



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 181 OF 2016
PATRICK LUMUMBA KIMUYU.....CLAIMANT
VERSUS
PRIME FUELS [KENYA] LTD.....RESPONDENT
J U D G M E N T

INTRODUCTION

1. This is a claim for ksh.1,030,308 being employment benefits accruing from the contract of service between the parties herein. The contract of service was terminated by the claimant by a resignation notice dated 10/4/2015. The respondent denied liability to pay the sum claimed by the claimant and accused the claimant of terminating the contract without prior notice. She has further counterclaimed for ksh.35300 being one month salary in lieu of notice.

2. The issues for determination are therefore:

(a) Whether the claimant is entitled to the dues sought in this suit.

(b) Whether the respondent is entitled to dues sought by the counterclaim.

3. The suit was disposed of by written submissions on the basis of the pleadings, witness statements and documentary evidence filed.

CLAIMANT'S CASE

4. The claimant was employed by the respondent on 27/12/2006 as a Truck driver. His working hours were 6am to 6pm including Sundays and public holidays as he drove the trucks to East and Central African countries. He worked for 8 years and 3 months. He produced contract letter to prove that he was not supposed to work on Sundays and public holidays.

5. On 10/4/2015, he served the respondent with resignation notice of 30 days but left immediately after asking the respondent to deduct one month salary in lieu of notice from his terminal dues. He produced a copy of the said notice as an exhibit herein.

6. He contended that after the resignation the respondent never paid him his terminal dues and prays for ½ salary for 8 years (ksh.118020), 365 Sundays worked equaling 2920 hrsx258 (753,360) and 77 public holidaysx8 hoursx258(ksh.158928).

DEFENCE CASE

7. The respondent's Road Transport Manager, Mr. Michael Ochwal filed witness statement on behalf of the respondent. He confirmed that the claimant was employed by the respondent on 27/12/2006 as an Articulated Truck Driver. His working hours were from 6am to 6pm from Monday to Saturday excluding Sundays and public holidays. His salary was ksh.20000 per month which was later increased to ksh.35300. He produced appointment letter plus salary increment letter as exhibits. He however clarified that whenever the claimant worked extra hours while in his international trips, he was paid for the days worked. He produced cash request forms to prove the said compensation.

8. He denied that the claimant worked every day until he resigned and contended that the claimant utilized all his annual and paternity leave days during his employment. He produced leave records to prove the same.

9. He contended that on 10/4/2015, the claimant served a resignation letter and left work the same day and authorized the respondent to deduct salary in lieu of notice from his terminal dues. He however contended that the claimant's outstanding dues were not enough to settle the one month salary in lieu of notice. He therefore prayed for the suit to be dismissed with costs and the counterclaim be allowed with costs.

ANALYSIS AND DETERMINATION

10. There is no dispute that the claimant was employed by the respondent from 27/12/2006 until 10/4/2015 when he resigned by a notice of 30 days but failed to work during the notice period. The issues for determination have already been framed herein above and I now proceed to answer them.

CLAIMANT'S RELIEFS

Half salary for 8 years

11. The claim for half salary lacks in material particulars but the submissions by counsel indicate it as gratuity pay. However no evidence has been adduced to prove that it was founded on the contract of employment between the parties herein. I therefore dismiss that prayer.

Sundays and Public holidays worked

12. The claimant alleged that he worked on 365 Sundays, and 77 public holidays during his 8 years 3 months service. The respondent has denied the alleged continuous service. According to her the claimant utilized all his annual and paternity leave days and that whenever he spent extra days during his long distance trips he was always compensated in addition to the trip allowances, paid to him. She has prayed for the dismissal of the claim for lack of material particulars.

13. After careful consideration of the evidence and the submissions by the two sides, I agree with the defence that the claim for public holidays and Sundays worked must fail. The first reason for the foregoing is that by his resignation letter, the claimant has confirmed that he utilized all his leave dues. It follows therefore that there are Sundays and public holidays he never worked because he was away on leave. The second reason for rejecting that claim is that the claimant did not contest the evidence by the defence that showed that he was sufficiently compensated for the long distance trips by trip allowance, plus further compensation by way of cash and off days for any extra days taken in his long distance trips. Consequently, it is my view that the claimant ought to have pleaded the particulars of the public holidays and Sundays worked and not paid.

14. The facts of this case are distinguishable from the facts in the ICC 196 OF 2013 MESHACK KIIO IKULUME VS PRIME FUELS KENYA LTD which was cited by the claimant. Unlike in this case, the claimant in the said case did not admit that there are days he was on leave and there was no evidence adduced to prove that he was compensated for the extra days travelled by cash or off days. In addition

there was admission that the claimant had utilized all his leave days.

Counter claim

15. The claimant authorized the respondent to recover one month salary in lieu of notice from his terminal dues. I therefore allow the counterclaim as prayed because it is not in dispute save to observe that the respondent has admitted that there were accrued dues in favour of the claimant though not enough to settle the one month salary in lieu of notice. The question that flows from the foregoing contest is, how much dues were owing to the claimant?

16. The claimant never proved any dues herein other than the dues which respondent has admitted herein above. The respondent has however not revealed what amount was owing to the claimant either by her pleadings or evidence but only stated that it was less than one month salary. In my view she had the obligation of disclosing the amount or the dues accruing to the claimant in order for the court to fully determine the dispute. Without that disclosure the court is left guessing on the amount due to the claimant. For example it could be salary for the 10 days worked in April 2015 but there is no supporting evidence. Consequently I direct that the respondents counterclaim be settled from the undisclosed amount of claimants final dues.

DISPOSITION

17. For the reasons stated above the claimant's suit is dismissed. The respondent's counterclaim is allowed but the sum of ksh.35300 is to be recovered from the claimant's dues, the amount which is only known by her. Each party shall bear his or her costs.

Dated, signed and delivered this 28th July 2017

O.N. Makau

Judge