



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.725 OF 2016

MARTIN IRERI NDWIGACLAIMANT

VERSUS

OLERAI MANAGEMENT COMPANY.....RESPONDENT

JUDGEMENT

Issue in dispute – wrongful and unfair termination of the claimant’s employment by the respondent

1. The claimant is based on the facts that the claimant was in January, 2011 employed by the respondent as a Caretaker and Cleaner at a monthly wage of Kshs.15, 000.00 which was increased to Kshs.20, 000.00. He was not issued with a letter of employment of terms and conditions of service. The claimant served with diligence until 1 April, 2014 when the respondent wrongfully and unlawfully terminated his employment and failed to pay his terminal dues.

2. The claim is for the payment of the following;

- a) *Notice pay at Kshs.22, 718.00*
- b) *Annual leave unpaid Kshs.74, 212.00;*
- c) *Service pays Kshs.58, 649.00*
- d) *NHIF deductions and not remitted Kshs.3, 840.00*
- e) *House allowance to 15% Kshs.190, 831.20*
- f) *Underpayment*
 - i) *May, 2011 to April, 2012 Kshs.8,784.00*
 - ii) *May, 2012 to April, 2013 Kshs.57,514.00*
 - iii) *May, 2013 to May, 2014 Kshs.68,703.00*
 - iv) *April, 2014 to December, 2014 Kshs.1,703.40*
 - v) *May, 2015 – 4 months Kshs.10,872.00*
- g) *Compensation for unfair termination Kshs.272, 616.00*

3. The claimant also testified in support of his case and claims against the respondent. The claimant was employed over an oral contract by the respondent to take care of a residential building, to clean, do gardening and ensure general

cleanliness of the common areas and compound. On 31st May, 2015, Mr Mohamed one of the directors called him and asked him to vacate the premises. Previously the claimant had been managed by Mr Omar and when he called him seeking assistance in the matter and was told that his salary and other dues would be paid. After 7 days, Omar told the claimant to collect rent from the tenants and to deduct his wages and send the balances to him.

4. During the course of the employment, the claimant had not taken leave, there was no accommodation or an allowance for housing, he was not registered with NSSF or NHIF and he was underpaid for the service rendered to the respondent.

5. The claimant called his witness Mr John Musyoki who testified that he knew the claimant as an employee of the respondent and was working diligently for the respondent.

Defence

6. In defence, the respondent's case is that the claimant commenced employment with them in January, 2011 and before his termination he had been given one month notice and while he remained in employment he took his entire annual earned. The respondent provided the claimant with living quarter but he declined for his own reasons. The claimant's employment was terminated following repeated absconding from work when the directors of the respondent were abroad and he chose to give his duties to the watchman instead. The claims made should be dismissed with costs.

7. In evidence the respondent called Ahmed Mohamed Omar as the witness and testified that he is a director of the respondent and employed the claimant. The respondent was forced to terminate the employment of the claimant because of absenteeism and leaving work early. The tenants in the apartment would call the directors during normal work hours if they had issues because the claimant could not be reached. The claimant had the duty to ensure that security personnel were on duty on time, cleanliness and tenants' requirements were met but he failed to attend. Upon employment the claimant was offered accommodation by the respondent but he declined due to personal reasons. A notice of one month was issued to the claimant before he was terminated from his employment with the respondent.

8. The respondent also called Mohamed Nur Hassan as a witness as a director of the respondent. He testified that the claimant did not attend to his work duties diligently, and thus he was given notice and terminated from the same.

9. Ms Yvonne Wanjiru Njuguna was called as a witness for the respondent and testified that she is a friend to the respondent directors and on several occasions would be sent to the respondent premises to assist in supervising work and in most cases would not find the claimant at work. She would have to wait for hours before tracing him. She notified the respondent of these events.

10. Both parties filed written submissions.

11. The claimant reiterated his claims and evidence.

12. The respondent submitted that the claimant was terminated from his employment due to absconding duty and for not taking his work seriously. The claimant had been granted accommodation within the respondent premises but declined the same. The claimant breached his contract of employment as required under section 44 of the Employment Act, 2007 and the respondent took the option to dismiss him. The claimant had been issued with warnings but failed to change. A new caretaker was appointed and replaced the claimant and before this could be effected, the claimant had notice as required in law and as held in the case of **Linus Barasa Odhiambo versus Wells Fargo Limited [2012] eKLR**. The claims made are not justified and should be dismissed.

Determination

13. The respondent has admitted to having employed the claimant from January, 2011 to the date of his termination of employment. There was no written contract of employment save for the oral arrangements between the parties. Section 8, 9 and 10 of the Employment Act, 2007 requires that every employee be issued with a contract of service stating the terms and conditions of such employment. Where such written contract is not possible to issue immediately, section 10(1) makes it mandatory that such a document should issue not later than two (2) months as follows;

(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment. (

14. Therefore, where an employer fails to issue an employee with a written contract of service, the word of the employee is to be believed. The contract of service is not only useful to the employee but also protects the rights of both the employer and employee in the employment relationship. It is therefore to the benefit of the employer such as the respondent to issue a contract of service/employment stating the terms and conditions of such employment.

