



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

CAUSE NO. 533 OF 2012

(Originally Milimani CMCC No. 29 of 2008)

FREDRICK OTIENO OGUTU.....CLAIMANT

VERSUS

DAYALAL BHANTI & SONS LTD.....RESPONDENT

JUDGMENT

1. The Claimant instituted legal proceedings against the Respondent on 9th January 2008 alleging unfair termination.
2. The Respondent filed a Response on 7th March 2008 but the hearing never took off.
3. On 8th March 2017, the Deputy Registrar issued a hearing notice with the hearing scheduled for 3rd April 2017.
4. The Claimant acknowledged service of the notice on 14th March 2017, while the Respondent was served on 13th March 2017.
5. When the Cause was called out for hearing, the Respondent was not present and was not represented. The Court allowed the hearing to proceed after satisfying itself that a hearing notice was served.
6. The Claimant gave sworn testimony and stated that he was dismissed in 2007 without notice being given. At the time of separation, he disclosed that he was a mechanic and the salary was Kshs 7,700/- per month.
7. To demonstrate that he was an employee of the Respondent, the Claimant produced a copy of his National Social Security Fund membership card (original was shown to Court).
8. Save for denying that the Claimant was in its employment, the Response consisted of no more than bare denials of the assertions by the Claimant.
9. The National Social Security Fund membership card show that the Respondent was the Claimants' employer as at date of registration on 22nd March 2005.
10. The NSSF membership card can serve as secondary evidence of employment relationship and more so where there is no formal written contract.

11. The Court therefore finds that the Claimant was an employee of the Respondent.

12. At the time that the Claimant states he was dismissed, the law allowed an employer to dismiss without cause provided notice or pay in lieu of notice was given/paid.

13. Damages awardable where notice was not given was also generally measured in terms of the notice period.

14. As regards the heads of claim for salary for January 2007 and untaken leave, the Court has only the testimony under oath of the Claimant.

Remedies

Salary for January 2007

15. The Court, in the absence of evidence from the Respondent finds that the Claimant is entitled to earned wages for January 2007 in the sum of Kshs 7,700/-.

Severance pay

16. The Claimant was not declared redundant and therefore cannot be granted severance pay.

Pay in lieu of Notice

17. The Claimant was being paid by the month and therefore the equivalent of 1 month pay in lieu of notice would be appropriate.

Leave

18. The Claimant sought Kshs 46,200/- on account of leave not taken during the 6 years of service.

19. The head of claim not challenged or controverted, the Court finds for him.

Conclusion and Orders

20. The Court finds and holds that the termination of the Claimant's employment without notice was unlawful and awards him and orders the Respondent to pay him

(a) Salary for January 2007	Kshs 7,700/-
(b) 1 month pay in lieu of notice	Kshs 7,700/-
(c) Leave	Kshs 46,200/-
TOTAL	Kshs 61,600/-

21. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 5th day of April 2017.

Radido Stephen

Judge

Representations

For Claimant Mr. Omondi instructed by Nzavi & Co. Advocates

For Respondents Munyalo Muli & Co. Advocates

Court Assistant Nixon