



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 35 OF 2017

(Before D. K. N. Marete)

DANIEL OGARE.....CLAIMANT

VERSUS

HERNE LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 4th July, 2017. It does not disclose an issue in dispute on its face.

The matter is not defended, or at all. The respondent has not showed up in the prosecution of this cause. This is despite service.

This matter is consolidated with ELRC Cause No.s 36, 37, 38, 39, 40, 41 and 42/2017 with this as the leading case.

The claimant's case is that his employment was terminated by the respondent on grounds of redundancy on 13th December, 2015 after a two (2) year stint of service. Then, his gross salary was 9,000.00.

The claimants other case is that he was terminated with notice but with no pay at all. This was demeaning, illegal, embarrassing and punitive and amounts to unlawful termination.

Further, the claimant was dismissed without a right of appeal or pay as provided by the law. This was despite demand and intervention by the County Labour Officer, Narok. The respondent has refused or failed to pay him thus rendering this claim necessary. No terminal dues were paid or even a Certificate of Service issued.

It is his penultimate case that the respondent's action violated section 35, 41, 44, 45, 49 and 51 of the Employment Act, 2007 and is therefore unlawful. This is expressed as follows;

9. THAT the Respondent's action violates the employment Act Section 35, 41, 44, 45, 49 and 51. Are unlawful, unwarranted and threatens the employment rights and fundamental freedoms of workers and denies the workers and denies the workers their right to earn a living, is discriminative and violates the rights of the Claimant contrary to the constitution of Kenya.

He prays as follows;

CLAIMANT – DANIEL OGARE

- Employed on 18th July 2015.*
- Position at termination – Security Guard.*
- Gross Salary at termination – Kshs. 9,000/=.*
- Worked for 2 years 3 months.*
- Terminated on 13th December 2015.*

i) Claims/prays for terminal dues as follows;

A) NOTICE

One months's gross wages in lieu of notice =Kshs.9,000.00

B) NORMAL OVERTIME FOR 2 YEARS 3 MONTHS

- Working 52 hours in one week

- 52 hours – 48 hours normal time = 4 hours

- 4 hrs – 1 hr lunch break = 3 hrs overtime in a week

- 3 hrs overtime x 4 weeks = 12hrs overtime in a week

- 12 hrs overtime x 27 months = 324 hrs overtime

- Salary = Kshs.9,000 $(9,000 \times 324 \times 1.5) = \text{Kshs.}22,430.75$

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C) LEAVE FOR 2 YEARS 3 MONTHS

- Salary Kshs.9,000/= $(9,000 \times 21 \times 2)$

30 =Kshs.12,600.00

- Salary Kshs.9,000

30 =Kshs.300 per day

Leave pro-prate = $1.75 \times 300 \times 3 = \text{Kshs}1,575/=$

Total for leave =Kshs.14,175.00

D) GRATUITY FOR TWO (2) YEARS UNDER SECTION 40(1) G

He was declared redundant after serving for 2 years 3 months

Salary package of Kshs.9,000/= per month = $(9,000 \times 2) = \text{Kshs.}9,000.00$

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E) PENDING OFF DAYS (31 DAYS)

- Working 9 hrs in one day i.e 52 hrs in even my period of 6 days

- 9 hrs x 31 days = 279 hrs

- Salary Kshs. 9,000/= $(9,000 \times 279 \times 2) = \text{Kshs.}25,753.85$

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F) UNPAID SALARY FOR 13 DAYS (DEC 2015)

- Daily rate Kshs.300/=

- Kshs.9,000 x 12 months =Kshs.3,900.00

G COMPENSATION

- Salary at termination Kshs. 9,000/=

- Kshs. 9,000 x 12 months = Kshs.108,000.00

TOTAL =Kshs.192,259.60

ii) A certificate of Service as per Section 51 of the Employment Act.

iii) Costs and interest.

iv) Any other relief this Honourable court may deem fit to grant

The matter came to court variously until 17th July, 2018 when the claimant was ordered to serve his written submissions within seven days.

Like was earlier observed this matter is not defended, or at all.

The claimant in support of his case has annexed the following documents in support of his claim;

1. Employment Agreement signed on 13th November, 2015.
2. Termination letter dated 13th November, 2015.
3. Letter dated 1st January, 2015.
4. List of pending off days as at 13th December, 2015.
5. Letter dated 11th December, 2015 by the Ministry of Labour, Society Security and Services Department of Labour to Herne (K) Limited.
6. Letter dated 10th August, 2016 from KUDHEIHA to Mara River Lodge.
7. Letter dated 27th October, 2016 from KUDHEIHA to Mara River Lodge.
8. Pay slip for October, 2015.

The claimant further annexes a Verifying Affidavit sworn on 4th July, 2017 and a Statement of even date under Order 3 Rule 2 (c) both of which authenticate the validity of the claim.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. In the absence of a defence, or any word to that extent and on the basis of the evidence adduced in support of the claim, I find that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follows;

- i. One (1) months salary in lieu of noticeKshs.9,000.00
 - ii. Unpaid salaries for 13 days in December, 2015.....Kshs.3,900.00
 - iii. Six (6) months salary as compensation for unlawful termination of employment
= Kshs.9,000.00 x 6.....Kshs.54,000.00
- Total.....Kshs.66,000.00**

iv. The respondent be and is hereby ordered to issue a Certificate of Service to the claimant within 30 days of this judgement of court.

v. The costs of this claim shall be borne by the respondent.

vi. The costs of the claim be and are hereby assessed at Kshs.100,000.00

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Oumo instructed by Oumo & Company Advocates for the claimant.
2. No appearance for the respondent.