



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 255 OF 2014

BONIFACE WANDERA

CLAIMANT

v

PATEL MAHENGRA DAHYABHAL

RESPONDENT

JUDGMENT

1. Boniface Wandera (Claimant) sued Patel Mahendra Dahyabhal (Respondent) on 27 June 2014 and he stated the issue in dispute as *unfair termination*. He sought a total of Kshs 170,304/- as dues and other entitlements accruing out of the employment relationship.
2. On 9 July 2014, the Claimant amended the Memorandum of Claim by deleting the name Peter and substituting thereof Patel.
3. The Respondent in his Response filed in Court on 7 August 2014 denied that he unfairly terminated the employment of the Claimant. He asserted that the termination of employment was on account of *misconduct and poor performance*.
4. The Claimant's testimony was taken on 13 October 2016 and because the Respondent was not ready, his case was adjourned to 8 November 2016.
5. However, the Respondent sought another adjournment on 8 November 2016, but the Court declined to accede to the application forcing him to close his case without calling or leading any testimony. The Respondent indicated he would rely on the record and submissions to be filed (Respondent's submissions were not on record by this morning while Claimant's submissions were filed on 9 December 2016).
6. The Court has considered the evidence and submissions and identifies the questions for determination as, *whether the termination of the Claimant's employment was unfair, whether Claimant is entitled to commuted accrued leave, whether the Claimant worked overtime and appropriate remedies*.

Whether termination of employment was unfair

Procedural fairness

7. Section 41 of the Employment Act, 2007 contemplate an employer informing the employee of the allegations which may lead to termination of employment and affording the employee an opportunity to make representations before taking a decision to terminate the employment.
8. On the other hand, section 35 of the Act envisages written notice of termination of employment.

9. The Claimant testified that the Respondent came to the Naivasha home where he was working on a Sunday and the next day called him at around 11.00 am and told him that his employment was being terminated on account of absconding work.

10. The Claimant's testimony that he was not given notice of termination of employment or afforded an opportunity to be heard before the termination remains unchallenged and uncontroverted.

11. The Court can therefore conclude that the termination of the Claimant's employment was procedurally unfair.

Substantive fairness

12. In light of the conclusion, it is not necessary for the Court to consider whether the Respondent has discharged the statutory obligation imposed upon an employer by sections 43 and 45 of the Employment Act, 2007 on substantive fairness.

Leave

13. The Claimant's testimony that he did not take leave during the employment save for short offs/breaks equally remain unchallenged and juxtaposing that testimony with the provisions of section 10(3) of the Employment Act, 2007, the Court would find for the Claimant.

Overtime

14. The Claimant was staying within the work place. However he did not lead any evidence as to the contractually agreed working hours or the prescribed minimum hours as against the number of hours he worked.

15. Without the evidential basis as to the actual workings hours, contractually agreed hours and/or prescribed minimum working hours either on a daily or weekly basis, the Court cannot conclude that the Claimant worked overtime.

16. Before considering remedies the Court wishes to observe that the Claimant admitted receipt of Kshs 13,385/- (less loan balance of Kshs 18,500/- advanced during employment as part of terminal dues).

Appropriate remedies

Wages for June 2014

17. The Claimant acknowledgment payment of Kshs 13,385/-. The sum included Kshs 4,813/- for June 2014 wages and the Court finds this remedy does not avail the Claimant.

Pay in lieu of notice

18. The money received by the Claimant included Kshs 9,024/- on account of pay in lieu of notice. This head of relief is misplaced.

Gratuity

19. Gratuity of Kshs 18,048/- was included among the dues paid to the Claimant. This relief does not lie.

Leave

20. Claimant sought Kshs 4,320/- under this head and the Court finds he is entitled to the same.

Overtime

21. Evidential basis for this head of relief was not led and this remedy is declined.

Compensation

22. The Claimant served the Respondent for about 5 years and in consideration of the length of service, the Court is of the view that the equivalent of 6 months gross wages would be appropriate and fair (monthly wage was Kshs 9,024/-).

Conclusion and Orders

23. 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) Leave	Kshs 4,320/-
(b) Compensation	Kshs 54,144/-
TOTAL	Kshs 58,464/-

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

Delivered, dated and signed in Nakuru on this 20th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Opar instructed by Muthanwa & Co. Advocates

For Respondent Mr. Chege instructed by Munene Chege & Co. Advocates

Court Assistant Nixon/Daisy