



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 306 OF 2015

BENARD OUMA OCHANJO CLAIMANT

V

COMPLY INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. Benard Ouma Ochanjo (Claimant) sued Comply Industries Ltd (Respondent) on 15 October 2015 alleging *unfair termination of employment, failure to pay house allowance, overtime pay and leave*. He sought several remedies.
2. The Respondent was served with Notice of Summons and the Memorandum of Claim on 19 October 2015, but no Response was filed within the statutorily prescribed period.
3. When the Cause was mentioned on 8 December 2015 to confirm compliance with pretrial procedures/directions, Mr. Masese informed the Court that he was holding brief for Ms. Mumia for the Respondent and that he was seeking leave to file a Response.
4. The Court granted the leave and ordered the Respondent to file its Response, documents to be relied on and witness statements before 12 December 2015. Mention to confirm compliance was set for 3 February 2016.
5. Come 3 February 2016, the Respondent had not filed a Response or complied with the orders of 8 December 2015, but because the Claimant had not filed a proper affidavit of service, the Court directed him to file the affidavit and mention was scheduled for 24 February 2016.
6. On 24 February 2016, an affidavit of service having been filed and in the absence of the Respondent, the Court scheduled the Cause for hearing on 16 November 2016
7. On 15 November 2016, a day before the scheduled hearing date, the firm of Mumia & Njiru Advocates filed a Notice of Appointment to act for the Respondent.
8. When the Cause was called out for hearing, Mr. Kinyanjui on behalf of Mr. Njiru sought to have an adjournment and leave to file a Response. The twin applications were opposed by Mr. Andama for the Claimant.
9. Because Mr. Kinyanjui offered no explanation as to why a Response had not been filed as earlier ordered by the Court slightly a year before, the Court declined both applications.
10. The Claimant testified and was cross examined after which Mr. Kinyanjui again sought an

adjournment to enable him call witness(ess), an application which the Court rejected as the Respondent did not lay any legal basis entitling a party who has not filed a Response/Defence affording him the right to lead oral evidence.

11. The Court directed the parties to file written submissions and in this respect the Claimant filed his written submissions on 24 November 2016 while the Respondent's submissions were not on file by this morning.

12. The Court has given due consideration to the pleadings, evidence and submissions.

Whether dismissal was unfair

13. The Claimant's testimony that he was dismissed on 1 April 2015 without a notice of termination went unchallenged and/or uncontroverted.

14. The Court would therefore find that in terms of sections 35(1)(c) as read with section 47(5) of the Employment Act, 2007, the Claimant has established that an unfair termination of employment occurred.

15. Consequently, it was incumbent upon the Respondent employer to demonstrate that a hearing as contemplated by section 41 of the Employment Act, 2007 was held.

16. Further, it was an obligation upon the Respondent to prove the reasons for the termination of the Claimant's employment in terms of section 43 of the Act and that the reasons were valid and fair in terms of section 45 of the Act.

17. By failing to file a Response and the consequential failure of not leading evidence to discharge the obligations imposed on employers by sections 41, 43 and 45 of the Employment Act, 2007, the Court reaches the conclusion that the termination of the Claimant's employment was unfair both procedurally and substantively.

House allowance

18. The Claimant's testimony regarding non-payment of house allowance is equally unchallenged/uncontroverted. He sought a total of Kshs 38,400/- under this head of claim.

19. In terms of section 31 of the Employment Act, 2007, the Respondent had a statutory duty to provide housing accommodation to the Claimant or pay him in lieu thereof an allowance to cater for rent.

20. The Respondent was also under an obligation to draw up a written contract in compliance with the requirements of sections 9, 10 and 31(2) of the Employment Act, 2007.

21. The failure to draw up the written contract with the requisite particulars and the Claimant's testimony lead the Court to conclude that the Respondent did not provide housing accommodation to the Claimant or pay him a house allowance.

Overtime pay

22. The Claimant did not lead any evidence as to the actual working hours vis-a-viz the contractually agreed working hours or the prescribed minimum working hours during examination in chief, but while under cross examination, he stated that he worked Monday through Sunday.

23. The Court is therefore unable to determine this issue in the Claimant's favour.

Leave

24. The Claimant did not lay any evidential basis as to the dates or years he did not proceed on leave or

establish how he arrived at the sum of Kshs 14,933/-.

25. The Court would decline this head of claim.

Appropriate remedies

Pay in lieu of Notice

26. The Court finds that the Claimant is entitled to 1 month pay in lieu of notice in the sum of Kshs 12,800/-.

House allowance

27. The Court finds for the Claimant in the sum of Kshs 38,400/- as pleaded.

Leave and Overtime

28. These heads of relief are declined.

Compensation

29. The Court has reached a conclusion that the termination of the Claimant's employment was unfair, and considering that he served the Respondent for about 5 years, the Court is of the view that the equivalent of 6 months gross pay would be fair compensation.

Severance pay

30. The Claimant did not prove that this was a case of redundancy and therefore severance pay is applicable.

Certificate of Service

31. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 14 days from today.

Conclusion and Orders

32. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

a. Pay in lieu of Notice Kshs 12,800/-

b. House allowance Kshs 38,400/-

c. Compensation Kshs 76,800/-

TOTAL **Kshs 128,000/-**

33. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 27th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Andama instructed by Wanyama & Co. Advocates

For Respondent Mr. Kinyanjui instructed by Mumia & Njiru Advocates

Court Assistants Nixon/Daisy