



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT KISUMU
CAUSE. NO. 247 OF 2013
AND
CAUSE NO. 248 OF 2013
(CONSOLIDATED)

(Before Hon. Lady Justice Maureen Onyango)

JARED ODHIAMBO OMORO.....1st CLAIMANT

GILBERT OJWANG ACHAPA.....2nd CLAIMANT

VERSUS

MAC OIL LIBYA SERVICES STATION.....RESPONDENT

J U D G M E N T

The Judgment herein is consolidated for **cause No. 247 of 2013** filed by **JARED ODHIAMBO OMORO** and **cause No. 248 of 2013** filed by **GILBERT OJWANG ACHAPA**.

Although the two cases were not consolidated they were heard together for convenience and expediency as the Respondent's witness in both cases was the same.

In the Memorandum of claim filed on behalf of JARED ODHIAMBO OMORO has states that he was employed by the respondent, a petrol service station situated along Mosque Road within Kisumu City on 3rd May 2010 and worked until 4th April, 2013 when his employment was terminated. He testified that on 30th January, 2013 he reported for work on night shift but was told to go back home. When he asked why, he was told that the Respondent had decided to send him on leave for 2 months. He testified that he reported back to work on 4th April, 2013 after the two months leave and was told to go away and wait for his terminal dues as his employment had been terminated. He visited the station several times but was never paid. He was however given a tabulation of Kshs. 20,000 as his terminal dues.

By 28th May, 2013 his terminal dues had not been paid and he decided to seek legal assistance. His advocate wrote a demand letter which was responded to by the Respondent's advocates by letter dated 31st May, 2013 offering to pay Kshs. 20,227.

The Claimant prays for payment of terminal benefits as follows;

- (a) One month pay in lieu of notice - Kshs.12,765/-

- (b) Unpaid salary for February and March 2013 - Kshs.25,530/-
- (c) Accrued leave for 3 years - Kshs.35,349/-
- (d) Days worked in April 4 days - Kshs.1,854/-
- (e) Underpayments for twelve months Kshs.12,705 - 6,500 - 6,265 x 12 =75,180/-.
- (f) Underpayments for 12 months 2011 Kshs.12,765 - 6,500 - 6,265 x 12=75,180/-.
- (h) Underpayments in the year 2011 - Kshs.69,444/-.
- (i) Severance pay for 3 years 22,095/-.

Total Kshs.249,876/-.

The Claimant further prays that this honourable court be pleased to find his summary dismissal and the continued withholding of his terminal dues by the respondent to be unjustified, unlawful, unfair, wrongful and illegal. He prays that this honourable court be pleased to order the respondent to pay the claimant's statutory entitlements and/or terminal dues totaling to Kshs.172,883/- with interest at court rates, that this honourable court be pleased to order for reinstatement of the claimant back into employment and in addition that this honourable court orders that costs of this suit be borne by the respondent.

JARED testified that he was paid salary of Kshs. 4,500 in 2010, Kshs. 5,500 in 2011 and Kshs. 6,500 in 2012. At the time of termination of his employment he was earning Kshs. 6,500.

GILBERT OJUANG ACHAPA, the claimant in **cause No. 248 of 2013** states in his memorandum of claim that he was employed by the Respondent for 12 years and as at the date of termination of employment on 4th April, 2013 his salary was Kshs. 15,000.

GILBERT testified that he was employed by the Respondent on 1st November, 2000 as supervisor. His duties as supervisor entailed monitoring shift changes, banking, receiving products gas and fuel and monitoring off-loading.

He testified that on 30th January, 2013 he reported to work as usual but there was no fuel. The fuel arrived around 10.00 a.m. and he monitored off-loading. After that he was informed by the Accountant that sales cash was not balancing. He was taken to Central Police Station with 2 cashiers and they were locked up. He testified that he was released the following day after paying Kshs. 35,000 out of alleged shortage of Kshs. 44,000. He was collected from the Police Station by the manager and they went to the petrol station after which he was told to go home.

Gilbert denied stealing Kshs. 44,000. He testified that the collection of money was the role of the accountant and the shortage was on the money given to the accountant and the manager.

The claimant testified that he was later paid Kshs. 160,000 as terminal dues, which he received and signed for under duress.

His claim is for Kshs. 537,210 made up of 3 months' salary in lieu of notice, unpaid salary for March, 2013 and 4 days worked in April, 2013, accrued leave, severance pay, public holidays for 3 years and 12 months compensation. He further claimed for bonus and responsibility allowance for working as a supervisor.

