



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1095 OF 2012

SAMSON NDIKA OLINGA CLAIMANT

VERSUS

JIKU BUILDERS LIMITED RESPONDENT

JUDGEMENT

Issue in dispute – unlawful termination of employment and non-payment of terminal dues/benefits

1. The claim was filed on 26th June 2012. Defence is not on file. On 13th May 2015, the Respondent advocates allowed to cease acting for the Respondent vide application dated 13th March 2015 as the Claimant was not opposed. The Respondent was served directly with hearing notice on 20th April 2016 and an Affidavit of Service sworn by Jackson Yanana filed on 16th May 2016.

2. On 28th April 2011 the Claimant was employed by the Respondent as a Carpenter within their construction site at Kshs.500.00 per day which was paid every end of week. There was no housing provided and no allowance in lieu thereof given as required at 15% vide Legal Notice No. 64 of 1st May 2011. That the Claimant was being underpaid by 66.26 shillings per day all being Kshs.463.82 per week and all being Kshs.1, 855.28 per month.

3. The Claimant was to work for 45 hours per week but was made to work for 51.5 hours a week all being 360 hour overtime in a month amounting to Kshs.24, 375.00. For 7 public holidays the Claimant was at work without the requisite pay and claim Kshs.12, 740.00.

4. The Claimant also testified in support of his case that upon employment by the Respondent on 24th April 2011, he was terminated on 2nd March 2012. He worked as a Carpenter form 7.30am to 5pm but was never paid overtime. On his last day at work, he was told by the site manager that there was no work. The Claimant asked for reasons as his fellow workmates were still working but no reasons were given. There was no prior notice or an indication that work had ceased. That this was not lawful as it was not true work got finished and the Respondent did not pay the dues for the termination. His workmates are still in the employment of the Respondent to date.

5. The Claimant testified in support of his claims set out in the memorandum of claim.

Determination

6. As no defence is filed to challenge the claims made by the claimant, the same shall be analysed on their merits.

7. The Claimant worked for the Respondent from 24th April 2011 to 2nd March 2012, a period of 10 months. Such employment was continuous and without a break. On such basis, by operation of section 37 of the Employment Act, the Claimant was a protected employee with rights and benefits of a full time employee.

8. Termination of employment is regulated under the provisions of section 35, 43 and 41 of the Employment Act. Before termination, an employer must issue notice accompanied by reasons for termination and where the reasons related to misconduct or gross misconduct, the employee must be given a hearing. Failure to comply with such procedural and substantive requirements of a termination of employment, the same becomes unfair under the provisions of section 45 of the Act.

9. Employees in each sector are protected through the law and Regulations which set out the wages payable and the effective hours of work and where there is requirement to work overtime, each sector/industry must comply with set regulations published by the Minister.

10. Based on the Wage Order in the Building and Construction Industry, Wages order, 2012 the Claimant as a Carpenter was entitled to a daily wage of kshs.502.00. Where the Claimant was paid kshs.500.00 per day, the underpayment was for Kshs.2.00 only all being kshs.12.00 per week and Kshs.48.00 per month. For the 10 months served, this amounts to Kshs.480.00 as due.

11. Work hours in the industry the Claimant was serving are 45 hours a week. The Claimant testified that he worked from 7.13am to 5pm all being ½ hour more than the stipulated time for each day. For each week this amounted to 3 hours and cumulatively 30 hours in total for the 10 months. Overtime pay is at 1.5 the daily rate and in this case, on a rate of Kshs.502.00 daily wage, the overtime due is Kshs.2, 823.75.

12. Leave is due to each employee serving continuously. Leave due to the Claimant for the 10 months based on the wage payable is 22 days all at Kshs.11, 044.00.

13. The Claimant is seeking pay for public holidays worked. He is seeking pay for 7 days. In evidence, the Claimant did not set out which public holidays were served at work. Despite there being no defence to challenge the claim, it is trite that public holidays in each year fall on different days of the week and the Claimant must justify his claim. It cannot be put in general terms.

14. Under the Wage Orders for the Industry, there is provision for tools allowance. A carpenter who is not issued with work tools is entitled to a tools allowance of Kshs.152.00 per month. In this case the Claimant is entitled and owed Kshs.1, 520.00 for time served.

15. An employee such as the Claimant was entitled to housing or a house allowance while employment continued. Where no housing was provided, the Wage Orders made provisions for a housing allowance of kshs.2, 277.00 per month. The Claimant is entitled to Kshs.22, 770.00.

16 . On the claim for costs, the claim and notices to the Respondent were by *K/S A.O Jacob Kenya Labour Consultant*, such is not a qualified entity for purposes of proceedings herein. No costs are due despite change to the claimant's current advocates. See **Timothy Munyaka versus M/s Nairobi Pacific Hotel Ltd, Cause No.4 of 2013; Mercy Kanini Lilian versus Ali Ishmael Mwangi t/a Tupelo Restaurant continental dishes, Cause No.71 of 2013.**

In conclusion, and based on the claims set out in the Memorandum of Claim; the Judgement is entered for the Claimant against the Respondent in the following terms;

(a) Notice pay for one (1) month at Kshs.15,060.00;

(b) Underpayments awarded at Kshs.480.00;

(c) Overtime pay awarded at kshs.2,823.75;

(d) Leave days' pay awarded at kshs.11,044.00;

(e) House allowance due at kshs.22,770.00;

(f) Tools allowance Kshs.1,520.00

Delivered in open Court at Nairobi this 25th day of November 2016.

M. MBARU JUDGE

In the presence of:

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