



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 535 OF 2014

KELVIN MUGALLA OSOMO

CLAIMANT

v

FARM PARTS LIMITED

RESPONDENT

JUDGMENT

1. From the pleadings, evidence and submissions, the Court is called upon to determine, *the legal burden in disputes for unfair termination of employment, whether Claimant was an employee of the Respondent as store help, whether the termination of the Claimant's employment was unfair, whether the Claimant had accrued leave by time of separation, whether the Claimant was underpaid, whether the Claimant worked overtime, whether portions of the Claimant's cause of action are statute barred and appropriate remedies.*

2. For the record, the Court notes that oral evidence was taken on 22 February 2016 and 3 May 2016, and that the Claimant filed his submissions on 17 May 2016, while the Respondent filed its submissions on 29 June 2016.

3. The Court will set out the parties respective cases under the identified issues for determination.

Legal burden in disputes concerning unfair termination of employment

4. In its Response and in the submissions, the Respondent contended that the Cause was incompetent, bad in law and an abuse of the court process.

5. The Respondent further contended that the Claimant had not satisfied the *cardinal principal of law that, whoever alleges a fact must prove its existence, or the truth* and that the Claimant did not discharge that legal burden.

6. In complaints of unfair termination of employment or wrongful termination of employment, the primary reference point as to the incidence of legal burden is the Employment Act, 2007 and not the Evidence Act.

7. Section 47(5) of the Employment Act, 2007 provides that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

8. To the Court, the burden placed upon the employee by the aforesaid section is a low threshold one, and may be demonstrated just by asserting that a written notice of termination in terms of section 35 of the Employment Act, 2007 was not issued or given; that pay in lieu of notice was not paid or that the termination was on account of any of the reasons alluded to in section 46 of the Act.

9. Once the employee has discharged the burden, the obligation turns to the employer to prove the reasons for the termination of employment (section 43 of the Employment Act, 2007), or that the reason for the termination was a valid and fair reason (section 45 of the Act), or that written notice was given (section 35 of the Act).

10. The Act has other provisions such as section 10(7) and the list can go on and on.

Whether Claimant was an employee of the Respondent as Store help

11. Although the Respondent denied that the Claimant was ever its employee at paragraph 5 of the Statement of Response, its witness stated that he did not know the Claimant, as he joined the Respondent after the Claimant had left, and that he did not have employment records.

12. On the same breathe, he stated in examination in chief that the Claimant was a store helper, but in cross examination he testified that the Claimant was a general labourer.

13. As to the daily duties of the Claimant, the witness stated that he used to bring goods from the stores to the counters and that in March 2012 he was assigned to a lorry as a turn boy helping to bring goods from Mombasa.

14. The Claimant testified that he was a store help.

15. Store help is not one of the occupations listed in any of the various Regulation of Wages Orders, and considering the evidence on the daily duties of the Claimant, the Court reaches the conclusion that he was an employee of the Respondent as a general labourer up to March 2012 when he became a turn boy, a position he served in for 7 months.

16. The Court has in reaching the conclusion taken note of the requirement placed on employers by section 9 of the Employment Act, 2007 to draw up a written contract and the implications of section 10(7) of the Act.

Commencement of relationship

17. Closely linked to the occupation of the Claimant is the question of when the relationship commenced.

18. The Claimant contended that he was engaged by the Respondent in October 2011 through an oral contract, while the Respondent's witness despite the lack of records asserted that the Claimant was employed in January 2012.

19. In terms of section 10(7) of the Employment Act, 2007, the Court finds that the Claimant was employed by the Respondent in October 2011.

Whether termination of employment was unfair

20. The Claimant testified that he was paid by the month and that he was not issued with a notice of termination.

21. On the circumstances regarding the separation, he stated that on 11 February 2014 after a body search by a contracted guard he was summoned to the office by a Salesman called Minesh who accused him of theft and who took him to a Mr. Nitesh Patel for interrogation, and eventually he was informed by a Manager called Bhatt that his services were no longer required.

