



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 198 OF 2011

JOHN MUSYOKA MUTHEMBWA CLAIMANT

V

AKAR BUILDERS LIMITED RESPONDENT

JUDGMENT

1. John Musyoka Muthembwa (Claimant) instituted legal proceedings against Akar Builders Ltd (Respondent) on 15 February 2011 and he stated the Issues in Dispute as *wrongful and unlawful termination of the Claimant's services and failure by the Respondent to pay terminal benefits to the Claimant*. The Claimant also alleged breach of contract.
2. In its Defence, the Respondent contended that the Claimant was a contractor engaged on a *need to basis* and that he absconded. Breach of contract was denied.
3. The Claimant's testimony was taken by Nduma J on 10 November 2015 while I took the Respondent's Managing Director's testimony on 21 June 2018. The Court notes that the Cause was prosecuted and defended in a most casual manner.
4. The Claimant filed his submissions on 19 July 2018, while the Respondent filed its submissions on 6 September 2018.
5. The Court has reviewed the pleadings, evidence and submissions and identified the questions for determination as, whether the Claimant was an employee or independent contractor, whether Claimant's employment was unfairly terminated, whether there was breach of contract and appropriate remedies/orders.

Employment relationship

6. The Claimant's testimony was that he was employed by the Respondent on 5 January 2004 as a mason at a daily rate of Kshs 250/- (same was increased over time). The same was accumulated and paid at the end of the month.
7. He also testified that he used to sign attendance records.
8. The Respondent denied in the Response that the Claimant was an employee but its witness admitted that the Claimant worked on a *month on month* contract.
9. Written contracts from 2004 to 2010 were filed by the Respondent. Also filed were overtime schedules and the witness admitted that the Claimant worked overtime.
10. The contracts had provision on termination upon notice or pay in lieu of notice.
11. Considering the written contracts produced and in particular the termination clause(s) thereon, the signing of attendance registers and the overtime schedules, the Court is satisfied that the Claimant was an employee of the Respondent. It is not normal to pay an independent contractor overtime.

Unfair termination of employment

12. The Claimant's testimony on the separation was that in 2010 the Respondent's Director alleged he was a bad employee and dismissed him.
13. The Respondent's witness (a director) on the other hand testified that the Respondent had a contract with General Motors and when the

contract lapsed, he informed the Claimant to wait for about 10 days but he never came back.

14. The Court has the word of one against the other.

15. In terms of sections 76 and 78 of the Employment Act, 2007, the Respondent should have notified the local labour office of the vacancy arising out of the Claimant's leaving or absconding. No such report was made that the Claimant had absconded.

16. The Court is therefore of the view that the narration by the Claimant is more probable and in this respects finds that he was dismissed without appropriate notice as envisaged by section 35 of the Employment Act, 2007.

17. The dismissal was unfair (the Court notes that in the submissions the Claimant introduced the question of redundancy when the pleadings did not outline the issue of separation as based on redundancy).

18. Considering that the Claimant served the Respondent for about 6 years, the Court assesses compensation as the equivalent of 6 months gross wages (Claimant was earning Kshs 7,580/-).

Breach of contract

Overtime

19. The Employment Act, 2007 gives the leeway to the employer and employee to agree on the working hours.

20. In the case at hand, there are records to suggest that the Claimant was paid for overtime work.

21. The Court therefore finds that the Claimant has not demonstrated that there was breach of contract in respect to working hours or payment of overtime.

Leave allowance

22. An employee is entitled to at least 21 days annual leave with full pay. *Leave allowance* is not a right under the Employment Act, 2007.

23. If there was contractual agreement to pay *leave allowance* on top of the entitlement to leave with full pay, the Claimant did not draw the attention of the Court to such contractual provision.

Salary May to July 2010

24. The Claimant's pleaded case was that termination was on 7 May 2010.

25. In the view of the Court therefore there is no legal basis for payment of salary up to July 2010. The Claimant would be entitled as of right only to wages up to 7 May 2010.

26. The Respondent filed a petty cash voucher showing that the Claimant was paid for the 7 days.

Holidays

27. The Claimant sought Kshs 7,056/- on account of holidays for 6 years. However, he did not lay any evidential foundation as to the nature of the holidays and the period.

Uniform

28. On account of uniform, the Claimant sought Kshs 4,000/- but he did not present any facts as to the issue of uniform and why he was seeking the amount.

Service pay

29. There was no evidence that the Claimant was a contributor to the National Social Security Fund, and the Court will therefore allow the head of claim for service pay of Kshs 26,460/- as claimed (Claimant introduced relief of severance pay in the submissions and the Court declines to entertain the same).

Conclusion and Orders

30. The Court finds and holds that the Claimant's employment was unfairly terminated and awards him

(a) Compensation Kshs 45,480/-

(b) Service pay Kshs 26,460/-

TOTAL **Kshs 71,940/-**

31. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 24th day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant Ms. Arati instructed by Arati & Co. Advocates

For Respondent Ms. Kitaa instructed by D.S. Kitaa & Co. Advocates

Court Assistant Njunge/Lindsey