



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO.734 OF 2014

ANDREW NATEMBEA WAFULA CLAIMANT

VERSUS

METAL CANS & CLOSURES KENYA LTD 1ST RESPONDENT

LUPRA MANPOWER AND HR MANAGEMENT SERVICES 2ND RESPONDENT

JUDGEMENT

1. On 6th May 2014, the Claimant filed the Memorandum of Claim herein, the Respondents were served and entered appearance on 17th November 2014 and defence filed on 5th December 2014. The matter came for hearing on 28th July 2016, the Respondents had been served and hearing notice acknowledged on 11th April 2016. The Claimant filed Affidavit of Service confirming such service. The Respondents opted to be absent at the hearing.

2. The claim is that the 1st Respondents being a company dealing with the manufacturing of metal cans and closures offered the Claimant employment at a gross salary of Kshs.11, 247.00. No written contract was issued, instead the 1st Respondent delegated this responsibility to the 2nd Respondent by outsourcing labour – staff recruitment, staff data, time attendance, staff payroll and statutory deductions. The 1st Respondent remained the owner of the business.

3. The claim is that the Claimant was never paid for his overtime hours worked, he was made to work for long hours. There was a deduction of statutory dues which were never remitted.

4. In November 2013, the Respondents director Mr Dhruv driven by racism and with the sole intention to frustrate the Claimant terminated the Claimant from his employment. There was no warning or reasons given. The Claimant was not given a reason to defend himself against any allegations. This amounted to discrimination under the provisions of section 5 of the Employment Act and the termination was unlawful. The Respondents did not issue notice under section 35 of the Employment Act and rights under sections 41 and 43 of the Act were not addressed.

5. The Claimant is seeking;

a) 12 months' pay in lieu of notice kshs.134, 964.00;

b) *Compensation of 114 extra hours Kshs.49, 896.00;*

c) *NSSF deductions Kshs.4, 800.00;*

d) *PAYE deducted Kshs.8, 436.00;*

e) *NHIF deduction Kshs.3, 840.00;*

f) *Leave due Kshs.14, 112.00;*

g) *Compensation for disturbance*

h) *Costs of the suit.*

6. In evidence, the Claimant testified that upon employment by the respondent, he was made to work for long hours and was not paid overtime. He would start work from 7am to past 10pm and overtime should have been paid from 4pm to 10pm which was not done.

7. On the date of his termination, the Claimant was parking metal cans and when he was told to change the parking, the carton he was using got torn as it was very old. He was chased away by the boss/manager Mr Dhruv and told to remain outside the Respondents premises. He was never called back or advised on what to do. Mr Dhruv drove off from the premises without talking to the claimant. He reported the matter to the union but nothing was done. The report was made to the Labour office but no action was taken against the respondent. He is seeking payment of his dues.

Defence

8. In defence, the statement filed notes that the Claimant was issued with a letter of appointment which he declined to acknowledge receipt by signing. That the Respondents are not evading payment of taxes and the allegations made against them are denied as there is no prove. The alleged violations of the Employment Act are not correct as there is no evidence or truth to such. The claim should be dismissed with costs.

9. No evidence was called by the respondents.

Determination.

10. The Respondents in defence state that the Claimant was issued with a letter of appointment but he declined to acknowledge. However such letter even though allegedly not acknowledged by the Claimant has not been attached to the statement of defence for the court to assess the terms and conditions of employment given to the claimant. Such letter would have set out what dues the Claimant was entitled to. The defence is therefore left bare.

11. The Employment Act, section 8, 9 and 10 requires that an employer should issue an employee with a written contract of employment setting out the terms and conditions of work. The employer has the duty to keep all work records and where suit such as this one is filed, the employer has the duty to produce the same. No records are attached to the defence with regard to the employment of the claimant.

12. The admission by the 1st Respondent that they issued an appointment letter to the Claimant but he declined to accept it confirms that the employment relationship existed but the details with regard to termination are not set out. I take it the evidence and submissions by the Claimant and the circumstances leading to his termination are correct. That he was at work when an old carton he was working with got torn and was chased away from work without notice, hearing or being an opportunity to explain himself.

13. Section 35, 41 and 43 of the Employment Act are mandatory in the sense that before termination of employment, an employer must issue an employee with notice or payment in lieu of such notice. Also,

before termination, an employee must be given a hearing so as to defend himself. And more fundamentally, the employer must give written reasons for termination. Where there is no notice, hearing or such reasons being given to the employee, the resulting termination is unfair pursuant to the provisions of section 45 of the Employment Act as held in **Joseph Mariko & Another versus Padya Mukesh t/a Relish Restaurant, Cause No.1237 of 2013.**

14. Before termination of employment, an employee must be given a hearing even in the case of gross misconduct. Where the employer is not able to hear the employee, the circumstances dictating the same must be demonstrated to the court. In this case, the evidence of the Claimant is not challenged.

15. I find the termination was unprocedural and lacked reason. It was therefore unfair in terms of section 45 of the Employment Act.

Remedies

16. The Claimant is seeking compensation in lieu of notice for 12 months. I find no justification for the claim of notice pay for 12 months. However, where the termination was without notice, section 35 of the Employment act allow a grant of one (1) month notice pay. Kshs.11, 247.00 is awarded.

17. Overtime hours worked are due. Where there is no record by the Respondents as the employer setting out the time lines at work, I find no challenge to the claim. I award kshs.49, 896.00.

18. The dues under NSSF, PAYE and NHIF claimed relate to statutory deductions that are regulated in law. Where the Respondents have not paid such statutory dues, there are penalties due to the requisite statutory bodies which regulate the same. These dues are not payable to the claimant.

19. On the finding that the termination was unfair, the Claimant is awarded compensation at 6 months gross pay all being kshs.67, 482.00.

In conclusion, judgement is entered for the Claimant in terms of paragraphs 16, 17 and 18 above. Costs are also awarded.

DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF AUGUST 2016.

M. MBARU

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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