



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 313 OF 2014
BETWEEN
BONIFACE MUGOYA.....CLAIMANT
VERSUS
GALAWA MARINE SERVICES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

*Nyange Sharia Advocate instructed by Kituo Cha Sheria, Advocates for
the Claimant Khaminwa & Khaminwa Advocates for the Respondent*

JUDGMENT

1. The Claimant filed his Statement of Claim on 11 July 2014. He states he was employed by the Respondent as a Supervisor on the 5th August 2010. His contract was terminated on 30th January 2013, on the ground of redundancy. He earned a monthly salary of Kshs. 15,000. He complains termination was without notice and he was never paid redundancy dues under Section 40 of the Employment Act 2007. He was denied notice pay, off days, and compensation for work done during Public Holidays. He prays for:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. 144 off days for 3 years worked at double daily rate at Kshs. 144,000.
- c. 27 Public Holidays at double daily rate at Kshs. 27,000.
- d. 2 hours overtime for 3 years at Kshs. 273,750.
- e. 12 months' salary in compensation for unfair termination at Kshs. 180,000.

Total..... Kshs. 639,750

- f) Certificate of Service to issue.

g) Costs.

h) Any other relief.

2. The Respondent filed its Statement of response on the 15th August 2014. It concedes the Claimant was its Employee. He was a Member of the Kenya Shipping, Clearing and Warehouses Workers Union. The Union reported the existence of a dispute to the Minister on behalf of the Claimant, under Section 73 [3] of the Labour Relations Act 2007. He therefore does not have *locus standi* in bringing the Claim in his own name, before the Court. The Claim is bad in law. Secondly, it is stated by the Respondent that the Respondent paid the Claimant all his dues, in accordance with the Employment Act 2007.

3. The Claim was heard and closed on the 27th July 2016, in the absence of the Respondent. Although served with the Hearing Notice as evinced in the Affidavit of Service of Process-Server Mr. Timothy Kiringi Kitsao sworn on the 21st October 2015, the Respondent did not attend Court on hearing. The Claimant proceeded *ex parte*.

4. The Claimant testified he was employed as a General Labourer. He used to load containers. He was issued a contract dated 5th August 2010. The Claimant worked under the contract at all times. He was expected to report for duty "at all times and on all days, except where permission of absence has been granted by the Operations Manager or any other authorized Person." He worked continuously the whole week. His salary was Kshs. 15,000 on exit. The Tally Sheets captured the hours the Claimant worked. He was paid service pay of 3 years and notice pay. There was no rest day. There was no compensation for work done during Public Holidays. Work had not diminished to justify termination. Work was still going on at the time the Claimant was giving evidence in Court. He prays the Court to allow the Claim.

The Court Finds:-

5. It is agreed the Claimant was employed by the Respondent as a Supervisor. It is admitted the Respondent terminated the Claimant's contract, but the Respondent holds this was done fairly and lawfully. The Respondent states in its Response that it would show at the hearing that the Claimant utilized his annual leave and/or was paid in lieu of such utilization. The Respondent states the Claimant was paid all his terminal dues in accordance with the law. Lastly the Respondent's position is that the dispute was reported to the Minister for Labour under the Labour Relations Act 2007. It should therefore have been processed under that law.

6. Unfortunately the Respondent did not provide the Court with material showing the dispute was reported to the Minister by the Claimant's Trade Union. If the dispute was shown to have been reported to the Minister, then the Court would have insisted on the Claimant following the procedure prescribed under that law. In the absence of evidence on the Report to the Minister, the Court shall decline the objection by the Respondent on the Claimant's capacity in pursuing his claim individually.

7. The Respondent undertook to show to the Court that the Claimant took his annual leave, and/or was paid in lieu of annual leave. There is no claim for annual leave pay and the undertaking by the Respondent counts for nothing.

8. The Respondent states it paid to the Claimant all his terminal dues. The details of what was paid are missing.

9. It is not denied that the Claimant's contract was terminated on account of redundancy. The Respondent did not endeavour to show to the Court, that this was done in accordance with Section 40 of the Employment Act.

10. While under the contract the Claimant was expected to report for duty at all times and on all days, there is no evidence that he worked excess hours claimed under his Statement of Claim paragraph 2. He was expected to report at any time. The contract did not say he was to work continuously, 24 hours in a

day. The Tally Sheets do not show that he worked 2 hours in excess over 3 years. There were only 3 Sheets, covering a few select days while the period claimed is 3 years. His period of service was 2 years, 5 months. It is not clear why his overtime pay is claimed on the basis of 3 years of service. Evidence of the prayers for 144 off days worked for 3 years, as well as 27 Public Holidays, spread over 3 years, while the Claimant worked from August 2010 to 30th January 2013, seems to this Court deficient and incapable of sustaining these prayers. The Court is not able to grant these prayers.

11. The Respondent did not justify termination, or show the decision was arrived at fairly, under Sections 40, 43 and 45 of the Employment Act 2007. The Claimant merits compensation for unfair termination. He is granted the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 150,000. He was paid notice, and years of service. Certificate of Service shall be released to the Claimant under Section 51 of the Employment Act 2007. Costs granted to the Claimant.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant compensation for unfair termination, the equivalent of the Claimant's 10 months gross salary at Kshs. 150,000.

c. Certificate of service to issue.

d. Costs to the Claimant.

Dated and delivered at Mombasa this 18th day of October 2016.

James Rika

Judge