



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 258 OF 2015
(FORMERLY NAIROBI INDUSTRIAL COURT CAUSE NO. 7N OF 2009)

(Before Hon. Lady Justice Maureen Onyango)

BERNARD KHAKULI CLAIMANT

-Versus-

KHILESH NATUBHAI1ST RESPONDENT

JUBILEE RAFIKI HARDWARE COMPANY LIMITED...2ND RESPONDENT

J U D G E M E N T

The Memorandum of Claim herein was originally filed as Nairobi Industrial Court Cause No. 7N of 2009. The case was transferred to this court on 2nd July 2015 and registered under its present number. By his Memorandum of Claim dated 7th January 2009 which was amended by consent order of 5th August 2009 and further amended on 10th March 2016 pursuant to leave granted on 7th March 2016 the Claimant alleges that he was engaged by the Respondents as a general worker to carry out duties of a turn boy between July 2007 and 17th October 2008 when he was unlawfully dismissed by the Respondents. He avers that the Respondents paid him Kshs. 1380 for services rendered from Monday to Saturday but he worked on Sundays and during the night for 12 hours without pay. He further avers that during employment he was underpaid in violation of minimum wages under the Regulation of Wages and Conditions of Employment (General) Order. He seeks the following remedies

(a) Sunday Pay

Having worked on all Sundays between

July 2007 - October 2008 @ shs.238.45 for

64 Sundays rest day Kshs. 15,260.80

(b) Overtime Pay

12 hours overtime x 7 days = 84 hours

weekly x 64 weeks - 5376 hours @ 43/= Kshs.231.168.00

(c) Under Payment

Paid Kshs.230 per day instead of Kshs.238.45/=

Thus under paid by 8.45/= per day x 448 days

Worked

Kshs. 3,785.60

Kshs.250,214.40

The Claimant further prays for a declaration that he was unlawfully dismissed from employment, costs and interest.

In the Respondent's Defence which was amended on 7th December 2009 and further amended on 29th June 2016 the Respondents admit employing the Claimant as a general worker on casual basis but deny that he was deployed as a turn boy. The 1st Respondent states he was an officer of the 2nd Respondent and states that the Claimant was employed on casual basis as a general worker from July 2007 to January 2008 at daily wages of 230 and again from January 2008 to October 2008 as a turn boy on casual basis at daily wages of Kshs. 230 per day and an additional Kshs. 250 daily allowance while on safari or company business.

The 2nd Respondent denies terminating the employment of the Claimant unlawfully or unfairly and states that due process was complied with. The 2nd Respondent states that after the termination of the Claimant's employment the Labour Officer Uasin Gishu convened a meeting at which the Claimant's terminal dues were assessed at Kshs. 10,939.10 which the Respondent deposited at the Labour Office and was issued receipt No. 075786 dated 21st October 2008. The 2nd Respondent denies subjecting the Claimant to overtime work without pay and further denies that the Claimant is entitled to the prayers in the Claim or any other sum. The 2nd Respondent prays that the Claim be dismissed with costs to the Respondents.

The case was heard on 16th November 2016. The Claimant testified on his behalf led by Mr. Mogambi instructed by Wambua Kigamwa and Company Advocates. The Respondents called one witness Mr. LAMECH ODOYO NYABALA, who testified on their behalf led by Mr. Isiji instructed by Nyairo and Company Advocates. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was employed by Jubilee and Rafiki Hardware in Eldoret as a turn boy from July 2007 to October 2008 at a daily wage of Kshs. 230. He worked both day and night and did not take any day off. He was not paid overtime. He testified that he was stopped from working without being given any letter in October 2008. He testified that he was not given any reason for termination or an opportunity to defend himself. He was not paid his last salary. He was not issued with a certificate of service. He testified that his advocate sent a demand letter to the Company which was responded to. He prayed for orders as set out in the Claim.

Under cross examination the Claimant stated that he was not issued with a letter of appointment. He denied that he was terminated for misusing the Respondent's vehicle and siphoning fuel. He denied that he was paid Kshs. 250 extra when on a journey. He stated that he was not aware that his case was dealt with by the Labour Officer Eldoret who assessed the amount due to him at Kshs. 10,939.10. He stated he had not collected any money from the labour Office as he had never been informed to collect the money.

