



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1183 OF 2012

ELLY ODHIAMBO.....CLAIMANT

VERSUS

OSTERIA GROUP (K) LTD.....1ST RESPONDENT

GOTHIC INVESTMENT LTD.....2ND RESPONDENT

JUDGEMENT

1. The Claimant being an adult male was employed by the respondents in July 2004 as a Cook and was issued with a letter of appointment. The Claimant diligently performed his duties, working overtime but was terminated from his employment on 20th September 2011 and claim that this was unlawful as he was not give notice, reasons or given time to know the case against him to enable him give a defence. The Claimant was paid a salary of kshs.13, 000.00 per month.

2. The claim is for;

- a) Compensation for 12 months;*
- b) Notice pay;*
- c) 20 days salary worked in September 2011;*
- d) Severance pay for 7 years;*
- e) Unpaid house allowance;*
- f) Unpaid overtime; and*
- g) Costs of uniform.*

3. The Claimant is also seeking costs of the suit.

4. In evidence, the Claimant testified that upon employment by the respondents he was never given house allowance or provided with uniforms and was made to work overtime without an allowance or any form of compensation for it. Every time he worked overtime he was made to sign on a document but was never paid or given a copy of it. Each day he worked for 3 extra hours in a week of 6 days. He would take his off day on Saturday.

5. On 20th September the Claimant was at work and at 11am he was called by the human resource officer who said he had his letter to issue. The human resource officer stated verbally that work had reduced at the Respondent and he had to be terminated. He was advised to go home. He was the only sent home on such grounds. He had no prior notice of such loss of employment and was not paid for time worked or terminal dues and benefits.

6. In cross examination the Claimant testified that upon employment with the respondent, his initial salary was Kshs.7, 500.00 out of which;

He used 3,000 to pay school fees; 1,200 to pay rent; 2,500 household contribution; and 800 for savings.

7. He had a wife and two children he was taking care of. The wife did odd jobs to contribute to the family finances. When the Claimant was given notice that the Respondent had no work he was left but was not paid his terminal dues. He would report to work at 10am and with a break at 4pm and would only leave for home at midnight. All this was due to the nature of his job as a cook.

Defence

8. In defence, the Respondent case is that they had employed the Claimant but he did not serve overtime as alleged and for all his work he was paid for it. The termination was lawful and justified as the Respondent had the right to terminate the claimant. He was given a notice setting out the reasons for termination. Such reasons are valid and cannot form a basis to claim unlawful conduct on their part. It was not possible to keep the Claimant at work when the Respondent business went down making his service unsustainable and not required. The correct procedure was complied with in effecting the termination of the claimant. The claim should be dismissed as nothing unlawful was committed.

9. The Respondent did not call any evidence. On the date set for hearing of the defence case, the respondents remained absent despite evidence that they were served on 15th February 2016 and an Affidavit of Service to this effect filed as sworn by Edward Murithi Muchemi on 11th March 2016.

10. The Respondent did not call any witness. I find the statement of defence bare. No records of employment were filed.

11. At the close of the case the Claimant filed his written submissions. The Claimant replied on the provisions of section 43, 45 and 74 of the Employment and submitted that the employer must give valid reasons for termination of employment and to fail to do so results in unfair termination of employment. It is the duty of the employer to keep work records and when required, the employer should submit such records to the court for an effective analysis of the employment status and the terms and conditions of such employment. in this case the Respondent violated mandatory provisions of the law when they failed to give the Claimant valid reasons for his termination and further failed to submit any record to conform payment of due salaries; allowances for housing, uniform or overtime paid. the Claimant relied on the cases of **Robai Musinzi versus Safdar Mohamed Khan, Cause No.267 of 2012; Samson Bulima versus DPI Festive Limited, Cause No.520 of 2012.**

Determination

12. On 20th September 2011 the respondents issued the Claimant with notice as follows;

REF: One Month Notice

You are hereby given one month's termination notice. This is because the volume of work has gone down.

13. The Claimant confirmed the contents of such notice when he testified that he was called by the human resource officer of the respondents and he was verbally told that he would be terminated on the grounds

that there was no more work. The reduction of work is a matter contemplated and addressed under section 40 of the Employment Act. Reduced work is also defined under section 2 of the Act as being a situation of redundancy as the employer, due to circumstances of business prudence is forced to reduce staff, reorganise or restructure its business so as to remain afloat or reduce costs. However, section 40 gives the employer mandatory procedures to follow upon realisation that a situation of redundancy exists and action to address the same is commenced.