15. On the breath, termination of employment must be done in writing. This is to enable the employer state the reason(s) upon which the same is based upon. Where an employee wishes to challenge the reason(s) due to their validity, lawfulness or otherwise, the written notice is to be applied as required under section 47 of the Employment Act, 2007 as follows?

(1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

16. The respondent witnesses testified that the claimant had an oral contract of service which I find was contrary to the provisions of the law as it was never reduced into writing for the period of service running from January, 2011 to April, 2014. Equally, the respondent failed to issue the claimant with written reasons for termination of such employment. The defence that the claimant was issued with warnings and a months' notice before his employment was terminated is not supported by any evidence at all.

17. Where the claimant's work was found poor, below expected standards or he absconded duty or remained absent when the respondent directors were abroad, there is no record of such misconduct submitted as proof. Section 41 of the Employment Act, 2007 requires that where an employee is of poor performance or has misconducted himself, he should be issued with notice and given a chance to give his defence before he can be terminated from his employment as follows;

(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.

18. I find, by the conduct of the respondent and its officers, they failed to meet the mandatory provisions of the law as set out under the Employment Act with regard to the employment and termination of the same for the claimant. Such practice is addressed under section 45 of the Employment Act, as being a procedural and substantive unfairness which the court must address and give a remedy as set out under section 49 of the Act.

Remedies

19. The claimant pleaded that he was employed by the respondent in January, 2011 and he was terminated

from his employment in April, 2014. The submissions changed the date of termination to October, 2015. Such change is not permissible at this stage. The pleaded dates shall apply.

20. On the finding that the claimant was not issued with a written notice terminating his employment, notice pay is due to him in accordance with section 35 of the Employment Act, 2007. The claimant testified that his last wage was Kshs.20, 000.00 which was not challenged. I award Kshs.20, 000.00 in notice pay.

21. The claims for annual leave are premised on evidence that the claimant did not take his annual leave for the entire duration of his employment with the respondent. In employment and labour relations, the duty is placed upon the employer to keep all work records with regard to each employee. Where there are proceedings such as these, the duty is on the employer to submit the same before the court as stipulated under section 10(6) and (7) of the Employment Act, 2007 as follows;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. [

22. In this regard, where the claimant took his annual leave as alleged by the respondent, the duty is vested upon the respondent to produce such records of him taking annual leave. Section 28 of the Employment Act, 2007 gives an employee the right to take annual leave of 21 days and above as may be agreed between the parties. In this case, without any prove by the respondent that such leave was taken and a record kept, the claimant is entitled to claim the same as due and owing.

23. The claimant served from January, 2011 to April, 2014 a period of three (3) full years and four (4) months. At the wage of kshs.20, 000.00 per month, the leave pay due is pro-rated and awarded at Kshs.66, 000.00.

24. Service pay is dues to an employee who has not enjoyed the benefit of statutory deductions and thus covered under section 35(5) and (6) of the Employment Act, 2007. The claimant had no written contract, no written statement of payments is submitted and in essence, the respondent does not make any effort to demonstrate that as the employer they complied with statutory requirements and regulations to deduct and remit the applicable statutory dues to Kenya Revenue Authority, to the Kenya National Social Security Fund and to the National Hospital Insurance Fund as required by law. Failure to abide mandatory provisions of the law in this regard, the claimant is entitled to his claim for service pay. For the three complete years of service worked, the claimant is hereby awarded service pay at 15 days' pay for each year all at Kshs.30, 000.00.

25. On the claim for house allowance, the claimant asserted that he was never given accommodation by the respondent or paid an allowance thereof. In defence, the respondent emphasized that the claimant was given accommodation at the premises but he declined for personal reasons. However there is no offer for such accommodation and in the absence of any written communication over the terms and conditions of employment with regard the claimant, the respondent must suffer in terms of whose word to be believed. The lapses in terms of documentation in this case being so glaring work to the disadvantage of the respondent.

26. Based on the last wage paid to the claimant at Kshs.20, 000.00, the due allowance for accommodation is 15% all being Kshs.4, 000.00. For the 40 months worked, the total allowances due amount to Kshs.160, 000.00.

27. On the claim for underpayments, based on the Wage Guidelines applicable for the sector the claimant was employed, the minimum wage due as from 2011 to 2014 when he was terminated from his employment, the paid wage of Kshs.20, 000.00 was over and above the same. With the award for housing

included hereinabove, to pay the wage beyond the stated amounts by the claimant would be an unjust enrichment and contrary to fair labour practice. The claims are declined.

28. On the findings that the respondent failed to abide the mandatory provisions of the law in terms of the procedures required to effect the termination and further that there were no reasons given or before such termination of employment took effect, compensation is due in terms of section 45 of the Employment Act, 2007. Based on the evidence and the fact that the respondent made effort to pay all the due salaries owing to the claimant at the time to his termination, I take this into account and the awards above and find the claimant is appropriately compensated on his dues.

Accordingly, judgement is hereby entered for the claimant against the respondent for the award of notice pay at Kshs.20,000.00; annual leave pay Kshs.66,000.00; service pay at Kshs.30,000.00; house allowance at kshs.160,000.00; each party shall bear own costs.

Delivered in open court at Nairobi this 26th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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