In the written submissions filed on behalf of the Claimant it is submitted that there is no dispute that there was an employment relationship between the Claimant and the Respondents as defined in section 2 of the Employment Act. It is further submitted that under section 10(1) it is the legal duty of the Respondent to issue a written contract within 2 months after the commencement of the contract. It is further submitted that a contract that lasts for more than 3 months should be in writing. The Claimant relied on section 74 of the Employment Act on records to be kept by employers and section 10(7) of the Act which places the

burden of proof on an employer who fails to produce prescribed records of employment. The claimant further relied on section 37 which provides for conversion of casual employment to monthly contracts of employment. It was submitted that the finding of the Labour officer that no notice was given to the Claimant is proof that the termination of his employment was unlawful. That the Labour officer further confirmed that the Claimant was underpaid. It was submitted that section 48(1) of the Labour Institutions Act permits the court to substitute the wages paid to an employee if underpaid with the minimum statutory wages.

It was submitted for the Claimant that the Respondent did not comply with section 41 of the Act. It was further submitted that the Claimant is entitled to service pay as provided in section 35(5) of the Act as he was not a member of National Social Security Fund.

The Claimant relied on the case of **Kenya Hotel and Allied workers Union v Marryland Hotels Limited** whose facts were similar to the instant case and the court found the Respondent liable for unfair termination. In that case the court awarded the Claimant pay in lieu of notice based on statutory minimum wages, annual leave, public holidays pay, underpayment of wages and compensation together with costs.

Respondent's Case

RW1 LAMECH ODOYO NYABALA testified that he was employed by the Respondent in October 2012. His testimony about the Claimant is a restatement of what is pleaded in the Defence and is hearsay as he was employed long after the claimant left employment.

In the written submissions filed on behalf of the Respondent it is urged that the dismissal of the Claimant was fair and procedural. The Respondent relied on the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR**, in which Radido J summarised the legal fairness requirements set out in Section 41 of the Employment Act, 2007 as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

It was submitted that the Respondent acted in accordance with section 44(1) of the Employment Act and that under the section an employer is permitted to terminate the employment of an employee without notice or with less notice.

It was further submitted that the Respondent complied with Article 10 and 41(1) of the Constitution with respect to natural justice and section 45(5) of the Employment Act. The Respondent submitted that the Claimant had not proved his case and relied on the decision of the court in **Shadrack Kahungani Mukwana v Wines of the World Limited [2014]eKLR** in which the court stated as follows-

'who in the circumstances would this court be forced to believe and walk along with? The court in this case is persuaded that the right direction is to seek guidance on the Civil Law Principle of a balance of probabilities. On a balance of probabilities, who of the two parties in this situation is likely to be telling the truth?

This court is of the view that on a balance of probabilities, the Respondent's case and testimony would carry the day. Parties are always bound not only to state their cases in pleadings but also

to prove the same in evidence. This is a cardinal principle of all legal disciplines. We cannot at all be seen to deviate from this well articulated principle of law and practice. It is proven and has been effective in situations of this nature. I therefore find that the employment of the claimant was on a need basis and therefore casual."

The Respondent further relied on section 43(1) which provides that

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

The Respondent further relied on the following cases-

- 1. Elizabeth Gathoni & 2 Others Versus Andrew Nightgale and Kembu EA Ltd [2014] eKLR**
- 2. Ugass Abdi Mohammed versus Grand Bus Service Limited [2013] eKLR**
- 3. George Morara Nyakioba versus Mini Bakers (Nairobi) Limited (2016) eKLR.**

Determination

I have carefully considered the pleadings, evidence and written submissions. The issues arising for determination are whether the Claimant was a casual employee or not, whether his summary dismissal was fair and whether he is entitled to the remedies sought.

