



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO 31 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

LABOUR OFFICER VIHIGA COUNTY.....CLAIMANT

VERSUS

ESAU KEVOLWE.....RESPONDENT

JUDGMENT

By Memorandum of Claim filed in court on 21st February 2014 by the Labour Officer Vihiga County on behalf of **Ayub Litunda** the Grievant on account of unfair termination of services and failure to pay salary and terminal benefits, the Claimant seeks the following orders;

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|--------------|--|-----------------------|
| 1. | One month salary in lieu of notice | Shs. 5,218.00 |
| 2. | Annual leave for two years

(5,218x21:-30x2) | Shs. 7,305.20 |
| 3. | Salary for twelve months

1st July 2012 to 30th April, 2013

4,577.20x10 | Shs. 45,772.20 |
| 4. | 1st May, 2013 to 30th June, 2013

5,218x2 | Shs. 10,436.00 |
| 5. | Salary for 15 days worked in July | Shs. 2,609.00 |
| Total | | Shs. 71,340.00 |

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The Respondent **ESAU KEVOLWE** filed a defence through the firm of Nyanga & Company Advocates denying the the claim.

The Case was heard on 19th November, 2015. The Grievant **Ayub Litunda** and

Ms. Winnie Otieno the County labour officer Vihiga testified on behalf of the Claimant led by Mr. George Abuto the County Labour Officer Kakamega. The Respondent **Mr. Esau Kevolve** testified on his behalf led by his advocate Mr. Nyanga.

Claimant's case

The Claimant's case is contained in the memorandum of claim and the testimony of Ayub Litinda and Ms. Winnie Otieno the County Labour Officer Vihiga.

The Claimant's case is that the Grievant was employed by the Respondent between 1st January, 2005 and 15th July, 2013, taking care of animals and working in the shamba. They agreed on a salary of Shs. 2000 per month which the respondent failed to pay. He reported a dispute to the labour office and was given a letter to take to the Respondent. Upon receiving the letter from the labour officer the Respondent terminated his employment on 15th July, 2015.

It is the grievant's case that during the period he worked for the Respondent he did not take leave and his employment was terminated on 15th July, 2013 without notice.

The Respondent was summoned to a meeting at the Labour Office on 23rd July, 2013. At the meeting it was agreed that the Respondent would pay Shs. 40,000 in full and final settlement. The Respondent however failed to pay and on 22nd August, 2013 he was given another letter of demand tabulating the claim of the Grievant but did not pay. A notice to prosecute was issued to the Respondent on 6th September, 2013 requiring him to deposit the Grievant's terminal dues at the Labour Office by 16th September, 2013 but he failed to do so prompting the filing of this dispute.

Respondent's case

The Respondent's case is that the Grievant is his nephew whose deceased mother was the Respondent's sister. The Respondent stated that he lived with the Grievant on and off but the Grievant was never his employee. He testified that the Grievant and CW2, Ms. Otieno had ganged up with the Respondent's elder brother, who did not get along with the Respondent, to file this dispute. He further testified that he visited the Labour Officer in the company of the Deputy Governor to ask her to drop the case so that they could resolve the case at home but she refused.

The Respondent denied that he terminated the Grievant's employment when the Grievant delivered the letter from the labour officer. He testified that he has never employed any worker in his life. He denied agreeing to pay Shs. 40,000 to the Grievant at the labour office or owing the Grievant any money.

The issues for determination are whether the Grievant was employed by the Respondent and if the Claimant is entitled to the reliefs sought.

In his testimony the Claimant was emphatic that he worked for the Respondent between 1st January, 2005 and 15th July, 2013 but was never paid a salary. In his defence filed in court the Respondent denied that on 1st January, 2005 he employed the service of Ayub Litunda as a general worker or at all, denies not paying him any salary or at all denies that the said Ayub Litunda commenced the employment and served the Respondent with loyalty and diligence or at all, until 15th July, 2013 when the Respondent unfairly terminated the service without notice and refused to pay his salary and terminal dues. He further denied the particulars of the dues stated. He also denied that several letters were written or that he received notice of intention to sue and put the claimant to strict proof of the said allegations.

In the alternative and without prejudice, the Respondent averred that Ayub Litunda is his nephew being the son of his sister and that he has been staying with the Claimant as a son since 1990 after the marriage between his parents broke down irretrievably.

Further in the alternative and without prejudice the respondent avered that during his stay with Ayub Litunda, he treated him as one of his sons and provided him with all basic needs including education until when Ayub Litunda decided to drop out of school in class four.

Further in the alternative and without prejudice the Respondent avered that if at all the alleged contract of employment was entered between them which is denied, the same has been doctored by the Claimant and Ayub Litunda.

The Respondent's version at the hearing was very different from what was pleaded in his defence. In his testimony he admitted that he was served with letters from the Labour Office and attended a meeting at the labour office. He also testified that the Grievant was colluding with his brother with whom he did not see eye to eye, and that he tried to persuade the Labour officer to drop the case. He did not explain why he had to use the Deputy Governor to persuade the Labour Officer to drop the case, if not to intimidate her. He never explained what was to be resolved at home if there was no employment relationship with the Grievant.

Based on all the different versions given by the Respondent and the discrepancies between what was pleaded and his testimony, I am inclined to believe that the Respondent was not telling the truth. There can never be more than one truth. An employment relationship is a matter proved on a balance of probability and it does not help the case of the Respondent to have so many different versions of the same story. On the other hand the Grievant's story as corroborated by the labour officer CW2 is consistent

For these reasons I am persuaded that the Grievant lived with the Respondent and worked for him but the Respondent failed to pay his salary as agreed and hold accordingly. I am also persuaded that the Respondent dismissed the Grievant when he delivered the letter from the labour officer to the Respondent and hold accordingly.

On the remedies the Claimant seeks payment to the Grievant of Shs. 5,218 on account of pay in lieu of notice, Shs. 7,305.20 for annual leave for two years and salary from July 2012 to June, 2013 at Shs. 56,208.20. There is no claim for all the other years that the Claimant worked for the Respondent or for compensation for the unfair termination of the Grievant's employment.

The foregoing being the case, I award the Grievant the sum of Shs. 71,340.40 as claimed.

The Respondent will also pay disbursements incidental to the filing of the claim including filing and service fees and travelling expenses which I assess at Shs. 20,000 all inclusive.

Judgment dated, signed and delivered this 26th February, 2016

MAUREEN ONYANGO

JUDGE

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