14. Under section 40, the employer such as the Respondent should have given notice to all its employees and also notify the Labour Officer as a redundancy situation does not affect one (1) employee only as held in the case of **Jane Khalachi versus Oxford University Press [2012] eKLR**. A reduction of work is a situation that must be brought to the attention of all employee before any one of them can be singled out for termination. To commence the process and direct it to an individual employee is an act of discrimination against such an employee as there is no basis for such action. Notice must first issue to all employee in preparation for the next phase and issuance of the termination notice to the individual employee with the knowledge of the labour Officer as held by the **Court of Appeal in Kenya Airways Limited versus Kenya Aviation Workers Union & Others [2014] eKLR**.

15. In this case, I find no evidence that the Respondent complied with the mandatory provisions of section 40 while terminating the claimant. The notice issued to the Claimant on 20th sept member 2011 should have been preceded by a general notice declaring a redundancy at the Respondent business. The notice to the Labour Officer is also mandatory as this is the officer charged with the duty to advise an employer faced with redundancy as held in **David Matevu & Others versus Africa Nazarene University, Cause No.2286 of 2012** that;

.....the notices under section 40 is different from the notice as under section 41, the notices envisaged under a redundancy process is that once an employer has reviewed their business situation and realised that there is need to restructure and or reorganise for more productivity, there must be notification to the employees, whether they will be affected or not. This process does not just suddenly happen where an employer open their doors in the morning and realise they have to reorganise for better productivity or be more strategic in running their business at the close of day.

16. The termination of the Claimant was therefore procedurally and substantively unfair. The Respondent failed to comply with the provisions of section 40, 43 and 45 of the Employment Act. Compensation is due.

Remedies

17. On the finding above, the Claimant is awarded 12 months' pay for unfair termination. The Claimant testified that his last salary was Kshs.13, 000.00. The Respondent did not submit any pay slips or records to challenge this evidence. On a gross salary of kshs.13, 000.00 per month, the Claimant is awarded Kshs.156, 000.00 in compensation.

18. On the claim for 20 days salary worked in September 2011, such is due on the basis that the Respondent did not controvert this claim in any material way. For the 20 days worked in September 2011, the Claimant is awarded Kshs.8, 700.00.

19. Severance pay is due where an employee is declared redundant and due process of the law is not adhered to. In this case the Claimant was employed on 5th June 2006 and was terminated on 20th September 2011. He had served for a period of 5 full years. Severance pay is therefore payable based on his last gross salary for 15 days of each year all at Kshs.32, 500.00.

20. On the claim for a house allowance, a look at the employment contract, it does not include the payment of a house allowance or provision for the same. The clause under the contract for *wages* is stated to be *inclusive of house allowance*. However, the gross wage of Kshs.7, 500.00 paid to the Claimant was already an underpayment are regulated by the General Wages Guidelines for the position the Claimant

held with the respondent. Despite the freedom of contracting between the parties, an employee cannot be subjected to an illegality for the simple reason that there was an agreed wage that fell below the Wage Guidelines and of which was inclusive of house allowance. Such house allowance as claimed is due in this case and awarded at kshs.63, 375.00.

21. The Respondent as the employer had the duty to keep records of overtime worked by each employee. When challenged in this regard, the Respondent should have filed such records with the court. With no evidence to challenge the fact that the Claimant worked overtime for 3 hours each day for the 6 days he was at work, the overtime claimed is hereby confirmed as owing and due at kshs.419, 538.00.

22. Notice pay is due on the finding that there was no general notice declaring a redundancy and the termination notice issued to the Claimant on 20th September 2011 was instant and he was not paid for the month of for the requisite notice thereof. One month's salary in lieu of such notice is due at kshs.13, 000.00.

Judgement is hereby entered for the Claimant against the Respondent in the following terms

- a) I declare the Claimant was unfairly terminated by the respondent;**
- b) Compensation is awarded at kshs.156, 000.00;**
- c) Notice pay awarded at kshs.13, 000.00;**
- d) Severance pay kshs.32, 500.00;**
- e) House allowance awarded at kshs.63, 375.00;**
- f) Overtime Kshs.419, 538.00; and**
- g) Costs of the suit.**

ORDERS ACCORDINGLY.

DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF MAY 2016.

M. MBARU

JUDGE

in the presence of

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