



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

CAUSE NO. 747 OF 2014

LUCAS ADAM LABAN

CLAIMANT

V

UKWALA SUPERMARKETS (NAKURU) LTD RESPONDENT

JUDGMENT

1. The Court is called upon to determine the questions, *whether Lucas Adam Laban (Claimant) was employed by Ukwala Supermarkets (Nakuru) Ltd (Respondent) as a general worker or Shop Assistant, whether the Claimant worked overtime, whether the Claimant's employment was unfairly terminated, whether the Claimant's contributions to the National Social Security Fund were remitted, whether the Respondent offered the Claimant service charge and appropriate remedies.*

2. The Cause was heard on 12 October 2016 and 21 November 2016 after which the Claimant filed his submissions on 14 December 2016. The Respondent's submissions were filed on 20 January 2017.

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

General worker or Shop Assistant

4. It is not disputed that the employment relationship between the Claimant and Respondent started in 2006. It is also not disputed that the Claimant was issued with a Confirmation Letter dated 1 January 2009.

5. Apart from the Confirmation Letter, the parties did not provide any formal contract indicating the designation or duties the Claimant was carrying out.

6. During testimony, the Claimant stated that he was a Shop Assistant but he did not disclose the duties he was carrying out on a day to day basis. That disclosure would have made it easier for the Court to determine the question of occupation.

7. Prior to the Employment Act, 2007, there was no statutory requirement imposed upon an employer to issue a written contract of employment outlining the particulars prescribed in section 10 of the Employment Act, 2007.

8. However, a Shop Assistant has been defined in the Regulation of Wages (Wholesale and Retail Distributive Trades) Order to mean *any person wholly or mainly employed for the purpose of transacting business with customers in a department of an undertaking to which customers have access but who is not in charge of such a department.*

9. In the instant case, the Claimant did not disclose what his day to day duties were, and even assuming that the Respondent is involved in *Wholesale and Retail Redistributive Trade*, the Court declines to find that he was a Shop Assistant. It is more probable that he was a general worker.

Overtime

10. The Claimant testified that he would report to work at 8.00am and leave at 9.00pm and that he worked 6 days in a week. Sometimes, he would work during Sundays from 8.30am to 8.00pm and also during public holidays without payment of overtime.

11. Various Regulation of Wages Orders have prescribed working hours during the week above which an employee qualifies to be paid overtime.

12. The Claimant did not disclose the particular Regulation of Wages Order which prescribed the working hours in the industry he was employed.

13. To rebut the overtime claim, the Respondent's Administration Manager testified that the Claimant worked 12 hours per day and that he was paid overtime. He also produced as a bundle, copies of the Claimant's pay slips from 2009 to 2014.

14. The pay slips indicate that the Claimant was being remunerated for overtime work.

15. On the strength of the pay slips, the Court finds that any overtime worked by the Claimant was paid.

Contributions to NSSF

16. Although the Claimant pleaded that the Respondent did not remit his NSSF contributions, the Respondent produced a Provisional Member Statement of Account for the years 2005 to 2014 indicating that the monthly contributions were remitted to the National Social Security Fund.

Unfair termination of employment

17. The Respondent pleaded that the Claimant absconded from work while its witness testified that the Claimant voluntarily left employment after returning his uniform on 6 September 2014 and when asked for a reason, the Claimant responded that he was going to *serve the Lord*.

18. The witness stated that soon thereafter, the Respondent received a demand letter dated 15 September 2014 (produced).

19. The Claimant on his part asserted that he was dismissed on 1 September 2014 after resuming duty after taking 2 days off.

24. The Court has considered the position advanced by the Respondent and noted that there is an inconsistency between the pleaded case and the fact(s) disclosed during testimony.

21. The Court has also taken note that the Claimant caused a demand letter to be sent to the Respondent immediately around the time of separation in which the substance of complaint was *unfair termination of employment*.

22. The Court is inclined to accept the version of separation as contended by the Claimant, and because there was no suggestion of compliance with the requirements of sections 35 and 41 of the Employment Act, 2007, returns a verdict of unfair termination of employment.

23. If by any chance the Claimant absconded duty, that would have amounted not only to a *misconduct* but a breach of a fundamental obligation arising out of the contract of employment which would have implicated section 44(4) of the Employment Act, 2007 as read with section 41(2) of the Act.

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates

Court Assistants Nixon/Daisy