22. The Claimant's testimony was not controverted by a witness who was present at the material time or through documentary records kept at the material time.

23. The Claimant ought to have been given written notice of termination and none was given, he should also have been subjected to the hearing contemplated by section 41 of the Employment Act, 2007 on the allegations of theft but there is no suggestion that such a process was conducted.

24. The Respondent has also failed to prove the involvement of the Claimant in any theft or that the theft was a valid and fair reason for the termination of the employment.

25. The Court therefore has no hesitation in finding that the termination of the Claimant's employment was both procedurally and substantively unfair.

Accrued leave

26. The Claimant contended that he did not go on leave for 2 years 4 months that he was in the Respondent's employment.

27. This testimony was not challenged and the Respondent did not provide the leave records.

28. The Court would find for the Claimant.

Underpayments

29. From October 2011 to March 2012, the Claimant was a general labourer, and therefore he cannot claim underpayments on the basis of a Shop Assistant, as he has sought.

30. From March 2012, the Claimant served as a turn boy and he stated that this went on for 7 months.

31. The prescribed minimum wage for a turn boy during the period was Kshs 7,269/- (exclusive of house allowance) in terms of Legal Notice No. 64 of 2011 which was applicable until 30 April 2012.

32. The Claimant's testimony was that during this period his was earning Kshs 6,500/-.

33. From 1 May 2012 to September 2012 (when the Court presumes the 7 months turn boy tenure ended) the prescribed minimum wage for a turn boy was Kshs 8,221/20 (exclusive of house allowance) in terms of Legal Notice No. 71 of 2012.

34. The Court would therefore find that the Claimant was underpaid for the 7 months served as turn boy from March to September 2012.

35. After the 7 month period, the Claimant must have reverted to his general labourer duties and the Court finds no underpayment.

Overtime

36. Although the Claimant testified as to the working hours, he did not disclose the contractually agreed hours beyond and above which he would be entitled to claim overtime pay, nor did he prove the statutorily prescribed working hours above which he would lay claim to overtime pay.

37. Coupled with the failure to lay a statutory basis for the overtime pay claim, the Claimant did not disclose or prove the particular Regulation of Wages Order applicable to the industry or sector the Respondent was operating in.

38. The head of claim for overtime is therefore declined.

Limitation

39. The Respondent did not take up the question of limitation either during the hearing or in the submissions and the Court considers that this issue was abandoned.

Appropriate remedies

Pay in lieu of notice

40. The Court holds that the Claimant is entitled to 1 month pay in lieu of notice in terms of section 35(1) (c) of the Employment Act, 2007 in the sum of Kshs 10,000/- which was the pay at point of separation.

Underpayments

41. This head of relief is declined save for the 7 months the Claimant served as a turn boy.

42. But because it is not capable of precise calculation by the Court on the basis of the record, the Court will take into account this fact in awarding compensation in terms of section 49(4)(i) of the Employment Act, 2007.

Accrued/outstanding leave

43. The Court would award the Kshs 19,291/50 as pleaded.

Overtime

44. This head of relief is also dismissed.

Compensation

45. The Claimant served the Respondent from 2011 to 2014, about 3 years, and the Court considers this as a relevant factor in assessing compensation.

46. The Court also considers that it has not awarded an exact figure in respect of underpayments.

47. Putting the 2 factors into perspective, the Court is of the considered view that the equivalent of 4 months gross pay (monthly wage at separation was Kshs 10,000/-) would be appropriate and fair.

Conclusion and Orders

48. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) 1 month pay in lieu of Notice	Kshs 10,000/-
(b) Accrued leave	Kshs 19,291/50
(c) Compensation	Kshs 40,000/-
TOTAL	Kshs 69,291/50

49. The other heads of relief are dismissed.

50. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 19th day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Matiri/Ms. Njoroge instructed by Matiri Mburu & Chepkemboi Advocates

Court Assistant Nixon