



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1716 of 2015

FESTUS MUNYAO MAKAU.....CLAIMANT

VERSUS

RODS AND STEEL LIMITED..... RESPONDENT

JUDGEMENT

1. The Claimant filed the Memorandum of Claim on 25th September, 2015; the Respondent was served and filed Appearance through their advocates on 27th October, 2016. On 22nd August, 2016 the respondent's advocates applied to withdraw from acting for the Respondent on the grounds that they had no instructions to file defence which had not been filed up and until such date. The application was allowed by consent on 8th September, 2016.

2. The Respondent was given 15 more days to file defence. The defence was filed on 23rd September, 2016.

3. The Claimant served the respondent's advocates with a hearing notice on 10th January, 2017 the same was acknowledged but on the hearing date the Respondent and the advocate were absent from court. The Claimant was heard on his evidence.

Claim

4. The claim is that in February, 2014 the Claimant was employed by the Respondent as a Turn Boy at a gross wage of Kshs.10,301.00 per month and which was exclusive of a house allowance. The Claimant worked diligently but was not issued with a written contract or a pay slip. He worked for a year without taking annual leave or payment in lieu thereof. Despite working overtime, the Claimant was not paid for the extra hours.

5. In February, 2015 the Claimant was summoned by the Transport Manager, Mr Khan to his office and was informed that he would not be working with the truck he had been allocated and instead would be allocated another one. The Claimant was then directed to go home and would be called once another truck arrived.

6. After two weeks, on 20th February, 2015 the Claimant went to work as he had not received any call. Mr Khan then told the Claimant that he should never be seen at the Respondent premises and had been dismissed. No reason was given or notice issued. The Claimant had not been issued with any employment contract or a termination letter. Such was unfair and the Claimant is seeking pay for the same.

7. The Claimant is seeking;

Salary for February, 2015 at Kshs.10, 301.00;

Notice pay at Kshs.10, 301.00;

Unpaid leave Kshs.7, 210.77;

House allowance Kshs.20, 086.30;

overtimeKshs.324, 455.00

Compensation Kshs.123, 612.00.

the Claimant is also seeking for costs.

8. The Claimant also testified in support of his claim that upon employment he was never issued with a contract of service or a pay slip. His work hours were 7am to 6pm from Monday to Saturday, he would rest and the resume work from 2am to 5am. In February, 2015 he was directed by the manager not to go to his allocated vehicle as a new one would be allocated to him. However after two weeks away from work he was not called and when he made effort to go to work he was terminated. There was no hearing, notice or reason given for the termination. Such was unfair.

9. The Claimant also testified that he would start work at 7am for sales landing; he would resume the same process at 5pm; take a rest of 2 to 3 hours and then start loading again. He worked from Monday to Saturday and only took a break on Sunday when he went to see his family.

Defence

10. In defence, the Respondent deny the claims made by the Claimant save that the Claimant was employed as a casual labourer and was issued with a day off for every 6 days he worked as a mandatory requirement of the law. The Claimant had proper work hours and was not overworked.

11.The Respondent also avers that it came to their notice that the Claimant was engaged in unscrupulous activities that denied the Respondent revenue and thus did not represent the best interests of the Respondent as required. On several occasions the Claimant was required to supply several equipment to the Respondent customers some of which were found out to be less than the quantities the Claimant had been entrusted with as a *Turn Boy*.

12. The Respondent undertook investigations which revealed that the Claimant was involved with some shortages that had been realised by the Respondent customers. This constituted gross misconduct, a fact that prompted the Respondent to relieve the Claimant of his duties forthwith.

13. The Claimant was notified of the same and being serious misconduct and without any defence, he was relieved of his duties. The dismissal was not with malice but as a result of gross misconduct. The reasons for the same were for colluding with other colleagues and employees to defraud the Respondent by delivering fewer materials to customers to the detriment of the Respondent and for failing to maintain proper work ethic by improperly performing the duties as directed.

14. The defence is also that there was no breach, loss or damage caused to the Claimant and there is no evidence of the same. The Claimant is made to extort the Respondent and have no legal basis in law as there is no proof of he claims made. The suit should be dismissed with costs.

15. The Respondent filed a witness statement by Davesh Davji, the witness was not called and the Respondent was not available to present any evidence on the hearing date as scheduled.

