



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.29 OF 2016

EVALINE TITAI PARIKOLO.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim on 4th February, 2016. The respondent was served and entered appearance on 20th September, 2016. There was no defence filed at the close of pleadings.
2. On 6th March, 2017 court issued directions and allowed hearing to proceed by way of formal proof. A hearing date was allocated for 2nd October, 2017 when the respondent was present but the claimant was not ready for hearing.
3. The respondent filed defence on 6th March, 2017 out of time and without leave.
4. On 31st July, 2018 both parties attended and the court confirmed the hearing of the claim by formal proof. A hearing date was allocated by consent of the parties for 20th September, 2018.
5. On the due date, the claimant and counsel were in court. Oumo Advocate held brief for Mr Andama for the respondent and parties were allocated time at 11am. At the appointed time, the respondent was absent.
6. The claimant was heard in evidence.

Claim

7. The claimant was employed by the respondent company in September, 2012 as a Day Guard and at a monthly wage of Kshs.2,400.00. The claimant was issued with contract and payment statements.
8. The wage was increased over time to Kshs.5,200.00 per month from October, 2012; Kshs.6,000.00 per month from November, 2012; Kshs.6,200.00 per month from December, 2012 and then the wage was reduced to Kshs.4,800.00 per month from 31st January, 2013.
9. The claimant was underpaid contrary to the applicable wage orders which required a payment of Kshs.8,873.80 per month and a house allowance of Kshs.1,331.10 at gross of Kshs.10,204.90 per month.
10. The claimant would report to work all week from 6am to 6pm without payment of overtime or taking a rest day. There was no compensation. Public holidays were also not compensated.
11. On 31st February, 2013 the claimant was dismissed from her employment without notice, hearing or compensation.
12. The claimant is seeking the payment of the following;

- a) Notice pay
- b) Underpayments;
- c) Overtime payment;
- d) Rest days payment;
- e) Work on public holidays payment;
- f) Leave due for 6 months;
- g) Compensation;
- h) Issuance of Certificate of Service.

13. The claimant testified in support of her claims.

Defence

14. On record is a defence. The respondent admit the claimant was an employee from 8th January, 2013 as a Casual Labourer and to the Memorandum of Claim, the claimant has attached her form noting she was a casual labourer. The claims made are without merit and should be dismissed with costs.

15. There was no evidence to support the defence or challenge to the claims. the defence is also devoid of any work records as required under section 10 of the Employment Act, 2007.

Determination

16. The claimant case is premised on facts that she was employed by the respondent as a Day Guard and her employment was terminated without notice or a hearing. Her terminal dues were not paid.

17. The claimant has however attached *Agreement* with regard to her employment with the respondent noting that she was engaged as a Casual Employee and on temporary basis at a daily wage of Kshs.200.00 per day. Such employment is lawful and allowed under the provisions of section 10(3) of the Employment Act, 2007.

18. Where an employer wishes to employ an employee on contract and the terms and conditions are put into writing, such mode of employment is legitimate and valid.

19. The claimant accepted the casual employment agreement issued to her on the agreed terms and conditions. She was to undertake duties allocated to her. the daily wage was agreed at kshs.200.00 and work commenced on 8th January, 2013.

20. The oral terms of employment subsisting as at 8th January, 2013 were converted into a written agreement. Such conversion is lawful and a requirement under section 8, 9 and 10 of the Employment Act, 2007. The provisions thereon read together requires an employer to issue an employee with written terms of employment. In this regard, the respondent adhered and issued a written agreement to the claimant. The terms therefrom apply.

21. The Regulation of Wages (General) (Amendment) Orders, 2013 the daily wage for a general labourer was Kshs.432.40. As a category of employment that was regulated, where the claimant as paid Kshs.200.00 per day, such was an underpayment from the wage guidelines applicable. The difference of Kshs.232.60 is due and owing.

22. The written agreement took effect on 8th January, 2013 and ended on 31st February, 2013 when the

claimant was dismissed.

23. But alas! There is no February, with 31 days!

24. I take not that February, 2013 had 28 day.

25. Taking the above into account, the claimant had a contract and was in the respondent's service for 51 day and with the underpayment of Kshs.232.60 the total dues amount to kshs.11,862.60.

26. Notice pay on a contract and daily wage is not due.

27. For the contract period, the claimant has not addressed which public holidays she was at work. Claims thereon are not justified.

28. Every employee has a right to a rest day after work every 7 days. For the 51 days at work, the claimant is entitled to 7 rest days all assessed at kshs.3,526.00.

29. With the grant of rest days for a general labourer, no annual leave is due.

Accordingly, judgement is hereby entered for the claimant against the respondent with an award for underpayment at Kshs.11,862.60; Payment for rest days kshs.3,526.00; Costs of the suit; and Certificate of Service be issued in 14 days and in terms of section 51 of the Employment Act, 2007.

Dated and delivered at Nakuru this 11th day of October, 2018.

M. MBARU

JUDGE

In the presence of:.....

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