



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE NO. 54 OF 2017
(Originally Nakuru Cause No. 478 of 2014)

RODNEY ESHIWANI ONYANGO

CLAIMANT

v

ELDORET MATTRESS LIMITED

1ST RESPONDENT

DANIEL NGUGI t/a KAMTINGA SERVICES LTD

2ND RESPONDENT

JUDGMENT

1. Rodney Eshiwani Onyango (Claimant) instituted legal proceedings against Eldoret Mattress Ltd (1st Respondent) and Daniel Ngugi t/a Kamtinga Services Ltd (2nd Respondent) alleging breach of contract/unfair termination of contract.
2. In a joint Reply to the Memorandum of Claim, the Respondents contended that the termination of the Claimant's employment was due to economic and financial difficulties (redundancy) and that all the statutory conditions were complied with.
3. The parties filed *Agreed Issues* on 23 January 2017 and the Claimant testified on 25 July 2017 while the 2nd Respondent testified on 26 September 2017.
4. The Claimant filed his written submissions on 27 September 2017 while the Respondents filed their submissions on 28 September 2017.
5. The Court has considered the pleadings, the evidence and the submissions.
6. Although the parties identified some 8 Issues as rising for determination, the Issues can be condensed into 3 being, *Which of the Respondents was the Claimant's employer, whether the termination of the Claimant's contract on account of redundancy was fair, whether the Claimant worked overtime without pay and appropriate remedies/orders.*

Claimant's employer

7. The Claimant asserted that both the Respondents were his employers.
8. The 2nd Respondent disclosed in his testimony that he was a recruiting agent for the 1st Respondent in that he would recruit and manage employees for the 1st Respondent.

9. He also stated that the 1st Respondent paid salaries through him.

10. Among the documents produced by the Respondents was an *Acknowledgment of Final Dues* to the Claimant which indicated that the dues were paid by Kamtinga Services Ltd.

11. On the basis of the 2nd Respondent's testimony and document aforesaid, the Court finds that both Respondents would be liable to the Claimant in respect of the cause(s) of action presented herein

Fairness of termination

12. The 2nd Respondent conceded that the termination of the Claimant's contract was on account of redundancy for the employees in the town branch.

13. He contended that the local labour office was notified of the intended redundancy but he did not produce any evidence of such notification.

14. In regard to selection of the employees to be sent off, an employer should demonstrate the method used such as *Last In First Out*.

15. The witness did not disclose the criteria used to send the Claimant off or why he was not considered for other options in the branches of the 1st Respondent which were not closed.

16. In terms of section 40 of the Employment Act, 2007, written notification ought to have been given one month in advance to both the local labour officer and the employee.

17. With no evidence of notification to the local labour office, or on the criteria employed to select those to be sent off, the Court can conclude that the termination was procedurally impaired.

18. An employer is also under obligation to prove the operational reasons leading to redundancy pursuant to sections 43 and 45 of the Employment Act, 2007.

19. Apart from saying so in Court, the Respondents did not attempt to discharge the burden of demonstrating that it faced economic and/or financial difficulties.

Overtime

20. Without batting an eyelid, the 2nd Respondent testified that the 1st Respondent's supermarket opened at 8.00am and closed at 5.00pm.

21. The Claimant's testimony on the other hand was that he reported to work at 8.00am and left at 8.00pm.

22. It is a notorious fact and the Court will judicial notice as much that supermarkets in this country do not ordinarily close at 5.00 pm as that is the time many employees leave work and pass through supermarkets.

23. The working hours as presented by the Claimant are more probable than the version stated by the 2nd Respondent.

24. The Court can therefore infer that the Claimant worked overtime without pay.

Appropriate remedies

Pay in lieu of notice

25. The Claimant was paid Kshs 12,200/- under this head and therefore nothing turns on the relief.

Service benefits

26. The Claimant was paid Kshs 12,200/- as service benefits for the 2 years he served the Respondent at the rate of 15 days' pay for each year. It would be unconscionable for him to be paid twice.

Overtime

27. Under this head of claim, the Claimant sought Kshs 304,050/-.

28. The Respondents as custodians of employment records in terms of sections 10 and 74 of the Employment Act, 2007 did not in any meaningful way challenge or controvert the computations.

29. The Court will allow the same as computed.

Compensation

30. The Claimant served the Respondents for only 2 years. In consideration of the length of service, the Court is of the view that the equivalent of 2 months gross wages as compensation would be fair and appropriate (wage was Kshs 12,200/-).

31. Overall, the Court reaches a conclusion that there was breach of contract by the Respondents.

Conclusion and Orders

32. The Court finds and holds that the termination of the Claimant's employment on account of redundancy was unfair and awards him and orders the Respondent to pay him

(a) Overtime Kshs 304,050/-

(b) Compensation Kshs 24,400/-

TOTAL Kshs 328,450/-

33. Claimant to have costs.

Delivered, dated and signed in Eldoret on this 29th day of September 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Rugut instructed by Chepkwony & Co. Advocates

For Respondent Mr. Aseso instructed by Gicheru & Co. Advocates

Court Assistants Nixon/Etyang