



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO 29 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

COUNTY LABOUR OFFICER VIHIGA.....CLAIMANT

-VERSUS-

JOSEPH KINYANJUI.....RESPONDENT

JUDGMENT

The Claim herein was instituted by the County Labour Officer, Kakamega Ms. Winnie Otieno under powers granted to Labour Officers vide Section 35(1)(l) of the Labour Institutions Act. the claim is filed on behalf of Kassim Ondeko against Joseph Kinyanjui the Respondent. The issue in dispute is unfair termination of services of Kassim Ondeko herein after called "the Grievant," by the Respondent and failure to pay salary and terminal benefits to the said Grievant.

The Claimant seeks the payment of the following;

- 1. One month's salary in lieu of notice..... Shs. 10,116.15
- 2. Arrears of wages underpaid between 1.8.2012 and 30.8.2013 Shs. 80,212.60
- 3. Arrears of house allowance
not paid between 1.8.2012 and 30.8.2013 shs.Shs. 16,531.80

Total

Shs. 106,85.50

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The Claimant also seeks costs.

The Respondent filed a Memorandum of Appearance through Kulecho Musomba & Company Advocates on 6th March, 2014 . The Respondent filed a defence and a Notice of Preliminary Objection on 13th March, 2014.

In the defence the Respondent denied all the allegations in the claim and further averred that the claim is

fatally defective. The Preliminary Objection was grounded on the fact that the suit is drawn by an unqualified person.

The case was fixed for hearing on 18th November, 2015 when the Labour Officer together with the Grievant attended court but the Respondent did not attend. After ascertaining that the Respondent was properly served through his advocate's office I allowed the case to proceed without him.

Mr. George Abuto County Labour Officer led the Claimant and the Grievant in their testimony.

The Grievant testified that between 1st December, 2012 and 9th September, 2013 he worked as a night watchman at Mbale White Ribbons Dry Cleaners at a salary of Shs. 2,500 per month. He was paid salary by Joseph Kinyanjui the owner of the Dry Cleaner. On 9th September, 2013 he reported to work at 6 pm as usual but was told there was no work. He reported to the Labour office as he did not know the reason for termination.

The Labour Officer gave him a demand notice (attached as appendix WAO II) dated 12th September, 2013 which he delivered to the Respondent. He went back to the labour office on 2nd October, 2013 and was given another letter to take to the Respondent. A meeting was held at the Ministry of Labour which the Respondent Joseph Kinyanjui attended on 14th October, 2013. The Respondent was directed to pay his terminal dues and submit records that were signed by Grievant when receiving payment but he failed to do so.

He testified that the Respondent was served with a notice to prosecute following which the claim was filed by the Labour Officer. He testified that he was claiming Shs. 106,860.50 as set out in the Memorandum of Claim.

CW2 Winnie Otieno testified that she is the Labour Officer, Vihiga. Her duties included claiming terminal benefits and salary in line with the Employment Act and Labour Institutions Act and any other duties of a Labour Officer. She also carries out labour inspections and handles labour disputes.

On 12th September, 2013 the Grievant lodged a complaint against White Ribbons Dry Cleaners owned by Joseph Kinyanjui the Respondent. The Complaint was that the Grievant was employed at the premises on 1st December, 2012 and was dismissed on 9th September, 2013. (CW2 gave the Grievant a letter addressed to the proprietor of White Ribbons Dry Cleaners inviting him for a meeting on 23rd September, 2013. The letter was dated 12th September, 2013. (APP."WAO11").

The Respondent attended the meeting on 23rd September, 2013 but the meeting could not proceed because he had not carried employment records of the Grievant. The meeting was postponed to 2nd October, 2013 but on that day the Respondent failed to attend. CW2 wrote another letter (APP."WAO10") dated 2nd October, 2013 addressed to the Respondent tabulating the Grievant's terminal benefits totalling Shs. 106,860.50 as claimed in the Memorandum of Claim. The letter required the Respondent to pay the same by 14th October, 2013 but he did not pay prompting CW2 to issue Notice to Prosecute (APP."WAO8") dated 22nd October, 2013 which gave the Respondent up to 6th November, 2013 to pay the amount indicated in the notice failing which the Respondent would be sued. The money was not paid and CW2 filed this suit. She stated she was claiming arrears of wages, underpayments and one months salary in lieu of notice on behalf of the Grievant. She attached a copy of Legal Notice No. 120 of 1982 which is the basis for claiming house allowance arrears under Clause thereof. She further claimed leave which was not taken by the Grievant also based on the same Legal Notice (APP."WAO6"). She also relied on extracts of Section 48 of Labour Institutions Act (APP."WAO5") extracts of Section 2,17 and 74 of Employment Act, 2007 ("WAO4") and the memorandum of claim (marked as APP"WAO2").

She stated in addition to the claim on behalf of the Grievant she sought court filing fees based on court receipts on record, process servers fees at the rate of Shs. 1000/= per service and travelling expenses for herself, the Grievant and Mr. Abuto using her car from Mbale to Kisumu.

Determination

I have considered the claim. The whole claim is based on Statutory Provisions. Section 35 of the Labour Institutions Act provides for powers of Labour Officer. At Subsection (1)(e) thereof it states that a Labour Officer may institute an appeal on behalf of any employee in any civil proceedings by an employee against his employer in respect of any matter, thing or cause of action arising out of or in the course of the employment, whether such civil proceedings are contemplated or instituted by the employee himself or are civil proceedings ordered by a Magistrate.

Sections 48 of Labour Institutions Act, 17 and 74 of the Employment Act, and Rule 9 of Legal Notice No. 120 of 1982 which the Labour Officer relied on provide as follows;

Section 48(1)

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

(a) Pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) Provide an employee with the conditions of employment prescribed in the order,

commits an offence

4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum or to provide an employee with the conditions of employment prescribed in the order, then

a) If an employer, is found guilty of an offence, evidence may be given on any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and

b) on proof of such contravention, the court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid.

17 and 74 of the Employment Act

Section 17. (1) *"Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya-"*

Section 74(1) *"An employer shall keep a written record of all employees employed by him with whom he has entered into a contract under this Act which shall contain the following particulars-"*

Section 74(2) *"An employer shall permit an authorized officer who may require an Employer to produce for inspection the record for any period relating to the preceding thirty six months to examine the record"*

Clause 9(1) every employee shall be entitled-

a) *After every twelve consecutive months of service with his employer to not less than twenty one working days leave with full pay.*

b) *Where employment is terminated after the completion of two or more consecutive months of service during any twelve months leave earning period, to not less than one and three quarter days of leave with full pay in respect of each completed month of service."*

I am satisfied that the Claimant has proved the case against the Respondent on a balance of probabilities. The evidence adduced has not been controverted.

I have also looked at the defence filed by the Respondent and the Notice of Preliminary Objection which has no basis as the Labour Officer is authorised by law to file claims against employers on behalf of employees under Section 35(1)(e) of the Labour Institutions Act and is therefore not an unqualified person as pleaded in the notice of Preliminary Objection, nor is the claim defective as pleaded in the defence for the same reason.

For the foregoing reasons I enter judgment for the Claimant in the sum of Shs. 106,860.50 as prayed in the claim. I further award the Claimant Shs. 20,000/= to cover reimbursement of court fees, process servers fees and reasonable expenses for the claimant and the Grievant incidental to the filing of this claim.

Dated, signed and delivered this 17th Day of February, 2016

MAUREEN ONYANGO

JUDGE