



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1369 OF 2016

NGURUA MUITA..... CLAIMANT

VERSUS

GYTO SUCCESS CO LTDRESPONDENT

JUDGEMENT

Issue in dispute – wrongful and unfair termination of the Claimant and non-payment of terminal dues.

1. The 21st December, 2016 the matter came for hearing and the Respondent was allowed an adjournment to be able to file defence. Hearing date was allocated for 21st February, 2017 but the respondent's advocate adjourned the hearing on account of being at Embu Law Court in another matter. A hearing date was allocated for 8th May, 2017 with the confirmation of the respondents advocate holding brief. On the due date, the Respondent and the advocate were not in court. The file was put on hold until 11.45am when the Claimant was heard in the absence of the Respondent who failed to attend or have an advocate in court as scheduled. The advocate holding brief earlier in the morning was also absent despite the court allocating a time for hearing.

Claim

2. On 5th March, 2010 the Claimant was employed by the Respondent as a Security Guard at a monthly wage of Kshs.8, 000.00 but was not issued with an appointment letter.

3. The claim is that the Claimant worked diligently until 31st January, 2016 when the Respondent wrongfully and unlawfully terminated his employment by declaring him redundant and failed to pay terminal dues. The Claimant is seeking the payment of;

a) Annual leave pay at Kshs.5,600.00;

b) House allowance Kshs.84,000.00;

c) Underpayment Kshs.190,020.00;

d) Uniform deductions Kshs.3,600.00;

e) Service pay for 3 years Kshs.20,000.00;

f) Compensation; and

g) Costs

4. The Claimant testified in support of the claim that upon employment he worked diligently until his termination on account of redundancy but was not paid his underpayments; the due house allowances; overtime and terminal benefits.

5. The Claimant also testified that on 1st October, 2013 the Respondent started issuing its employees with temporary contracts and he was forced to sign it or be dismissed. Nobody read the contract to him which was in English. The contract was only favourable to the Respondent and 52 such employees were on a similar contract which the Respondent had introduced to deny the Claimant his due in terms of house allowance, leave, overtime and other benefits.

6. On 31st January, 2016 the Claimant was terminated when the respondent's contract with Kenya Railways ended. There was no notice and when the Claimant went to the office to seek guidance all the security guards at Kenya Railways were said to be many and all could not be taken up and the Respondent advised him to resign so that he could be paid his dues but after a month he was told he had been on a temporary contract and had resigned. There was no payment of terminal dues.

Defence

7. In defence, the Respondent admits they hired the Claimant on a temporary basis on the 1st October, 2013 for 52 weeks and the contract were subject to renewal and a fresh contract was at the discretion of the respondent. There was no need for notice at the end of the contract as it was clear when it was to end. Section 41 and 44 of the Employment Act do not apply in this case as there was a temporary contract which lapsed. The Claimant was paid all his dues and cannot claim outside his contract. Suit should be dismissed with costs.

Determination

8. The claim is premised on the termination of the Claimant by the Respondent which the Claimant asserts was unlawful and unfair and is thus seeking terminal dues and compensation. That the reason for termination was due to redundancy and so that he could be paid his terminal dues he opted to resign. The defence is that the Claimant was on a temporary contract from 1st October, 2013 for 52 weeks which lapsed and the same was not renewed and the dues payable have been paid and nothing is due.

9. The Respondent has not attached the record of employment particular the alleged temporary contract of 52 weeks. Section 10(6) and (7) of the Employment Act requires an employer upon a suit being filed by an employee with the court to provide all work records;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employee.

10. Without the Respondent as he employer producing the work records particular the contract of employment, the word of the Claimant is to be believed. The Claimant produced his payment schedules by the Respondent through his bank account with Equity Bank, Account No.0170191919907 and which has a history of payments from 6th January, 2012 and showing the Respondent as depositing monthly payments for the entire 2012 and the whole of 2013. The Claimant also produced the work sheets signed on different dates on 2nd January, 2015 and 29th November, 2015.

11. With the defence by the Respondent bare of any work records, by the strict application of the applicable law, I take the evidence of the Claimant as truthful with regard to the duration of employment,

the terms and conditions of the same.

12. The above taken into account and noting the failure by the Respondent to submit any work records, I note the Claimant testified that from 1st October, 2013 the Respondent started issuing him with temporary contracts. This evidence being under oath was that the Claimant signed each contract for fear of being dismissed. Indeed the Claimant has only submitted payments through his bank account for 2012 and 2013 only.

