



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 672 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS MUSERA NDANYI.....CLAIMANT

VERSUS

TOP FOOD (E.A) LIMITED.....RESPONDENT

JUDGMENT

By his memorandum of claim dated 8th May 2012, the claimant avers that he was employed by the respondent in December 2009 as a Machine Operator. That in June 2010 he was forced to work long hours from 6 am until 10.00 am in production department and thereafter proceed to supply department where he worked until 10 pm. He avers that in supply department the work involved loading and offloading heavy sacks and cartons from the factory on to vans for delivery to respondent’s clients’ premises, that he lifted loads of up to 80 kg against his weight of 54 kilograms.

The claimant avers that in September 2010 he started experiencing serious back pains, which was later diagnosed as arthritic and mild prolapse of intervertebral disc.

The claimant avers that he was given a letter by his doctor to take to his employer who on receipt dismissed him summarily. He avers that the dismissal was illegal, unfair and unlawful as he was not given reasons for termination or notice. He states he was underpaid, worked overtime including on Sundays, which was his rest day, and on public holidays. He further avers that he did not take annual leave during the 14 months he worked for the respondent and was not paid in lieu.

The claimant prays for the following remedies –

a) Kshs.71,637.50 calculated as follows:-

- (i) Underpayment of weekly wages..... Kshs.14,400
- (ii) Pay in lieu of notice..... Kshs.9,750
- (iii)..... Unremitted statutory deductions (NSSF)
for the four (4) years..... Kshs.2,800
- (iv) Pay for national holidays worked..... Kshs.2,600
- (v) Overtime for June, 2010 to January, 2011.....Kshs.34,125
- (vi) Pay in lieu of leave..... Kshs.7,962.50

Total Kshs.71.637.50

b) General damages for pain, suffering and loss of amenities for the back injury sustained.

- c) Interest on (a) at 18% per annum from 1st February 2011 till payment in full.
- d) Costs of the suit plus interest at court rate from the date of filing this claim until payment in full.
- e) Any other and/or further relief(s) as the court may deem fit to grant.

At the hearing, the claimant reiterated the averments in the memorandum of claim.

The respondent filed a memorandum of response and counterclaim dated 21st June 2013, which was amended on 6th May 2015. The respondent admitted employing the claimant but denied that he was a Machine Operator. The respondent denied all other averments in the memorandum of claim. It averred that the claimant was employed as a general labourer.

The respondent counterclaimed that the claimant breached their verbal agreement by absconding work without leave or valid reason or cause.

The respondent prays for the following remedies –

- i) The claimant's prayers for Kshs.71,637.50 as particularised in the memorandum of claim be dismissed.
- ii) The claimant's prayers for general damages for pain, suffering and loss of amenities for the back injury sustained be dismissed.
- iii) The claimant's prayers for interest on item (a) at 18% per annum from 1st February 2011 till payment in full be dismissed.
- iv) The claimants prayer for costs of the suit be dismissed
- v) The respondent be awarded costs for the claim and counterclaim.

At the hearing, the respondent called CHARITY WANGARE, the Accountant who testified that she joined the company after the claimant left employment but relied on documents on record. She testified that the claimant was a casual employee engaged in off-loading and packaging. She denied that there are heavy loads in the company or that the claimant carried any heavy loads. She testified that there are people who load goods onto vans for delivery to clients but the offloading at the client's premises is done by the client while also verifying if the delivery is as per order. She testified that the claimant did not raise any medical issues while in the employment of the respondent.

Determination

I have considered the pleadings, evidence and written submissions filed by the parties. The issues for determination are whether or not the claimant was a casual, whether or not he was terminated or absconded duty, whether or not he sustained back injury in the course of duty while in the employment of the respondent and whether he is entitled to the prayers sought.

Nature of Claimant's Employment

According to the respondent, the claimant was engaged as a casual worker earning Kshs.325 per day. In the certificate of service annexed as appendix 4 of the respondent's bundle it is stated that the claimant worked for the respondent for a period of one year. The Employment Act defines a casual employee as one who is not employed for longer than 24 hours. Section 37 of the Act provides that the contract of an employee who works continuously for one month or more is automatically converted to a contract where wages are paid monthly. Such employee is entitled to all terms of a regular employee.

The claimant testified that he worked for the respondent from 15th December 2009 to 23rd February 2011.

From the evidence on record, I find that the claimant was not a casual employee but a regular employee.