Gilbert testified that his first salary was Kshs. 4,000 and at the time of termination his salary was Kshs.15,000 per month.

In his claim he seeks the following orders.

- (a) Three months pay in lieu of notice Kshs.45,000/-
 - (b) Unpaid salary for March 2013 - Kshs.15,000/-
 - (c) Unpaid days for April - Kshs.2,308/-
 - (d) Three years accrued leave - Kshs.41,538/-
 - (e) Underpayment for twelve months for 2012 Kshs.12,765 - 6,500 - 6,265 x 12 - 75,180/-.
 - (f) Unpaid 4 days worked in April 2013 - 1,964/-.
 - (g) Severance pay for 12 years @ 15 days per each complete year = Kshs.103,860/-
 - (h) Public holidays worked for three (3) years Kshs.114,885/-
 - (i) Responsibility allowance for 3 years Kshs.114,885/-
 - (j) Unfair termination compensation Kshs.180,000/-
- Total Kshs.537,210/-

He further prays for an order of reinstatement back to employment and costs of this suit.

RESPONDENTS CASE

The Respondent filed a defence in both file No. 247 of 2013 and 248 of 2013. At the hearing the Respondent called one witness DILRAJ SINGH AHAYR, the station manager who testified that JARED ODHIAMBO OMORO was employed by the Respondent as a pump attendant and left employment on 30th January, 2013. He testified that there was a shortfall at the fuel pumps and JARED was sent on compulsory leave for 30 days but did not report back to work thereafter.

DILRAJ testified that the Respondent is ready to pay JARED whatever is due to him. He confirmed that JARED's last salary was Kshs. 6,500 at the time he left employment.

With respect to GILBERT ACHAPA, DILRAJ testified that he was also a pump attendant and his employment was terminated on 30th January, 2013 due to a cash shortage which he admitted. He testified that GILBERT was paid his terminal dues of Kshs. 160,000 and acknowledged receipt.

Under cross-examination DILRAJ admitted that JARED was underpaid as the minimum statutory rate at the time was Kshs. 11,000. He testified that JARED was on leave in February, 2013 but did not report back to work.

For GILBERT ACHAPA, DILRAJ admitted under cross examination the tabulation of his terminal dues was done in the presence of police officers and that he signed the acknowledgment in the presence of security officers but not police officers. He denied that JARED was forced to sign the acknowledgment so that he could be released. He denied that the Respondent owed GILBERT any money.

DETERMINATION

I have considered the pleadings the evidence and the written submission filed and exchanged by the parties. The issues from determination one whether the termination of the claimants was fair and if they are entitled to the remedies sought. I will consider the case of each claimant separately.

JARED ODHIAMBO OMORO

DILRAJ testified that JARED was sent on compulsory leave on 30th January, 2013 but never reported back to work. JARED however testified that on 30th January, 2013 when he reported to work he was told to go back home and on inquiry why, was told that the Respondent had decided to give him 2 months leave.

There is no letter sending the claimant on compulsory leave for either one month as stated by DILRAJ or for 2 months as stated by JARED.

DILRAJ further testified that JARED failed to report back to work after the compulsory leave while JARED testified that he reported back on 4th April, 2013 after the expiry of the 2 months leave but was told to go back home and wait for his terminal dues. He testified that he was given a tabulation of Kshs. 20,247 and visited the Respondent severally to collect the same but was never paid. That it was the nonpayment that prompted him to seek legal advice and to file this suit.

According to section 10 and 74 of the Employment Act it is the Responsibility of the Respondent to keep employment records. Such records should include leave and disciplinary records. None has been produced by the Respondent. In such event section 10(7) places the burden of proof on the Respondent. Section 47(5) further places the burden of justifying the grounds of termination on the employer.

The Respondent has not proved that the JARED was in any way responsible for the shortage of funds as alleged by the Respondent. There is no proof by the Respondent that the claimant was sent on compulsory leave for one and not 2 months as stated by the claimant. There is no proof that the claimant was given any hearing before being sent on compulsory leave, or that upon failure to return after the compulsory leave the Respondent took any action to bring the matter to a closure.

In the circumstances of this case I find that the termination of JARED's employment was unfair both procedurally and substantively for want of valid reason.

DILRAJ testified that the Respondent is willing to pay JARED any money owed to him. He conceded that JARED was underpaid. I find that JARED is entitled to the following.

