



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO.1150 OF 2016

WYCLIFF MURILA OTIANG'ACLAIMANT

VERSUS

JOHN KAMAU WAMAKIMA RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 14th June, 2016 and served the summons upon the respondent on 17th June, 2016 but there was no appearance or defence filed. On 10th November, 2016 the respondent was served with mention notice; on 1st March, 2017 the respondent was served again with mention notice but failed to attend. The court issued hearing date and despite the respondent being served with notice on 23rd May, 2017 there was no attendance.

The claim is that on 6th April, 2008 the claimant was employed by the respondent as a Caretaker at a monthly wage of kshs.6, 000.00 but was not issued with a letter of appointment. The claimant worked diligently until 29th February, 2016 when the respondent wrongfully and unlawfully terminated his employment and failed to pay terminal dues. There was no notice, hearing or any reasons given for the termination of employment.

The claim is for;

- a) *One months' notice pay at Kshs.10, 954.70*
- b) *Service pay for 15 years Kshs.42, 887.65*
- c) *Underpayments for 2010 Kshs.2, 892.00*
- d) *Underpayments for 2011 Kshs.13, 032.00*
- e) *Underpayments for 2012 Kshs.24, 960.00*
- f) *Underpayments for 2013 Kshs.39, 372.00*
- g) *Underpayments for 2014 Kshs.39, 372.00*
- h) *Underpayments for 2015 53,460.00*

i) Annual leave for 7 years Kshs.60, 042.00

j) Compensation for unfair termination of employment

The claim is also that the claimant never went on annual leave or got paid in lieu thereof and this should be computed and paid to him. There were no statutory deductions or remittances by the claimant with regard to NSSF and NHIF and service pay is due.

The claimant testified in support of his claim. That as a Caretaker, the claimant was assigned duties at the respondent's commercial block to clear common areas around the flats, digging and clearing the gardens, removal of garbage and general attendance of the 20 units' common areas. The salary paid was below the minimum wage and thus all underpayments due are due.

The claimant filed written submissions.

Determination

Every employee should be issued with a written letter of employment and where the employer has sourced any person for a service, a written contract of service ought to issue. Such written contract of employment or for a service is to ensure that the terms and conditions agreed between the parties are clear and where there is a dispute; reference can be made to such written terms and conditions.

Section 10 of the Employment Act, 2007 requires that where an employee commences work and a written contract is not issued; such written contract must be issued within two (2) months of employment. The written contract therefore does not only protect the employee's rights but essentially it protect he employer against claims that may not be due and have been addressed in employment.

In this case the respondent failed to attend this matter by failing to enter appearance, failing to file any defence and failed to attend at the hearing of the claimant's case. The claim therefore stands not challenged. The merits of the claims made shall be assessed on their merits.

Section 41, 43 and 45 of the Employment require that before an employer can terminate the employment of any employee there must be a hearing, there must be a reason and where both are lacking, that is hearing and reasons, the resulting termination of employment is flawed and not justified in law. Such amounts to unfair termination of employment and in accordance with section 49 of the Employment Act, 2007 compensation is due.

Remedies

On the claim for underpayments, the claimant has relied on the General orders from 2010 to 2015. The publication of Wage Guidelines and the General orders thereof is to ensure that all employees are paid a minimum wage that is approved by the government in every sector. Such Wage Guidelines are the bare minimum and the employer is allowed to go above the minimum but not below.

Where an employee is underpaid, the defence is due in accordance with the law. As there is no challenge to the assessments to underpayment, such are due and awarded to the claimant all at Kshs.173, 088.00.

Section 35(5) and (6) of the Employment Act, 2007 requires that where the employer has failed to ensure the payment and remittance of statutory dues, service pay be paid on the employee. The claimant's minimum wage at the time of termination of his employment was lawfully due at kshs.10, 954.00 in terms of the Wage Orders applicable. For the 7 complete years of service, the claimant is entitled to 15 days' pay for each year all being Kshs.38, 339.00.

Without defence or any records submitted by the employer to confirm that the claimant went on annual leave while in the employment of the respondent, such being a requirement under section 10 of the

Employment Act, 2007 the claim for annual leave pay is hereby confirmed as due and the computation basis is on the last due gross wage payable at Kshs.10, 954 for 7 years all at Kshs.76, 678.00.

Compensation for unfair termination of employment is awarded for 3 months gross salary all at kshs.32, 862.00.

Accordingly, judgement is hereby entered for the claimant against the respondent with an award for compensation at Kshs.32,862.00; notice pay for Kshs.10,954.00; service pay at kshs.38,339.00; annual leave pay kshs.76,678.00; underpayments kshs.173,088.00 and costs of the suit.

Dated and delivered in open court at Nairobi this 27th day of July, 2017.

M. MBARU JUDGE

In the presence of:

Lillian Njenga and David Muturi – Court Assistants

.....

.....