



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 32 OF 2015

VINCENT SHIMENGA.....CLAIMANT

VERSUS

QUI OCCASSIONS.....RESPONDENT

JUDGEMENT

1. The claimant herein informed the court that he was employed on July 2013 as a tailor on a daily wage of Kshs 400/= which according to him was too low. He accepted the low salary after the respondent promised it would increase the pay after seeing the quality of the claimant's work.
2. He stated that during the period of his service there was delay in paying salary and that the respondent never wanted him to go on leave. According to him, he was dismissed for asking for pay rise. In November, 2014 he took 14 days. After the end of this leave he called the respondent and was told to stay away until he was called. He was never called and upon following up from the respondent's office he was told that his services were no longer needed.
3. According to him, he was not given any termination letter and that he was never paid his terminal dues. He was however paid for the month worked. It was further his evidence that the respondent offered to pay him Kshs 36,000/= as settlement for the claim.
4. In cross-examination he stated that he wanted leave for 21 days but the accountant approved only fourteen days. He further stated that he did not return after 14 days but called his boss but the call was diverted to her secretary.
5. The respondent witness Ms Pancrasia Wamboi informed the court she was the respondent's proprietor and that the respondent was in the business of doing events such as weddings and parties. According to her, most of the work was on Saturday and that they agreed with the claimant that he would be paid Kshs 400/= per day which would be reviewed after seeing the claimant work.
6. It was Ms Wamboi's testimony that the claimant applied for his full leave but was advised to break it into two. According to the respondent, the claimant could only go for 14 days at first and the rest later. The claimant neither returned at the end of his 14 days leave nor contacted her. According to her the claimant informed her that he took his whole leave and they had to find someone in his place. She denied terminating the claimant's services and instead averred that the claimant absconded duties.
7. The dispute which culminated in the termination of employment relationship between the claimant and the respondent was over underpayment and the issue of leave. The claimant felt the daily wage of kshs

400/= was low and that he was entitled to 21 days leave, The respondent on its part took the view that it could pay the claimant Kshs 400 per day as it monitors the claimant's work and make improvements later. Further respondent was of the view that the claimant could not take his full leave due to the workload. The taking of the extra days to make for the full leave was therefore construed by the respondent as absconding of duty by the claimant.

8. Wages for skilled and unskilled workers are regulated by Wage order issued from time to time by the Cabinet Secretary in charge of Labour. Further, leave is a statutory right. An employee is entitled to at least 21 days of leave with pay after twelve months of continuous service. With the agreement of the employee leave may be divided into different parts to be taken at intervals. Under section 26(3) of the Employment Act, unless otherwise provided in the contract of employment or CBA, an employee during the leave earning period is entitled to at least two uninterrupted working weeks.

9. From the evidence it would seem that whereas the claimant wanted his full leave, the respondent, due to exigencies of work wanted him to go only for fourteen days. The claimant was obliged to do so since the law permits an employer to negotiate with an employee on how to take leave. The insistence by the claimant to take his full leave was therefore unreasonable and a good reason to terminate the claimant's services. The respondent however stated that the claimant was not dismissed but absconded duty for the extra period he was away hence it had to procure the services of another person. The respondent however failed to bring forth any evidence to show effort was made to call upon the claimant to show cause why his services could not be terminated on account of absconding duty. To this extent, the court finds and holds that whereas the respondent had a valid reason to dismiss the claimant; it failed to follow the procedure as required by the Employment Act in carrying out the termination. The termination is therefore found to be unfair and the court taking into account the role of the claimant in bringing about the situation that led to his termination would award him three months salary on account of unfair termination of services.

10. Concerning underpayment, as observed earlier in the judgement minimum wage is a matter of statute. It is not open to an employer to offer a lesser wage than prescribed by the operative Wage Order on the premise that it is still assessing the capabilities of such employee.

11.

12. The applicable Wage Order for the period the claimant was employed was the one issued through legal notice no 197 of 2013. The order placed the wages of a tailor at Kshs 799.05 per day. The respondent was paying the claiming Kshs 400/= per day translating to an under payment of Kshs 399.05. The claimant worked for the respondent for one year and four months which is approximately 483 days. The claimant was therefore underpaid by a total sum of Kshs 192,741.15 which the court hereby awards him.

13. In conclusion the court enters judgement against the respondent for the following:

a. One months salary in lieu of notice	12,000.00
b. Three months salary for unfair	
c. termination of services	36,000.00
d. Underpayment of Kshs 399.05 for 483 days	<u>192,741.15</u>
	<u>240,741.15</u>

e. Costs of the suit.

14. It is so ordered.

Dated at Nairobi this 22nd day of September, 2017

ABUODHA J. N.

JUDGE

Delivered this 22nd day of September, 2017

NDERI NDUMA

JUDGE