1. One months salary in lieu of leave Kshs. 12,766. based on consolidated statutory minimum pay for petrol service worker for
2012;
2. The Claimant is also entitled to salary for February and March 2013
at Kshs. 25,532;
3. Accrued leave for 3 years is Kshs. 26,808.60 based on 21 days leave per year worked;
4. Days worked to 4th April, 2013 is Kshs. 1702.00;
5. Underpayments from 12 months (12,766 - 6,500) Kshs. 75,192
6. Underpayments (2011)

The claimant testified he was paid Kshs. 5,500 in 2011 as opposed to the consolidated statuting minimum was of Kshs. 11287.75. He was therefore underpaid by Kshs. 66712.75 which I award him

7. Severance pay is not payable as the claimant was not declared redundant

GILBERT OJWANG ACHAPA

Gilbert avers that he was arrested and taken to the police station where he spent one night in the cell before he was released after paying Kshs. 35,000 shortage and was thereafter intimidated into signing a tabulation of terminal dues. DILRAJ admitted that Gilbert signed the acknowledgment and disclaimer in the presence of security guards but denied that he signed in the presence of police officers. The disclaimer on record signed by Gilbert is not written by him but by the Respondent. There is also an admission of liability for shortages which is also written by the respondent and signed by the Gilbert.

There is however no letter of termination of employment or evidence of a hearing before a decision was made to pay Gilbert the terminal dues of Kshs.160,000. The process of relieving Gilbert of his employment was not in compliance with section 41 of the Employment Act and is therefore procedurally wrong. The fact that both the admission of liability and the disclaimer are written by the Respondent and the fact that the Claimant was locked up in police cells until he paid for shortages without evidence of a hearing to establish that claimant was responsible for the shortage give credence to his allegation that he was forced to sign both the admission of liability and the disclaimer in the presence of police officers and therefore it was not an admission either of liability or the tabulation of his terminal benefits.

The termination of the employment of GILBERT was therefore unfair for failure to comply with the law.

GILBERT prays for payment of 3 months' salary in lieu of notice. There is no justification for the same as the law provides for payment of only one month's salary in lieu of notice unless there is proof of a contract or terms of service providing for longer notice.

I award the claimant Kshs. 15,000 being one month's salary in lieu of notice.

The claimant prayed for salary for March 2013. He did not work in March and is not entitled to the same or salary for 4 days worked in April, 2013 as he only worked up to the end of January, 2013.

The tabulation by the Respondent of Gilbert's terminal dues includes payment for 3 years accrued leave at Kshs. 41,538.

The claimant prayed for Public holidays for 3 years. The Respondent included this in the tabulation of Gilbert's terminal benefits at Kshs. 200/= per day.

On the claim for public holidays there are 9 public holidays in a year and for 3 years the claimant is entitled to 27 days paid at the rate of double the daily rate of (15,000/30 x 27 x2). I award the claimant Kshs. 27,000 on account of public holidays.

Gilbert was not underpaid nor was he declared redundant. He is therefore not entitled to either underpayments or severance pay as prayed. Gilbert further prayed for responsibility allowance but did not give any legal or contractual basis for the same. The prayer for responsibility allowance is disallowed.

Having found that Gilbert was unfairly, terminated and taking into account his long service of about 13 years I award him maximum compensation of 12 months' salary at Kshs. 180,000.

The amount payable to Gilbert will be less the sum of Kshs. 160,000 already paid by the Respondent.

CONCLUSION

In summary therefore judgment is entered for the claimants against the respondent as follows:-

1. JARED ODHIAMBO OMORO

(i) Notice Kshs. 12,766.00

(ii) Salary for February and March 2013 Kshs. 25,532.00

(iii) Salary for 4 days of April	Kshs. 1,702.00
(iv) Accrued leave	Kshs. 26,808.60
(v) Underpayments for 2 years	Kshs. 141,906.75
Total	<u>Kshs. 208,715.35</u>

2. GILBERT OJWANG ACHAPA

(i) Notice	Kshs. 15,000.00
(ii) Accrued leave	Kshs. 41,538.00
(iii) Public holidays	Kshs. 27,000.00
(iv) Compensation	Kshs 180,000.00
Total	Kshs 263,538.00
Less paid	Kshs 160,000.00
Net due	<u>Kshs 103,538.00</u>

The Respondent shall also pay costs for each claimant separately as the two cases were not consolidated.

The decretal sum shall attract interest at court rates from date Judgment unless payment is made within 30 days.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE