



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 232 OF 2017

RAMA SAID MTINDA.....CLAIMANT

VS

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Rama Said Mtinda against his former employer, Kwale International Sugar Company Limited. The claim is contained in a Memorandum of Claim dated 28th March 2017 and filed in court on even date. The Respondent filed a Reply on 21st June 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Legal Officer, David Kulecho. Both parties further filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as an irrigation attendant, from 11th October 2008 until 18th March 2016, when his employment was terminated. He states that as at the time he left employment, he earned a daily rate of Kshs. 235.

4. The Claimant’s case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 6,110
- b) Leave pay for 7 years.....42,770
- c) House allowance for 90 months.....82,485
- d) Unremitted NSSF dues.....9,600
- e) Public holidays between 18.10.2008 & 18.3.2016.....35,720
- f) Underpayment.....77,102
- g) 12 months’ salary in compensation.....73,230

The Respondent’s Case

5. In its Reply dated 20th June 2017 and filed in court on 21st June 2017, the Respondent states that the Claimant was engaged as a casual labourer from time to time when necessary. He was paid his wages on a daily basis.

6. The Respondent adds that the Claimant was not terminated but merely failed to report to work on or about mid May 2016. The Respondent states that the Claimant was not entitled to house allowance as he was paid a daily wage in accordance with the applicable minimum wage

7. The Respondent pleads that NSSF dues were deducted and remitted on the Claimant’s account during the months in which he was

engaged. The Respondent further pleads that the Claimant's claims for leave pay and public holidays are untenable and unmerited in the circumstances.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case for unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

9. In support of his claim for unlawful termination, the Claimant told the Court that on 18th March 2016, he was informed by the Respondent's Assistant Manager, Patrick Chibosi that there was no more work for him. In its defence, the Respondent states that the Claimant was a casual employee who was not required to report to work every day. He therefore failed to report to work sometime in May 2016 and that was the end of his relationship with the Respondent.

10. Under Sections 10 and 74 of the Employment Act, 2007 the employer is under an obligation to keep employment records. In this regard, the Respondent ought to have produced a casual attendance register or payment vouchers to prove its averment that the Claimant was a casual employee. Having failed to do so, the Court invokes Section 10(7) of the Act and thereby adopts the Claimant's testimony that he was a regular employee of the Respondent.

11. Further, the Respondent's witness, David Kulecho had no first hand information regarding the circumstances leading to the Claimant's exit from the Respondent's employment. The Claimant's testimony in this regard was unchallenged and the Court had no reason to disbelieve him. The Court therefore finds and holds that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure.

Remedies

12. In light of the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. Additionally, I award the Claimant one (1) month's salary in lieu of notice.

13. Having dispelled the Respondent's defence that the Claimant was a casual employee, the claim for leave pay succeeds and is allowed.

14. The Claimant admitted that his salary was calculated on the basis of daily wage which is ordinarily a consolidated figure. The claim for house allowance therefore fails and is dismissed.

15. Regarding the claim for unremitted NSSF dues the only thing to say is that any such dues would be payable to the statutory body and not to the Claimant.

16. The claims for underpayment and public holidays were not proved and are dismissed.

17. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 10 months' salary in compensation.....Kshs. 70,500
- b) 1 month's salary in lieu of notice.....7,050
- c) Leave pay for 7 years (235x21x7).....34,545
- d) Prorata leave pay for 5 months (235x1.75x5).....2,056
- Total.....114,151**

18. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant will have the costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Njoru for the Respondent