



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1398 OF 2013

LENNOX OMONDI OYOKO.....CLAIMANT

v

RUIRU FEEDS LIMITED.....RESPONDENT

JUDGMENT

1. Lennox Omondi Oyoko (Claimant) was offered employment by Ruiru Feeds Ltd (Respondent) around 15 October 2010 as a turn boy.
2. On 2 September 2013, the Claimant a lay person acting for himself instituted legal proceedings against the Respondent and he stated the Issues in Dispute as **Wrongful and unfair termination of the Claimant's services and failure by the Respondent to pay terminal benefits to the Claimant.**
3. In terms of remedies, the Claimant sought pay in lieu of notice, unpaid salary for April 2012, leave earned but not taken, service pay, house allowance totalling Kshs 56,250/- and compensation for unfair termination of employment.
4. In a Response filed on 18 May 2016 (outside the period of leave granted on 14 March 2016), the Respondent contended that the Claimant was a casual employee paid on a weekly basis and did not work continuously; left work without notice after being caught attempting to steal and that the wages included house allowance.
5. The Claimant testified and closed his case on 15 November 2018 after which the Respondent sought adjournment on the ground that its witness had left its employment and had been sent on official duties to Mombasa by his current employer.
6. The Court allowed the application and scheduled the Respondent's case for hearing on 23 November 2018.
7. On 23 November 2018, the Respondent sought another adjournment and the reason given was that its witness had a sick child in hospital.
8. The Court declined the application and the reasons are on record, as a result of which the Respondent closed its case without calling any witness or leading evidence.
9. The Claimant filed his submissions on 11 December 2018 while the Respondent's submissions were not on file by this morning.
10. The Court has considered the pleadings, evidence on record and the submissions.

Whether Claimant was a casual employee

11. A *casual employee* is defined in section 2 of the Employment Act, 2007.
12. Although the Respondent did not lead any evidence, its admission in the Response that the Claimant was not paid at the end of the day removes him from the categorisation of *casual employee* and the Court so finds.

Desertion or unfair termination

13. The Respondent did not lead any evidence to demonstrate that the Claimant deserted work.

14. Even if the Claimant had deserted, it was incumbent upon the Respondent to prove that it complied with the provisions of section 41(2) of the Employment Act, 2007.

15. The Court is of that view because failure to turn up for work without permission and or lawful cause is *gross misconduct*, and may amount to repudiation where an intention never to return to work is established (see *Societe General, London Branch v Geys* (2012) UKSC 63). There was no evidence that the Respondent accepted the repudiation (desertion).

16. The Court rejects the defence of desertion.

17. The Claimant's testimony that he was informed that his services were no longer required by a Director of the Respondent called Patel after a trip from Mombasa was not rebutted, and the Court believes it as credible.

18. No explanation was tendered why the said Director did not attend Court to testify

19. Sections 35 and 41 of the Employment Act, 2007 require *written notice of termination of employment* and a *hearing* respectively, and because there was no suggestion of either, the Court finds that the Claimant's employment was unfairly terminated.

20. The Court therefore holds that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice.

21. Since the Claimant served the Respondent for about 2 years, the Court is of the view that the equivalent of 4 months wages as compensation would be fair.

April 2012 wages

22. The Claimant stated that he was dismissed on 30 April 2012. He is entitled as of right to the earned wages up to date of separation.

House allowance

23. It is incumbent upon an employer to provide housing or pay house allowance and there should be an indication whether wage paid is consolidated to include house allowance.

24. The Respondent did not issue the Claimant with a written contract as required by section 9 of the Employment Act, 2007 and the Court will therefore conclude that the monthly wage of Kshs 9,000/- paid to the Claimant did not include house allowance.

Leave

25. The Claimant's testimony that he did not take annual leave for the period of employment was not rebutted by filing/production of employment records and by dint of sections 10(3), (7) and 28 of the Employment Act, 2007, the Court will allow this head of claim.

Service pay

26. There was no evidence that the Claimant was contributing towards the *National Social Security Fund*, and in terms of section 35(5) & (6) of the Employment Act, 2007, the Court will allow the heads of claim.

Conclusion and Orders

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

(a) Pay in lieu of notice	Kshs 9,000/-
(b) April 2012 wages	Kshs 9,000/-
(c) Leave	Kshs 9,450/-
(d) Service pay	Kshs 4,500/-
(e) House allowance	Kshs 24,300/-
(f) Compensation	Kshs 36,000/-
TOTAL	Kshs 92,250/-

28. Claimant to have costs of Kshs 20,000/-

Delivered, dated and signed in Nairobi on this 17th day of December 2018.

Radido Stephen

Judge

Appearances

Claimant in person

For Respondent Ms. Chege instructed by Kittony Maina Karanja Advocates

Court Assistant Lindsey