



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 6 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

EVANS KATIEZO ALIGULAHCLAIMANT

-Versus-

ELDOMATT WHOLESALE AND

SUPERMARKET LTD RESPONDENT

J U D G E M E N T

The Claimant was employed by the Respondent as a turn boy in May, 2012 at a rate of pay of Shs.1,730 per week. The salary was later increased to Shs.1,830 a week. His employment was terminated on 27th June, 2013.

The Claimant avers that the termination was unfair because he was not given an opportunity to defend himself against an allegation that he was responsible for loss of a trolley.

The Claimant was aggrieved by the dismissal and first reported to the County Labour Officer, Uasin Gishu County but the Respondent failed to pay his terminal dues. He also reported to the Kenya Union of Commercial Food and Allied Workers but the Respondent did not co-operate with the Union. He thereafter filed this suit.

The Claimant prays for payment of salary in lieu of notice, accrued leave, service gratuity, underpayment of wages, public holidays, unlawful deductions, overtime and compensation all totalling Shs.249,267.

The Respondent filed a defence to the Memorandum of Claim denying that it unlawfully terminated the Claimant's employment or that it owes him any money.

At the hearing of the case the Claimant testified but the Respondent did not call any witness. The parties thereafter filed and exchanged written submissions.

The Claimant testified that he was reporting to work from 8am to 9pm every day and worked six(6) days a week from Monday to Saturday. He also worked on all Public Holidays.

He testified that on 22nd June, 2013 he worked until evening. When he went to collect his salary after work from the Store Supervisor he found that Shs.500 had been deducted. He asked why the deduction was made and was told by the Stores Supervisor that he had been instructed to inform the Claimant not to go back to work and if he has any issues he should go and ask at the office on Monday during working hours. The Claimant went to the office on Monday to see the personnel officer who told him to wait. At

4pm he was told to go the following day. On Tuesday he was again made to wait until evening then he was told to go back to work. He worked until 1st July, 2013 when the Personnel Officer told him not to go back to work. On 2nd July he reported to the Labour Officer who gave him a letter to deliver to the Respondent. The Respondent did not respond to the letter and on 9th July, 2013 the Claimant again went to the Labour Officer who called and talked to the Respondent. The Respondent asked the Labour Officer to inform the Claimant to go to the office to collect his terminal benefits from Mr. Shah, a director of the Respondent.

When the Claimant went to the office Mr. Shah offered to pay him notice only which he did not accept. He went back to the Labour Officer who wrote another letter to the Respondent on 24th July, 2013.

The Claimant testified that he felt that the Labour Officer was not doing much to assist him and reported to the Union Office. The Union wrote a letter to the Respondent on 17th July, 2013. The Respondent replied to the letter asking the Claimant to go and collect his terminal dues from the Labour Office. When he went to the Labour Office he was informed that the Respondent had not deposited any money for him. A letter written thereafter by the Union asking for a breakdown of the Claimant's terminal benefits was not responded to.

The Claimant testified that the Respondent had also deducted Shs.1000 from his salary on 8th June, 2013 for damage to a trolley.

Under cross examination the Claimant stated that he was employed as casual and was paid for days worked only. He denied receiving a letter of termination. He also denied that he left employment on his own. He stated that he did not use any trolley while at work. He stated that he signed for his salary up to 15th June, 2013 and did not sign for the following week.

Findings and Determination

I have considered the evidence and the Submissions by both parties. The issues for determination are whether the Claimant was unfairly terminated or he absconded duty after he was suspended. The other issue is whether he is entitled to the remedies sought.

The Claimant testified he was dismissed verbally. The Respondent however has in its bundle of documents annexed a letter dated 22nd June, 2013 which it alleges is a suspension letter. The letter which is hand written states the Claimant is suspended for one week for gross misconduct against his supervisor. The Respondent alleges the Claimant did not report for duty after that.

The Claimant denied receiving the letter. No evidence was submitted by the Respondent to prove that the alleged suspension letter was received by the Claimant.

Even had it been proved that the letter was delivered to the Claimant it would still not be a valid suspension. This is because suspension is not a punishment but should be resorted to where an employer wishes to carry out investigations which cannot be carried out while the employee is at work for reasons such as the employee's likelihood of interference, sabotage or embarrassment.

Secondly, the letter does not state why the Claimant was being suspended. Informing an employee that he has been suspended for gross misconduct does not inform the employee what constitutes gross misconduct.

