

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.462 OF 2017

MARCOS INGUMBA EVUSACLAIMANT

VERSUS

MENENGAI OIL REFINARIES LTDRESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 17th November, 2017. The respondent was served and entered appearance on 7th February, 2018. No defence was filed.

On 8th October, 2018 the claimant attended court and was issued with hearing directions. The respondent had been served with mention notice but failed to attend.

On 16th November, 2018 the firm of *Muli & Company Advocates* filed respondent's list of documents. Such firm of advocates is not on record as representing the respondent. Such documents as filed are of no legal effect as filed by a third party.

The claimant was heard on his case on 21st November, 2018. The respondent did not attend.

The claimant was employed by the respondent on 1st November, 2012 as a general worker at a daily wage of Ksh.375.00 the statutory dues to NSSF were paid by the respondent.

On 31st October, 2014 the claimant was issued with a letter of appointment and gave him a wage of Ksh.10, 380.00 per month.

On 26th September, 2017 the claimant was issued with a letter terminating his employment on the grounds that he was not attending work since 3rd August, 2017 and such was without an explanation.

The claimant's case is that though appointed as a general worker he was allocated duties of a store keeper as his primary duty for 5 years. Upon termination of employment, the claimant was only paid one month's notice and leave pay that was not itemised.

The claimant asked for permission from his supervisor Mr Sait and which was granted to travel home to resolve family issues in Kakamega. The claimant went home on 4th September, 2017 and came back on 29th September, 2017 noting the time period he had been allowed to be away. Upon reporting to work he was issued with a letter terminating employment. Such was without due process and or hearing. The claimant had a good defence having been allowed to travel home by his supervisor. Despite his pleas to be allowed at work, the respondent did not oblige.

The claimant is seeking his underpayment from that of a general worker to the pay of a store keeper as his duties entailed for 5 years. Such dues amount of Ksh.272, 685.95.

The claimant did not take leave for one year all being due at Ksh.9, 801.40.

The claimant worked overtime and was not compensated all amounting to Ksh.470, 907.00.

The claimant is also seeking compensation for unfair termination of employment.

The claimant testified in support of his claims. At the close of the hearing the claimant filed written submissions.

Without any defence or attendance by the respondent to cross-examine the claimant, the hearing closed with the claimant's case only.

Though no defence was filed, the court shall assess the claims made on their merits and based on the pleadings, evidence and the applicable law.

The claimant has attached his letter of appointment noting that he applied for a position with the respondent and was employed as a general worker. This thus stands out as the primary document and basis of his employment. There is no record changing such position or title to a store keeper to justify the claim that the claimant was in such employment.

Section 9 and 10 of the Employment Act, 2007 allow an employer to issue an employee with a letter of employment or contract of employment spelling out the terms and conditions of employment. Where there is a change in the employment status, a written communication should also issue to the claimant. The claimant had his employment appointment in writing and such was not changed or reviewed.

On this basis, the claims made for underpayment on the grounds of a different position other than the one the claimant held is not justified. Despite there being no challenge to this claim, the law with regard to employment is clear with regard to the nature of employment and the payment due.

The claimant testified that his supervisor allowed him time to attend to personal issues at home and thus left employment on 4th September, 2017 but upon return he was issued with a letter terminating employment dated 26th September, 2017.

Absence from work without a justifiable cause is a good ground for summary dismissal. The employer must however give the employee notice and a hearing in accordance with section 41(2) of the Employment Act, 2007.

In this case, the evidence by the claimant that he obtained permission from his supervisor Mr Sait to travel home for 3 weeks is not challenged. There was a good cause for the claimant to be absent from work. Even where such absence is not documented, before the respondent could dismiss the claimant was his employment, due process demanded that he be given a hearing even where the respondent intended to pay him in lieu of notice such payment in lieu of notice is not a justification for termination of employment. Section 43 of the Employment Act, 2007 requires the employment to have a valid and genuine reason leading to termination of employment. Such was lacking in this case and the result of it is unfair termination of employment.

Though the claimant was paid for notice, upon the finding that termination of his employment was unfair, compensation is due. The claimant had worked for the respondent diligently and with a clean record for 5 years. A compensation of 5 months is hereby found appropriate and on the gross wage of Ksh.13, 500.00 per month the award is Ksh.65, 500.00.

On the claim for overtime pay, the claimant has pleaded at paragraph 3(v) that his work hours were 8am to 5pm. That he would however leave work after 8pm. The claimant has attached a work clocking schedule where he would leave work at different times, 6.40pm, 5pm, 1pm, 7.30pm, 4pm, and the latest time out of work was 7.40pm. This record relates to March, 2017.

The schedule relied upon by the claimant is on a document of *Delivery Note*. With regard to Motor vehicle No.KBT 808R whose driver was Peter. It is not clarified how this records has such double application.

On the merits of the claims for overtime, the claimant has made the basis of the same on the alleged position of Store keeper which has since been established as not justified. The hours claimed for work overtime are therefore erroneous and on the wrong foundation.

There is no challenged for the leave pay due pro-rated at 8 months all at Ksh.9,801.40. Such pay is due in accordance with section 28 of the Employment Act, 2007.

Accordingly judgement is hereby entered for the claimant against the respondent for the payment of compensation at Ksh.67,500.00, leave pay Ksh.9,801.40; and costs of the suit. The claimant shall be issued with Certificate of Service in accordance with section 51 of the Employment Act, 2007.

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of: