



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO 604 OF 2014

JOSEPH OKOTA OMBOK

CLAIMANT

v

TAIDY'S INVESTMENTS LIMITED

RESPONDENT

JUDGMENT

1. Joseph Okota Ombok (Claimant) alleged in a Memorandum of Claim filed in Court on 18 November 2014 that Taidy's Investments Ltd (Respondent) unfairly terminated his employment. He sought various reliefs.
2. The Respondent filed a Response on 22 October 2015 (out of time but allowed by consent), agreed issues were filed on 19 September 2016 and the Cause was heard on the same day.
3. The Court has considered the pleadings, evidence and submissions and will consider the issues as agreed.

Whether Claimant's employment was terminated or he opted out on ill health

4. The Claimant contended that his employment was terminated without any reasonable cause but failed to plead the date. However, he exhibited a certificate of service indicating separation was in April 2013.
5. In oral testimony he gave the date as 19 May 2013 and stated that while on sick off a Manager called him on phone and told him that after discussions with the Respondent's director it had been agreed that he be stopped from working on ground of health.
6. He also stated that he was not given notice of termination.
7. The Respondent called its Accountant to testify and regarding the circumstances of separation, he stated that a Manager had informed him (witness) that the Claimant had requested to be relieved of his duties because of ill health, and instructed him to compute the Claimant's wages.
8. The Court has two different versions as to the manner of separation.
9. Among the documents produced in Court was a letter dated 24 July 2013 addressed to the Claimant on Final Dues which has a passage

... we take this opportunity to thank you for your work and regret your ill healths that lead to your

decision to go and rest.

10. The letter would suggest that the separation was at the request of the Claimant.

11. But the Claimant also produced a letter dated 4 July 2013 in which he stated

... I request my Director, to suspend my work termination. I fully request my director to consider me and make me clear my sacco-loan.... After cleared my sacco-loan, I will expect my work termination immediately.

12. This letter on the other hand suggest that the separation was at the behest of the Respondent.

13. Coupled with the oral testimony, the Court is unable to determine whether the separation was a resignation or unfair termination of employment.

14. The Court also notes in reaching that conclusion that the Claimant reported a dispute to the local labour office and among the dues computed by the labour officer, there was no element of pay in lieu of notice to suggest unfair termination.

Is Claimant entitled to 1 month pay in lieu of notice?

15. As noted, this was not one of the items recommended by the labour office and because of the reasons indicated above, the Court answers this question in the negative.

Underpayments and Overtime

16. Both the Claimant and one of the Respondent's Managers called Caleb appeared before the Labour Officer and among the items computed was Kshs 121,293/- under the head of underpayments and overtime.

17. Labour Officers serve as fact finders in employment disputes and that mandate is given to them by statute.

18. Unless it is shown that they considered irrelevant factors or misapprehended the law, a Court ought not to lightly ignore their findings.

19. It is equally a notorious fact that watchmen work 12 hour shifts in this country and therefore, it is more probable that the Claimant worked overtime.

20. The Respondent whose duty is to keep and maintain employment records did not produce any employment or attendance records and the Court would accept the findings by the Labour officer that the Claimant was owed the computed amount as underpayments and overtime.

Leave

21. The labour officer also found that the Claimant had 40 pending leave days which he computed was equivalent to Kshs 12,176/90.

22. The Respondent had tabulated the 40 days leave as equivalent to Kshs 10,667/-.

23. The Court would accept the computations by the labour officer.

Gratuity

24. The Claimant did not lay before Court either a contractual or statutory foundation for gratuity.

25. If by gratuity he meant service pay in terms of section 35 of the Employment Act, 2007, he is not entitled to the same on account of his membership of the National Social Security Fund.

Compensation

26. With the verdict on mode of separation, compensation, a discretionary remedy is not available.

Conclusion and Orders

27. The Court finds and holds that the Claimant has failed to prove that his employment was unfairly terminated, but finds and adopts the recommendations of the labour officer and awards him

(a) Underpayments/Overtime	Kshs 121,293/-
(b) Commuted leave	Kshs 12,176/90
TOTAL	Kshs 133,469/90

28. If Claimant had outstanding loans, the Respondent should act in terms of agreements in place as to recovery.

29. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 28th day of October 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Ms. Chege instructed by R. W. Chege & Associates Advocates

Court Assistant Nixon