



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.510 OF 2014

MOSES MUSUNGU ANUNGO.....CLAIMANT

VERSUS

GIRISH PATEL T/A TEJDIP HARDWARE STORES.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in July, 2009 as a turn boy at a gross wage of Ksh.4, 000.00 per month which amount he earned until August, 2013 when it was increased to Ksh.5, 000.00 per month from September, 2013. The claimant worked for the respondent until 17th September, 2014 when his employment was unfairly terminated.

The claims are that the claimant was underpaid by the respondent. under the Wage orders in May, 2009 the due basic wage was Ksh.5,874.00 plus a house allowance of Ksh.881.10 with gross due at Ksh.6,755.10. The claimant was thus paid less by Ksh.2, 755.10 each month. Using the Wage Orders, the due underpayments are Ksh.273, 766.70.

In the year 2014 the claimant was entitled to a minimum wage of Ksh.10, 377.75.

Upon termination of employment the claimant was entitled to such notice pay.

The claimant was made to work during public holidays without compensation. No leave days were allocated or paid in lieu thereof.

On 17th September, 2014 at 3.30pm the claimant was told to go and repair brake linings for the vehicle KBK 272V lorry to which he respondent that he had no knowledge or experience to attend as he was not a mechanic. On this response the claimant was ordered out of the workplace and dismissed from his employment. The turn boy for the lorry was a mechanic which he claimant was not and his vehicle was registration No.KBK 272X.

The dismissal of the claimant was therefore without due process and efforts to seek a hearing with the respondent was futile.

The claimant is seeking the following dues;

- a) Notice pay Ksh.10,377.75;
- b) Underpayments Ksh.273,766.70;
- c) Pay for work during public holidays Ksh.33,293.95;
- d) Leave for 4 years Ksh.24,039.70;
- e) Salary for 17 days Ksh.7,632.15; and
- f) Compensation.

The claimant testified that he was paid below the minimum wage for the entire period of employment. As a turn boy he would be on the road working without break or taking leave and without compensations. On 17th September, 2014 he was dismissed on verbal notice when he went to report back to work. He was not paid the terminal dues.

Defence

The defence is that the claimant left employment with the respondent on his own volition. The claimant was not at work during public holidays and he went on leave when due. The claimant absconded duty without notice and despite pleas for him to report back, he failed to attend. The claims made are not justified and should be dismissed with costs.

In evidence the respondent called Girish Patel who testified that he worked with the claimant well from July, 2011 where he was a turn boy and on motor vehicle No.KAR 272B. The respondent had work contract with Unga limited and Doshi Hardware in Nakuru and Eldoret where work would start at 8am to 5pm. Where the claimant went to Nairobi it was back and forth by end of day and would not work beyond official time as alleged. The practice of the respondent is to close work at 1pm for a break and close time is at 5pm. Overtime work is not allowed. The companies where the claimant was sent at Unga Limited open at 8am and close to 5pm and there is no work on public holidays to justify the claims by the claimant that he attended such off-hours work or on weekends.

Mr Patel also testified that from the year 2011 the claimant was paid Ksh.5, 000.00. In the year 2013 the claimant and others went on strike for 2 days and the respondent increased he wage to Ksh.7, 000.00.

The respondent does not have much work and in a week the claimant would attend to one trip and the rest of the day the claimant but was paid full salary for the month.

On 17th April, 2014 the claimant was paid his advance and given an invoice from Unga Limited for work within Nakuru but he came back at 4pm without indicating where he had been to. The rest of the day the claimant refused to attend to work and refused to pick calls made to him. The driver was required to take the vehicle to the garage and not the claimant as the turn boy as he had previously caused an accident in the year 2013 when he drove vehicle No.KAR 272B while he was not supposed to drive it and in the process two people died as a result and following the accident. The claimant was charged in court and the case is still on-going. The vehicle was off the road for over a year and caused a lot of loss and damage to the respondent business as goods loaded therein of Unga were stolen. The claimant was retained at work despite this misconduct.

