



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 227 OF 2015

CYRUS NJIRU

CLAIMANT

V

GODFREY NKURUNAH RESPONDENT

JUDGMENT

1. The Claimant moved Court on 4 August 2015 against the Respondent and he stated the Issues in Dispute as

1. Wrongful dismissal and unfair termination of the Claimant from employment.

2. Salary in lieu of Notice, Public holidays, service pay, underpayments and compensation under section 49(1) of the Employment Act.

2. The Respondent filed a Statement of Defence on 5 October 2015 and *Agreed Issues* were filed on 6 December 2016.

3. The Claimant's examination in chief was conducted on 2 March 2017 and cross examination and further proceedings were adjourned to 5 April 2017 (Court also encouraged the parties to attempt out of court settlement).

4. The Court did not sit on 5 April 2017, and on 24 October 2017, the Court scheduled further hearing for 30 November 2017.

5. When the Cause was called out for hearing on 30 November 2017, Mrs. Oliech holding brief for Mr. Masara for the Respondent attempted to secure an adjournment to facilitate out of court settlement which the Court declined and directed that the hearing proceeds at 10.30 am (about 8 months had passed since Court directed parties to attempt an out of court settlement).

6. Eventually when the Cause was reached at 10.40 am, the Respondent and his advocate were not in Court and Mr. Chege for the Claimant closed his case and requested the Court to close the Respondent's case.

7. The Court obliged and directed that it would deliver judgment today (court is on transfer and is clearing part- heard cases).

8. The parties went through conciliation before the County Labour Officer and his report and recommendations dated 14 January 2014 was produced by the Claimant.

9. The Court will consider the report in this judgment.

Whether Claimant was an employee of the Respondent

10. Agreed Issues 1 and 2 related to the nature of the employment relationship between the Claimant and the Respondent.

11. The Respondent had pleaded that the Claimant was a herdsman from 2008 to July 2013.

12. The Claimant's testimony that he was employed by the Respondent on 11 August 2008 as a general worker up to July 2013 was not controverted by production of a written contract as envisaged by sections 9(1) and (2), 10(3) and 74 of the Employment Act, 2007 and the Court finds that he was an employee of the Respondent.

Termination or desertion

13. Agreed Issues 3 and 4 addressed the fairness of the termination of contract, if at all.

14. The Respondent had contended in the Response that the Claimant absconded from work sometime in July 2013 and therefore the question of unfairness of termination of employment did not arise.

15. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was under a statutory obligation to prove the desertion or absence without permission and that the reason was a valid and fair reason.

16. The Respondent did not discharge that statutory obligation.

17. Coupled with the Claimant's testimony that he sought leave to attend to a domestic problem and that when he resumed the Respondent's wife sent him away in order to consult, the Court finds that the Respondent was not ready to accept the Claimant back and therefore there was unfair termination of employment.

18. And if the Claimant absconded as contended by the Respondent, the Respondent should have utilised the provisions of sections 41 as read with section 44(4)(a) of the Employment Act, 2007 to bring the contract to an end.

Underpayments

19. The Claimant alleged that he was underpaid in 2012 and 2013 and according to a report after conciliation by the County Labour Office, the Claimant was underpaid by Kshs 19,503/-.

20. Being an examiner of facts and employment records, the Court will find that the Claimant was underpaid by the said amount.

Annual leave

21. The Labour officer after inspecting employment records established that the Claimant was entitled to Kshs 8,429/- on account of 2 years annual leave and the Court has no reasons to depart from that finding and recommendation.

Overtime pay (public holidays and normal)

22. The Labour Officer equally found and recommended that the Respondent pay the Claimant Kshs 8,830/- on account of public holiday overtime which recommendation the Court accepts and adopts.

23. The Claimant did not prove the contractually agreed working hours or the prescribed minimum

working hours in the industry he was operating in and the Court finds the head of claim for normal overtime not proved.

Salary in lieu of notice

24. With the conclusion on fairness of termination, the Court agrees with and adopts the recommendation of the Labour Officer that the Respondent pays Kshs 5,218/- as 1 month pay in lieu of notice.

Wages for July 2013

25. The Labour Officer also recommended the payment of Kshs 2,609/- on account of days worked in July 2013. The Court adopts the recommendation.

Gratuity

26. No evidential foundation for this claim was provided and it is declined.

Compensation

27. The Claimant served the Respondent for about 4 years and 7 months and in light of that length of service, the Court is of the view that the equivalent of 5 months gross wages would be appropriate (Labour Officer computed same as Kshs 6,823/- in terms of Legal Notice No. 192 of 2013).

Conclusion and Orders

28. The Court finds and holds that the Claimant's employment was terminated unfairly and awards him and orders the Respondent to pay him

(i) Underpayments	Kshs 19,503/-
(ii) Overtime	Kshs 8,803/-
(iii) Leave	Kshs 8,429/-
(iv) Pay in lieu of notice	Kshs 5,218/-
(v) July 2013 wages	Kshs 2,609/-
(vi) Compensation	Kshs 34,115/-
TOTAL	Kshs 78,677/-

29. Claimant to have costs of Kshs 35,000/-.

Delivered, dated and signed in Nakuru on this 1st day of December 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Chege instructed by Munene Chege & Co. Advocates

For Respondent Mr. Masara instructed by Masara & Co. Advocates