Whether the claimant's employment was wrongfully terminated

The claimant testified that his employment was terminated on 23rd February 2011 when he submitted a letter from a Doctor to the respondent.

The respondent sent a letter dated 27th January 2011 to the District Labour Officer Nairobi in which it reported that the claimant's employment had been terminated with effect from 26th January 2011 due to negligence and unproductive behaviour.

RW1 who testified on behalf of the respondent was unable to substantiate what constituted negligence and unproductive behaviour. The respondent did not issue a letter of termination to the claimant and confirmed that the duty rosters reflect that the claimant was in employment in February 2011.

From the foregoing, it is evident that there was no formal procedure in the termination. It is also evident that the respondent had no valid reason to terminate the employment of the claimant and did not formally communicate to the claimant about the termination of his employment. The termination was therefore unfair under Section 45(2) of the Employment Act and I declare accordingly.

Whether the claimant is entitled to damages for injury to his back

The claimant avers that it is the heavy loads he carried while in the employment of the respondent that caused him back injuries. He produced treatment records and medical report from Dr. Moses Kinuthia, which confirm that he suffers from arthritic back and possible prolapsed intervertebral disc. The doctor states that the claimant will require prolonged use of analgesics, muscle relaxants and physiotherapy sessions at an estimated cost of Kshs.60,000 and that he is predisposed to lumbosacral spondylosis, which is a chronic sequelae of the sustained back injury.

The respondent only makes a general denial of the claimant's claim of injury and did not attempt to obtain its own medical report to either confirm or controvert the averments of the claimant. The respondent's witness only stated that there were no records of complaints of injury by the claimant. I find the approach of the respondent to be so lackadaisical. The respondent has not given me any cause to disbelieve the claimant. Unfortunately, neither the claimant nor the respondent put a figure to the general damages leaving the court with nothing to go by. There is also no mention by either party of permanent incapacity of the claimant in the medical report, which I note was done by a general practitioner.

In the circumstances, I award the claimant only the Kshs.60,000 mentioned in the medical report being for further treatment.

The claimant further prayed for the following –

(i) Underpayments

The claimant claims that he worked for 7 days every week but was not paid in lieu of the rest day. He prays for payment of one rest day for 52 weeks (one year). Since there was no specific denial of this claim, I award the claimant the sum of Kshs.325 per day for each of the Sundays worked at double the normal rate as provided under Rule 6 of the Regulation of Wages (General) Order at Kshs.33,800.

(ii) Pay in lieu of notice

Having been terminated without notice, the claimant is entitled to one month's salary in lieu of notice which I award him at Kshs.9,750 based on the daily wage of Kshs.325.00.

(iii) Unremitted statutory deductions

The claimant claims NSSF for 4 years at Kshs.2,800. He did not work for 4 years. He is also not entitled to NSSF, which was never deducted, from his wages. What he is entitled to is service pay under Section 35(5) of the Employment Act for the one completed year of service that he worked which I award him at (15 x 325) Kshs.4,875.00

(iv) Pay for National holidays

The claimant prayed for Kshs.2,600 for national holidays worked for eight public holidays, which was not denied by the respondent. I award him Kshs.5,200 being (8 x 325 x 2) [Refer to Rule 6 of Regulation of Wages and Conditions of Employment (General) Order].

(v) Overtime

The claimant prayed for overtime for the period from June 2010 to January 2011 when he claims he worked 4 hours overtime daily. I award him the sum of Kshs.34,125 as tabulated at paragraph 17 of the memorandum of claim.

(vi) Pay in lieu of leave

The claimant worked for 13 months. At the rate of 1.75 days per month, he earned 22.75 days, which translates to Kshs.7,393.75 which I award him.

(vii) Costs and Interest

Having been successful in his claim I award the claimant costs and interest at court rates on decretal sum from date of judgment.

In summary, I award the claimant the following

- (i) Underpayments..... Kshs.33,800.00
- (ii) Notice..... Kshs.9,750.00
- (iii).....Service Kshs.4,875.00
- (iv).....Public holidays Kshs.5,200.00
- (v) Overtime..... Kshs.34,125.00

(vi).....Leave Kshs.7,393.75

(vii) Medical Treatment.....Kshs.60,000.00

Total Kshs.155,143.75

(viii) Costs

(ix) Interest from date of judgment

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2018

MAUREEN ONYANGO

JUDGE