16. The Claimant filed written submissions.

17. The submissions are that section 9 of the Employment Act requires an employer to issue an employee with a written contract. Without such written details the Claimant became protected under section 37 of the Employment Act.

18. Upon employment and payment of the due wage the Claimant was not issued with a pay stamen contrary to section 20 of the Employment Act. The termination of the Claimant that the Respondent has confirmed in defence was without notice to the claimant; he was never given a hearing and whatever the reasons that may have led to the dismissal, there was no procedural or substantive justice. This was contrary to provisions of section 41, 43 and 44 of the Employment Act. The Respondent having failed to follow the law, section 45 applied with regard to the same being unfair as held in **David Gichana Omuya versus Mombasa Maize Millers Ltd [2014] eKLR**. The remedies sought are therefore due for payment.

Determination

19. The claim is premised on the facts that the Claimant was employed by the Respondent as a Turn Boy to load goods for delivery to the Respondent customers. He was however not issued with a contract of employment and was paid Kshs.10, 301.00 but was never issued with a pay stamen.

20. The defence is also that the Respondent employed the Claimant as a casual labour for the role of a Turn Boy and was paid for his work. The Claimant was dismissed from his employment due to gross misconduct for delivering less material than required which led to defrauding of the Respondent and that also amounted to the Claimant failing to follow instructions given. As such the dismissal was justified.

21. It is not disputed that the Claimant was in the employment of the Respondent undertaking Turn Boy duties from February, 2014 to sometime in February, 2015. The Respondent has attached various delivery notes for 13th September, 2014;

9th September, 2014;

24th October, 2014;

16th October, 2014;

8th May, 2014;

14th March, 2014;

8th May, 2014;

15th April, 2014;

10th May; 2014;

29th April, 2014;

23rd September, 2014; and

19th September, 2014.

22. These records are testimony that the Claimant served the Respondent over and above a period of over a year. Section 8 and 9 of the Employment Act requires an employer to issue an employee with a written contract of service spelling out the terms and conditions of employment. Such an employment contract is not only for the employee to understand the terms of employment but a record of the employee to be kept and produced in court when there is a dispute in terms of section 10(6) and (7) for the court to appreciate

the applicable terms between the parties. The duty to issue an employment contract is upon an employer.

23. In this case, the averments by the Respondent at paragraph 6 and 11(b) that the Claimant was a casual labourer but at the same time a Turn Boy go contrary to section 9 of the Employment Act. Where the Claimant commenced employment as a casual and such work did not end at the end of day and he was paid his wages at month end and not at end of day, his employment automatically converted to full time employment in terms of section 37 of the Employment Act.

24. The Claimant became a protected employee in law. Where the Claimant continued to work for the Respondent for a period of over a month and even after two months had not been issued with an employment contract, the tasks that he performed were not completed within the given period and became continuous and such went on for the entire year in the service of the respondent, the rights due to an employee under the Employment Act are available to protect his rights at work.

37. Conversion of casual employment to term contract (

1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

25. The issuance of an employment contract to an employee thus is paramount to protect the employer and the employee. Without such a crucial record, the word of the employee must be believed as the Respondent abdicated on their legal duty to issue the Claimant with a contract of employment.

26. Other than the employment contract, it is also mandatory that an employer must issue an employee with a pay slip or pay statement for all wages paid at month end. The Claimant testified that his monthly pay was deposited to his bank account. There are no details in a statement to show what such an amount comprised of.

27. Section 20 of the Employment Act requires an employer to issue a pay statement to enable the employee understand what items are covered in the paid wage. Failure to issue such statement makes it impossible for the court to also appreciate whether the Respondent was compliant with the law in terms of paying the minimum wage and all the legal entitlements like statutory payments and or deductions as well as the requisite allowances for house and medical. Without the pay statement, I take it the wage paid to the Claimant at Kshs.10,301.00 is only a basic wage without any benefits.

28. In defence the Respondent has not made any effort to set out what the wage paid comprised of. No work records have been attached to confirm payment of any house allowance, overtime or statutory dues and deductions. These elements shall be put into account in assessing the claims herein.

