant was also heard on this basis and the claims made shall be assessed on their merits.

Section 10 of the Employment Act, 2007 read together with sections 8 and 9 requires an employer to issue an employee with a written contract of employment setting out the terms and conditions of employment. Where there is no such written contract and where a claim is filed and the respondent fails to attend, the court is only left with the word of the claimant.

In his regard, where the claimant was employed in March, 2011 and was not issued with a written contract and he continued to work for the respondent as the Machine Operator, section 37 of the Employment Act, 2007 converted his employment into full time employment and rights and benefits set out in the Act. Such rights and benefits must be interpreted for the benefit of the claimant especially in this case where the respondent has not attended to challenge any of the claims made.

Section 43 of the Employment Act, 2007 requires an employer before effecting termination of employment to prove the reason(s) for the termination and where an employer fails to do so, such termination of employment is deemed unfair within the meaning of section 45 of the Act.

The burden to give reasons is on the rationale that section 45(2) of the Employment Act, 2007 requires an employer to demonstrate that;

*(2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid;*

*(b) That the reason for the termination is a fair reason—*

*(i) Related to the employee's conduct, capacity or compatibility; or*

*(ii) Based on the operational requirements of the employer; and*

*(c) That the employment was terminated in accordance with fair procedure.*

Even in a serious case that warrants summary dismissal, the employer must comply with the provisions of section 41(2) of the Employment Act, 2007.

In this case on the evidence that the claimant got injured while at work and was then terminated in his employment, such is not a matter giving the respondent as the employer a fair or valid reason to use and effect termination of employment. In any event under section 34 of the Employment Act, 2007 read together with section 35 of the Act the employer should ensure the employee is provided with a medical cover, time off to attend treatment and also ensure remittance of statutory dues to the National Hospital Insurance Fund under which the employee can seek the payment of the due medical bills. To use the reason of work injury to terminate employment is contrary to the law and acceptable practice in employment. In this case and on the basis of the claimants evidence, I find the termination of employment was without lawful cause and therefore unfair within the meaning of section 45 of the Employment Act, 2007.

On the claims for underpayments, the government publishes the minimum wage guidelines annually to ensure all employer have a guide on how much each category of employees are paid. An employer can go above the minimum wage but not below the same. To underpay an employee is contrary to the legal wage guidelines and upon claim, the difference in such underpayments is due. In this case, without challenge to the claimant for underpayments, the claimant is entitled to Kshs.341, 494.50.

Leave allowance is made on the basis that the claimant did not take annual leave or got paid in leave thereof. Section 28 of the Employment Act, 2007 requires every employer to ensure the employee takes annual leave with full pay. In his case, where the claimant did not take such leave and was not paid, the same is due. Section 28 allow for a minimum of 21 days of leave with full pay. In this case the claimant is seeking payment of kshs.40, 815.25 due as leave pay.

Where claimant worked from March, 2011 to November, 2014 all total of 42 months. For the 3 full years of service and based on the last

wage earned per month the claimant had 63 annual leave days and the extra 8 months under section 28 of the Act, the claimant earned 1 ¾ leave days all being 6 days and total to 69 leave days all computed at kshs.40,399.50.

Off days claim is on the basis that the claimant right to off days was secured under section 27 of the Employment Act, where not taken and there is no record by the respondent as to having paid for the same, the same is due in payment. The claimant is awarded kshs.23, 420.00 for off days due.

Severance pay though claimed, this case did not present a scenario as contemplated under section 40 of the Employment Act, 2007 to justify the claim for severance pay. This was not a redundancy and the claim is declined.

On the finding that there was unfair termination of employment, the claimant is awarded compensation at 10 months gross wage based on the last legal wage he was entitled at kshs.17,565.00 and all being Kshs.175,560.00 and notice pay in terms of section 35 of the Employment Act, 2007 at kshs.17,565.00.

**Accordingly judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) The termination of employment was unfair;**
- (b) Compensation awarded at Kshs.175,560.00;**
- (c) Notice pay Kshs.17,565.00;**
- (d) Underpayment 341,494.00;**
- (e) Leave pay due Kshs.40,399.50;**
- (f) Off days' pay Kshs.23,420.00; and**
- (g) Costs of the suit.**

Delivered in open court at Nakuru this 17<sup>th</sup> day of July, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy & Martin

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