Casual Employment

The Employment Act defines a casual employee as

a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

The Respondents admitted at paragraph 3 of Amended Defence* (*should be Further Amended Defence) that the Claimant was employed as a general labourer from July 2007 to January 2008 and as turn boy from January to October 2008. That is a period of 15 months. From a plain reading of the definition of casual employee the Claimant was not on casual employment at the time of the termination of his employment. Section 37 of the Act provides for conversion of casual employment to term contracts as follows:

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, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and

such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

The Claimant's terms automatically converted to monthly term contracts upon completion of 3 months of service by operation of the law. I therefore find and hold that the Claimant was not a casual employee.

Fair Termination of Employment Contract

The procedure for fair or lawful termination as provided in the law is now well settled in the jurisprudence of this court. The cases relied upon by parties herein are all arising from claims of unfair termination of employment.

Section 41 and 43 provide for the procedure and grounds for termination respectively as follows:

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.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 provides prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination.

45. Unfair termination

- (1) *No employer shall terminate the employment of an employee unfairly.*
- (2) *A termination of employment by an employer is unfair if the employer fails to prove—*
 - (a) *that the reason for the termination is valid;*
 - (b) *that the reason for the termination is a fair reason—*
 - (i) *related to the employee’s conduct, capacity or compatibility; or*
 - (ii) *based on the operational requirements of the employer; and*
 - (c) *that the employment was terminated in accordance with fair procedure.*
- (3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*
- (4) *A termination of employment shall be unfair for the purposes of this Part where—*
 - (a) *the termination is for one of the reasons specified in section 46; or*
 - (b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*
- (5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—*
 - (a) *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*
 - (b) *the conduct and capability of the employee up to the date of termination;*
 - (c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*
 - (d) *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
 - (e) *the existence of any previous warning letters issued to the employee.*

In this case the Respondent does not deny that there was no compliance with section 41 of the Act. What the Respondent argues is that the summary dismissal was in accordance with section 44(1), (3) and (4). Section 41(2) is explicit that "*...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...*" [Emphasis added]

Having failed to give the Claimant an opportunity to be heard, the summary dismissal of the Claimant was unfair under the provisions of section 45(2) of the Act. I therefore hold and declare the summary dismissal of the Claimant by the Respondent unfair.

Remedies

Under section 49 of the Employment Act an employee who has been unfairly terminated is entitled to-

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

The Claimant is thus entitled to one months' salary in lieu of notice, salary for days worked and not paid and compensation. The Claimant further prayed for Sunday pay, overtime pay, underpayments, service pay costs and interest.

The Claimant's salary at the time of summary dismissal was Kshs. 230/- per day. According to the Regulation of Wages (General) (Amendment) Order 2006 the daily minimum wage for a turn boy under All Other Municipalities was Kshs. 265. The Claimant's daily allowance was not part of his wages as it was for expenses incurred while he was travelling on company business. The Claimant was therefore underpaid by Shs.35 per day.

Under section 37 the Claimant's terms of service converted to monthly contract terms. He is therefore entitled to 28 days notice or pay in lieu at shs.265 per day being Kshs.7420 which I award him.

On underpayments the Claimant was underpaid by (265-230) Kshs. 35 per day which works out to Kshs. 13,650 based on a 26 day month for 15 months and I award him the same.

On damages for unfair termination the Claimant prayed for the maximum 12 months' salary as compensation. Taking into account his length of service and all relevant factors as provided in section 49(4) it is my opinion that 2 months' salary is reasonable compensation. I therefore award him (7420 x 2) Kshs. 14,840 as compensation. The Claimant is also entitled to service pay under section 35(5) of the Employment Act which I award him at 15 days per completed year of service for the one year worked at Kshs. 3975.

I do not find sufficient proof of work performed on all Sundays and public holidays and dismiss the claims. I further find that the Claimant did not prove his prayer for overtime.

Conclusion

I therefore award the Claimant the following:

1. 1 months' salary in lieu of notice Kshs. 7420
2. Service pay Kshs. 3975
3. Underpayments Kshs. 13,650
4. Compensation for unfair dismissal Kshs. 14,840.
5. The Respondent will pay Claimant's costs for this suit and the decretal sum shall attract interest at court rates.

Dated and signed and delivered this 22nd day of June, 2017

MAUREEN ONYANGO

JUDGE