13. I take it from the claimants own evidence, his employment from October, 2013 was regulated under different short term contracts until his last such contract on 31st January, 2016 which he testified all 52 guards similarly situated like him were terminated due to redundancy. I also take it when the Claimant resigned from his employment vide his letter of 5th February, 2016 it was to enable the Respondent pay his terminal dues.

14. The importance of work records cannot be overemphasised here. At the time of termination of the last employment contract on 31st January, 2016 had the Claimant been paid all his dues? Even where the Claimant was under a fixed term contract, was he paid a minimum wage and can such fixed term contract negate the legal entitlements due to the Claimant as the employee?

15. The Employment Act, 2007 sets out rights of an employer and employee and particularly right that have minimum provisions. Parties to an employment contract can apply the legal minimum and go higher but not below the legal minimum. To do so would negate the purpose of the law protecting rights in employment and labour relations.

16. Where the Claimant was employed whether under temporary contract of 52 months or otherwise, a minimum wage was due. To go below such minimum wage, the underpayments are due. From the records of payments to the Claimant having commenced in January, 2012, it can be surmised that formal Employment commenced on equal date. The Claimant was not keen to articulate matters as between 2010 to January, 2012 when the Respondent commenced salary payments through his bank account. I will thus apply the 1st January, 2012 as the date of employment.

17. A contract of employment that lapses on its term and the employee continues to serve continuously and to undertake work that is not completed within 3 months, becomes protected under section 37 of the Employment Act. Such an employee cannot be terminated without notice. The resignation of the Claimant on 5th February, 2016 only came after he had been terminated and he testified under oath that he submitted this letter after the fact to have his terminal dues paid. Without any evidence to controvert the testimony of the claimant, I take his evidence as truthful and speaking to events as they took place with regard to his termination and the reason for his letter of resignation.

18. To thus terminate an employee whether there is redundancy or not, notice and terminal dues for time worked are payable. To fail to pay amounts to unfair labour practice and an unfair termination under section 45 of the Employment Act.

Remedies

19. On the claim for under payments, The Government Wage Orders as at 20th May, 2015 required a security Guard be paid a monthly wage of in accordance with the wage orders for work of 12 hours. On this basis, the payments due to the Claimant being less than the minimum wage and not paid when due, the Wage Guidelines and Orders apply.

20. In 2012, The Regulation of Wages [General] [Amendment] Order 2012 the payable wage for Security Guard was 10,911.70. From the payments schedules the Claimant got he was paid as follows;

6th January, 2012 Kshs.4, 666.00 which is less Kshs.6, 245.00;

3rd February, 2012 Kshs.5, 300.00 less 5,611.00 and similar payments until August, 2012 the difference all being **Kshs.44, 888.00** in underpayments.

On 6th September, 2012 a payment of Kshs.10,258.00 less **Kshs.653.00**; and for October, 2012 to December, 2012 the Claimant was paid Kshs.7,900.00 which is less Kshs. **9,033.00** in underpayment. January, 2013 underpayment was Kshs. 4,377.00; February and March, 2013 underpay is Kshs.5,822.00; 5th April, 2013 the Claimant was overpaid; May to November, 2013 the underpayments all amount to **18,666.00**.

21. In application of similar computations the underpayments not effected from January, to 31st December, 2013 amount to Kshs.98, 724.00. This amount is due and payable to the claimant.

22. Claim for annual leave pay is sought for 2015. The Claimant did not clarify why the claim only relates to 2015 and what took place since 2010 when he alleges to have been employed. This piece of evidence despite their being no evidence did not stand out as being credible.

23. Claim for house allowance is for 70 months. Such 70 months are not articulated but in application of the record for underpayments set out above, from January, 2012 to 31st January, 2013 such being 24 months, the Claimant on the due minimum wage of Kshs.10,911.00 is awarded a house allowance of 15% all being Kshs.39,279.00.

24. Uniform deduction claim I find to be valid and awarded at kshs.3, 600.00.

25. Service pay is premised the non-payment of statutory deductions and remittances. Without the work records to confirm the payments due, the claim for service pay on the minimum wage for the 3 years is computed at Kshs.16,366.50.

26. Compensation for unfair termination is computed at one (1) months' pay together with notice pay of one (1) month.

Accordingly, judgement is entered for the Claimant against the Respondent for compensation at a minimum wage of Kshs.10,911.00 and due compensation is thus Kshs.10,911.00; notice pay Kshs.10,911.00; uniform deduction at Kshs.3,600.00; house allowance Kshs.39.279.00; service pay Kshs.16,366.50; underpayments Kshs.98,724.00. Costs of the suit.

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

M. MBARU

JUDGE

In the presence of:

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