The Respondent did not controvert any of the other evidence by the Claimant on how he was dismissed. The Claimant testified that he went to work after 22nd June, 2013 and worked up to 1st July, 2013.

I find that the Respondent has not controverted the Claimant's contention that he was dismissed verbally without a hearing or notice. The termination was therefore unfair.

Remedies

The Claimant prayed for several remedies. The Respondent did not adduce any evidence to controvert the prayers as it did not submit any evidence other than the defence and the written submissions. The Respondent did not deny that the claimant did not take annual leave, or that he was underpaid. The Respondent did not deny that the Claimant worked on Public Holidays, or overtime and was not paid. The Respondent also, did not deny making unlawful deductions of Shs.1,500 from the salary of the Claimant. The denials in the submissions cannot rebut the evidence of the claimant.

For these reasons I award the Claimant the following:-

1. Pay in lieu of notice.

The Claimant worked for the Respondent for a period of about 13 months. Although the Respondent paid him a daily wage, his contract had converted from casual to term contract by operation of section 37 of the Employment Act (herein after referred to as the Act) which provides as follows:-

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the

Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

I award the Claimant notice in line with the monthly pay in the general order, which as at June, 2013 was Shs.10,778 (being basic pay for turn boy of Shs.9,372.15 plus 15% house allowance)

2. Pay in lieu of Accrued Leave

Having worked for 12 complete months, the Claimant is entitled to 21 days annual leave by virtue of the provisions of section 28(1)(a) of the Act. I therefore award him Shs.7,544.60 being pay for 21 days leave.

3. Underpayments

The statutory minimum rate of pay for claimant (turn boy) from May 2012 to April 2013 was Shs.9,049.10 while from May 2013 was Shs.9,272.15 (excluding 15% house allowance). The house

allowance was shs.1,357.40 and Shs.1,406.40 respectively. The Claimant was therefore entitled to Shs.10,406.50 from 1st May 2012 to 30th April, 2013 and Shs.10,678.15 for May and June 2013. He was therefore underpaid by $(10,406 - 8,040) \times 12 = \text{Shs.}28,392$ from May 2012 to April 2013 and $(10,678.15 - 8,040) \text{ Shs.}5,276.30$ for May and June, 2013.

I award the Claimant underpayments in the total sum of $(28,392 + 5,276.3)$

Kshs.33,668.30.

4. Public Holidays

The Respondent did not deny that the Claimant worked on Public Holidays. There are 11 public holidays in Kenya and the Claimant worked the 11 public holidays from May to April and 1 Public Holiday in June 2013. He thus worked for a total of 12 public holidays. At a daily rate of Kshs.448.95 per day and taking into account that an employee is entitled to double the daily rate of pay for work performed on a public holiday and further that the Claimant was paid at the normal rate of pay he is entitled to Shs.5,387.40 in respect of public holidays. I award him the said sum.

5. Overtime

The Respondent did not controvert the Claimant's testimony that he worked from 8.00 am to 9.00 pm every day from Monday to Friday. He therefore worked 13 hours a day adding up to 312 hours a month instead of 225 hours a month. He is therefore entitled to 87 hours a month for 13 months at the rate of 1.5 times the hourly rate being Shs.80.95. I award him Shs.137,331.70 as overtime.

For the avoidance of doubt the formula for overtime calculation is provided for under Rule 6 of the Regulation of Wages (General) Order which provides as follows:-

6. (1) Overtime shall be payable at the following rates -

(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;

(b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.

(2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee's basic minimum monthly wage.

(3) Notwithstanding subparagraphs (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks -

(a) one hundred and forty-four hours for employees engaged in night work;

(b) one hundred and sixteen hours for all other adult employees.

6. Unlawful Deductions

I award the Claimant the sum of Shs.1,500 being unlawful deductions.

7. Service Gratuity

Under Section 35(5) of the Act. the Claimant is entitled to Service Pay of 15 days salary per completed year of service. Having worked for one full year I award him Shs.5,364.50.

8. Compensation

The Claimant worked for only one year for the Respondent. Taking all relevant factors especially those set out in section 49(4) of the Act, I award him one months salary as compensation in the sum of Shs.10,678.15.

9. Costs and Interest

The Respondent shall pay Claimant's Costs for this Suit and the decretal sum shall attract interest at court rates from date of Judgement.

Dated, Signed and Delivered this 30th day of June, 2016

MAUREEN ONYANGO

JUDGE