The claimant was given another vehicle No.KBL 278A. At the time the claimant absconded duties he had various cases of misconduct. The claimant had led a strike which was not approved by the labour officer and for two days business was lost and leading to losses.

The respondent is closed on all public holidays as well as the businesses where goods are collected from Unga Limited and Doshi. Every year all employees take their annual leave and the claimant has been given several days off work to attend to his criminal and traffic case on-going in court. When the claimant was allowed to take leave he would return before it was over seeking to be at work so as to earn more money.

On 17th September, 2014 the claimant was paid his advance salary and never reported back to work.

At the close of the hearing, both parties filed written submissions.

The claim herein was filed on 14th October, 2014.

The claimant's case is that on 17th September, 2014 he was verbally dismissed from work. Such claim is denied by the respondent on the evidence that the claimant absconded duty and never reported the matter to the labour officer.

Indeed there is a demand letter dated 25th September, 2014 alleging the claimant was unfairly dismissed by the respondent and that his terminal dues should be paid being notice pay, underpayments, overtime pay, pay for working on public holidays and for leave days unpaid. To this demand, the respondent replied on 2nd October, 2014 and where the respondent asserts that there was no termination of employment and that the claimant absconded duty.

On this response, the claimant ought to have resumed duty. He never did. He opted to file suit.

Failure to report back to work and claim notice pay, compensation and terminal dues despite being invited back to work are not remedies for the court to issue. Such is to sanction misconduct which based on the applicable law, section 44 of the Employment Act, 2007 warranted summary dismissal.

In the pleadings the claimant at paragraph 7, 8, and 9 avers that on 17th September, 2014 he was directed to go and repair a motor vehicle and since he was not a mechanic he could not attend and on this basis the respondent verbally dismissed him. However in his oral evidence in court the claimant testified that he went to report back at work on 17th September, 2014 but was verbally dismissed.

Such contradictory evidence does not speak well of the claimant. In his evidence before court he did not stand out as one telling the truth. Upon cross-examination the claimant testified that most of the work he did was to deliver and count well and the main client for the respondent was Unga Limited which would open from 8am and close at 5pm. He was not required to work overtime noting the goods to be collected from the client would only be available from 8am to 5pm. When Unga Limited was closed, there was no access. On weekends Unga Limited only opened on Saturday up to 1pm and remained closed on Sunday. There was no work on public holidays. The company opened when there was an emergency.

The claimant also admitted that in the year 2010 while traveling to Eldoret he drove motor vehicle KAX and had an accident at Salgaa, the

motor vehicle overturned and the police from Molo Police station attended but he suffered no injuries and the motor vehicle had no defects. The claimant was able to drive this vehicle back to the respondent premises. On the evidence that the claimant had no mechanic knowledge to change brake yet he was able to drive a vehicle following an accident leaves him as a dishonest person not capable of telling any iota of truth.

Such evidence clearly set out the claimant outside the period where he claims for overtime pay and pay for working over public holidays. Such claims are not supported and by his own evidence, such claims lack justification.

On the claims made, the only matter that stand out is the fact of underpayment. The respondent as the employer has not provided the court with any work records. Mr Patel testified that he started the claimant on a wage of Ksh.5, 000.00 and following a strike in the year 2013 this was increased to Ksh.6, 000.00 and later to Ksh.8, 000.00.

There is however no record to support the defence with regard to the nature of wages paid to the period when the claimant absconded duty. Such wages should be assessed based on the Wage Orders applicable with regard to the claimant as a turn boy.

The matter is hereby referred to the County Labour Officer for the assessment of the wages due to the claimant for the period of employment – May, 2011 to 17th September, 2014 which shall be paid less what has been acknowledged and based on the respondent submitting the work records and vouchers in payment. Each party shall meet own costs.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU

JUDGE

In the presence of: