



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 1139 OF 2013

MUNGUTI MULWA.....CLAIMANT

VERSUS

CYLINDER WORKS LIMITED.....RESPONDENT

JUDGMENT

1. By memorandum of claim filed on 19th July 2013, the claimant averred that he was employed by the respondent as a quality control staff from June 2006 to 1st December 2012. At the time of termination the claimant was earning Kshs.11,700/= per month excluding house allowance.
2. The claimant further averred that during his employment he served with diligence but the respondent violated his right by underpaying him and denying him annual leave.
3. The claimant also complained that throughout his service, the respondent forced him to work overtime without pay and that he was never housed or paid house allowance. As a result, the claimant sought judgment against the respondent for payment of the above items.
4. The respondent denied the claimant's allegations and averred that the claimant was a sub-contractor and that the salary paid was inclusive of house allowance. The respondent denied that it underpaid the claimant and the claimant worked overtime. The respondent further denied that the claimant is entitled to judgment sought.
5. At the hearing, the claimant stated that he makes cylinders and that he was employed by the respondent in June, 2006 as a quality controller. It was his evidence that he left employment on his own volition. He felt underpaid so he resigned. It was his evidence that he gave fourteen days' notice. He further stated that his monthly salary of Kshs.11,700/= did not include house allowance and further that he was not housed. It was his evidence that he worked both night and day shift. He further stated that he was never paid overtime and that he never went on leave or paid in lieu.
6. In cross-examination, he stated that his appointment described him as a subcontractor and further that his staff identity card was written contractor. According to him, contractor meant his employment was periodical. He further stated that his pay slip indicated the days worked.
7. When shown the letter he wrote, he conceded that his resignation letter did not state it was due to underpayment and further that the resignation letter did not make any demands.

8. It was his evidence that he considered himself underpaid in line with the section he worked. He was being paid Kshs.450/= per day but not from June 2006.

9. In re-examination, he stated that in his letter of resignation he said he was resigning to pursue further education.

10. The respondent's witness on the other hand testified that the claimant was a sub-contractor and that he was hired as an independent contractor. According to him under the sub-contract, the respondent only pays for the days worked. According to him, the respondent had regular employees who would fill leave forms when going on leave. He produced a sample leave form in evidence. According to him, the respondent had no overtime policy and that the working hours were from 8.00 a.m. to 5.00 p.m.

11. In cross-examination, he stated that appendix 1 emanated from the respondent and introduced the claimant as an employee of the respondent. According to him appendix 1 was a forgery as Mr. Thuku who purportedly wrote the same disowned it. He denied there were any sifts and that people would only work at night towards the end of the contract but this had to be applied for and agreed with the management.

12. In re-examination, he stated that his letter marked appendix 1 was a letter of introduction to the bank to enable the claimant obtain a loan.

13. In any civil claim, ordinarily the person who intends the court to make a finding in his favour upon an allegation of fact must prove it to the laid standards. The claimant herein averred that he was an employee of the respondent as a quality control staff and that during his contract of employment, he was never paid house allowance, was underpaid and that he was never paid for overtime.

14. Concerning the issue of employer-employee relationship, the claimant had adequately shown that there existed employee-employer relationship. The claim by the respondent that he was an independent contractor does not synchronize with the fact that the respondent paid the claimant a salary and bonuses. Further, the respondent issued letters to third parties in which it described the claimant as an employee. Furthermore, if indeed the claimant was an independent contractor, there was no need for him to resign.

15. On the part of the claimant, his claim for overtime, underpayment and non-payment of house allowance was not backed by any evidence or sufficient evidence to justify entry of judgment against the respondent. For instance regarding underpayment, it behoved the claimant to demonstrate his skill level and the minimum wage payable for people of his skill in order for the court to compare and see if there was underpayment. No attempt was made to attach with the pleadings or produce in court the applicable wage order for the court to compare and see if there was underpayment.

16. Regarding the other allegations, the claimant worked for the respondent for about six years and resigned voluntarily. Although he alleged in his oral testimony and pleadings that he resigned because of underpayment, no such thing is mentioned in his resignation letter. He stated in his resignation letter that he was resigning to pursue further education.

17. The court therefore reaches the conclusion that the claimant has failed to prove his claim to the acceptable standards in civil claims and hereby dismisses the same with costs.

18. It is so ordered.

Dated at Nairobi this 23rd day of June 2017

Abuodha J. N.

Judge

Delivered this 23rd day of June 2017

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge