



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 488 OF 2014

FESTUS NDOLO MBINYO.....CLAIMANT

v

DELNET SERVICE LIMITED.....RESPONDENT

JUDGMENT

1. Festus Ndolo Mbinyo (Claimant) sued Delnet Service Ltd (Respondent) on 7 October 2014 and he stated the issues in dispute as

1. Redundancy
2. Failure to pay overtime worked in arrears
3. Underpayment of wages
4. Unremitted N.S.S.F.

2. A Response to Claim was filed on 28 November 2014, and this prompted the Claimant to file a Reply to Memorandum of Defence on 11 December 2014.

3. The Cause was heard on 15 February 2016.

4. The Claimant testified and the Respondent did not call any witness after it made a feeble attempt to secure an adjournment which was rejected because no reason was given as to the whereabouts of its intended witness (the Respondent's counsel had at the call over stage informed the Court that she was ready to proceed and only sprung up the application for adjournment after close of Claimant's case).

5 The Claimant filed his submissions on 11 March 2016, while the Respondent's submissions which should have been filed by 15 April 2016 were not on file by this morning.

6. The Court has considered the pleadings, evidence and submissions and identifies the issues for determination as, *whether the termination of the Claimant's employment was unfair, whether the Claimant was underpaid, whether the Claimant worked overtime and appropriate remedies.*

Whether termination of employment was unfair

Procedural fairness

7. The Claimant was issued with a letter informing him of the termination of employment dated 5 April 2013 (Claimant's exhibit 3).

8. The letter advised the Claimant that his services were being discontinued effective 8 April 2013, and that he would be paid 1 month salary in lieu of notice.

9. The reason given for bringing the relationship to an end was that the service station had been transferred to a new dealer.

10. It is clear that the Respondent was bringing the relationship to an end without any *misconduct, poor performance or physical incapacity* on the part of the Claimant. In other words, the end of the relationship was involuntary on the part of the Claimant.

11. In the view of the Court, this was a case of *redundancy* and the Respondent ought to have complied with the peremptory requirements of section 40 of the Employment Act, 2007.

12. There being no suggestion that the conditions were complied with, the Court has no hesitation in finding that the termination of the Claimant's employment on the basis of *redundancy* was procedurally tainted.

13. The Court would have still reached the same conclusion were the dispute one implicating section 41 of the Employment Act, 2007, because there was no suggestion by the Respondent either in the pleadings or through oral testimony that a hearing was conducted prior to the termination of employment.

Substantive fairness

14. With the conclusion on the procedural aspects, it is not necessary for the Court to examine whether the Respondent has proved the reasons for termination of the contract (section 43 of the Employment Act, 2007) or that it had valid and fair reasons (in terms of section 45 of the Act) to bring the contract to an end.

Underpayments

15. The Claimant produced his pay slips for March 2011, June 2011, November 2011, January 2012 and April 2012.

16. He also produced computations by the County Labour Officer, Nakuru on dues payable and these included Kshs 103,023/20 as underpayments.

17. The evidence before Court is that the Respondent participated in the conciliation before the Labour Officer and *prima facie*, the Court accepts his computations on underpayments.

Overtime

18. The Claimant testified that he was working from 7.00am to 4.30pm (day shift) and from 4.30pm to 7.00am (night shift) and that he alternated the shifts fortnightly.

19. He also stated that he was doing 8 hours overtime during the 2 week night shift stint.

20. The Court is unable to agree with the Claimant that he worked overtime during the day shift (and if he did overtime, it was for only half an hour).

21. As for the night shift, the Claimant accepted and his letter of employment and pay slips show he was getting an allowance. This must have been in lieu of any overtime payment.

22. With the material placed before Court and also considering the Labour Officer's computations, the

Court does not concede that the Claimant has made out a case for overtime.

Unremitted National Social Security Fund contributions

23. No evidence was led by the Claimant on this head of claim, most probably because the Respondent had filed in Court payment schedules in respect of National Social Security Fund contributions.

Appropriate remedies

Underpayments

24. The Court concurs with the Labour Officer and also finds that the Claimant is entitled to underpayments of Kshs 103,023/20.

Overtime

25. This head of claim is declined.

Compensation

26. The Claimant served the Respondent for about 4 years and considering the length of service and that he did not seek and was not paid severance pay, the Court is of the view that the equivalent of 7 months gross wages compensation would be fair (based on prescribed minimum wage which as of April 2013 was Kshs 12,460/-).

Conclusion and Orders

27. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

a. Underpayments Kshs 103,023/20

b. Compensation Kshs 87,220/-

TOTAL Kshs 190,243/20

28. The Claimant confirmed having been paid Kshs 27,918/- and the same should be deducted from the Court award.

29. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 11th day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Ms. Njoroge instructed by Kiplenge & Kurgat Advocates

Court Assistant Nixon