29. The defence is that the Respondent terminated the Claimant on account of gross misconduct. That the Claimant was colluding with other colleagues employees to defraud the Respondent by delivering fewer materials to customers to the detriment of the Respondent and that he failed to maintain proper work ethic by improperly performing the duties as directed by the Respondent including but not limited to delivery of materials assigned to him as a Turn Boy. The defence is also that the Respondent was able to undertake investigations and established the facts of gross misconduct and thus relieved the Claimant of his duties.

30. Section 44 of the Employment Act allows an employer to summarily dismiss an employee for gross misconduct. Such can be done without short notice but section 41 of the Employment Act makes it mandatory for an employer to ensure such an employee is given a hearing. Where it is not possible to hear the defence of the employee, the duty is on the employer to demonstrate the exceptional circumstances prevailing that prevented the same. I find no evidence that the Claimant was given a hearing before his

dismissal.

31. Section 41 provides that;

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

32. Even in a case of gross misconduct, an employer must give the employee a hearing on any allegations and where the same relates to work performance the employee must be accorded procedural justice in terms of section 4(1) by being given notice and hearing in the presence of an employee of his choice.

33. Where the Respondent avers a defence that they conducted investigations on the alleged misconduct of the claimant, such facts should have been brought to the attention of the Claimant for him to give a defence. To thus proceed on the face of investigations done behind the claimant, however gross the same is made to appear, procedural justice demanded that he be given notice and hearing. That is what procedural fairness is in terms of section 45 of the Employment Act. to send the Claimant away without any notice, reasons or written notice of termination stating the reasons for his summary dismissal amounted to both procedural and substance unfairness.

Remedies

34. On the face of procedural and substantive unfairness on the Claimant by the respondent, compensation is due in terms of section 49 of the Employment Act. In this case, based on the evidence, compensation of 3 months is found appropriate. The Claimant is awarded Kshs.30, 916.00.

35. On the fact of unprocedural unfairness, notice pay is due as the dismissal was without notice. The Claimant is awarded kshs.10, 301.00.

36. On the claim for a housing allowance, where an employer fails to issue an employment contract stating that the house allowance is consolidated in the payment given, then the right under section 31 apply to an employee without a contract. Section 31 of the Employment Act provides that;

31. Housing

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

37. The Claimant for house allowance is made by the Claimant on the basis that he was not accommodated or paid any allowance. Such pay is due from February, 2014 to end of January, 2015 when the Claimant was sent away without notice. On he paid wage, 15% of the same for the 11 months amounts to kshs.16, 996.00.

39. Overtime claim is based on the facts that the Claimant was made to work from 7am to 6pm every day, he would rest for 2 to 3 hours and start loading good again. Upon prodding by the court, the Claimant

testified that he only rested for 2 to 3 hours a day and only took his rest on Sundays when he visited his family. The Claimant has made a claim for house allowance. I take it that this amount is premised on a good foundation that he was able to get accommodation away from work and take a rest. It is not humanly possible for the Claimant to have worked the whole day and night as well yet seek house allowance at the same time. In any event on the delivery notes submitted by the respondent, none show work overnight.

40. Despite there being no witness for the Respondent to controvert the claims made, on the claimant's evidence, I take the times at work to be 7am to 6pm and not beyond such hour. For a Turn Boy, work of 7am to 6pm on a day the Claimant was supposed to be at work for 8 hours, he thus worked for 3 hours overtime.

41. On the basic wage of Kshs.10, 301.00 for work of 3 hours overtime, such is computed at 1.5 per extra hour. For each month the Claimant cumulatively had 15 over time hours and all being for the 11 months all being 165 hour computed at Kshs.84, 983.25. This overtime pay is due to the claimant.

42. Costs are due to the Claimant noting the unfair labour practices committed by the Respondent and which forced the Claimant to file suit. As there is no work records to set out the terms of engagement between the parties, which duty is vested upon the Respondent as the employer, the Respondent cannot be justified in asserting that the claim is made with a view to extort. The Respondent failed to abide the law and keep work records.

Accordingly, judgement is hereby entered for the Claimant against the Respondent that the termination was unfair; compensation is awarded at Kshs.30,916.00; notice pay Kshs.10,301.00; house allowance Kshs.16,996.00; overtime pay Kshs.84,983.25; and costs of the suit.

Orders accordingly.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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