



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1606 OF 2013
MICHAEL OWINO ALEGO CLAIMANT
VERSUS
KABUITO CONTRACTORS LIMITED RESPONDENT

Mr. Kamotho for the claimant

Mr. Njuguna for the respondent

JUDGMENT

1. The claimant Michael Omino Alego was employed by the respondent as a mechanic. He earned a net weekly salary of Kshs. 2,640 per month after statutory deductions including NSSF and NHIF. The claimant alleges that the deductions were not remitted by the respondent between 2008 to 2010. The respondent is a construction company and the claimant worked in the motor vehicle workshop. According to him he was employed on 5th June 2008 after an interview. He filled an employment form. This translated to a daily rate of Kshs.650.
2. The claimant worked continuously until 21st August 2012 when he was told that there was no more work at 12 a.m. He was paid for days worked and told by his supervisor Mr. Mukesh to go home. He was situated at a workshop along Kangundo Road.
3. The claimant states that he was not given notice nor paid in lieu of notice. The claimant told the court that he worked daily from 7 a.m. to 6 p.m. for six days (Monday to Saturday). This translated to two (2) hours overtime daily but was not paid. The claimant also stated that he was not given leave nor was he paid in lieu of leave.
4. The claimant added that they did not work during holidays or during the Christmas period and were not paid for those days. The claimant denies that he was employed as a casual as alleged by the respondent or at all. The claimant added that they only signed a weekly sheet upon payment but did not clock in and out daily.
5. The claimant denies having signed an agreement in full and final settlement of all claims against the respondent produced by the respondent. He denied having received Kshs.16,500 on 9th December 2011 in full and final settlement. He denied receipt of other payments alleged by the respondent from pages 26 to 33 of the respondent's document.
6. The claimant denied having been notified of intention to declare him and other redundant. Attempt to settle the dispute failed. The claimant seeks the reliefs set out and in particular;

- i. That he be compensated for unlawful and unfair termination of employment.
- ii. That he be paid twenty one (21) days leave for every year served at a monthly salary of Kshs.19,500 in the sum of Kshs.54,600.
- iii. That he be paid overtime for years worked calculated at two (2) hours daily in the sum of Kshs.202,176.
- iv. That he be paid for holidays not worked in terms of the law since he was a permanent employee i.e. nine (9) days per year for four (4) years at Kshs.650 per holiday not served and not paid in the sum of Kshs.23,400.
- v. That he be refunded deducted but not remitted NSSF in the sum of Kshs.12,400 (Kshs.400 X 31 months).
- vi. Three months pay in lieu of notice Kshs.58,520.
- vii. Unpaid house allowance monthly in the sum of Kshs.140,400.
- viii. Punitive and aggravated damages.
- ix. Interest and costs.

Defence

7. The respondent filed a reply to memorandum of claim on 14th November 2013. The respondent in its defence states that by November 2011, it had run out of construction projects and it gave all its employees notice of redundancy dated 5th December 2011 upon completion of Thika – Magumu road project projected to be completed in February 2012. The works continued until 23rd March 2012 when the respondent issued KENHA with a notice of suspension of works on account of non-payment for works done as set out under paragraph 2 – 7 of the reply to the memorandum of claim.

8. That the claimant was employed by the respondent on a casual basis in November 2010 at the respondent's Nairobi yard as an ungraded Artisan serving as an assistant/junior mechanic. The respondent denies that the claimant was employed on 5th June 2008. The claimant was paid daily rates of Kshs.450 between November 2010 and July 2011; kshs.500 between August 2011 and January 2012 and Kshs.650 per day from February 2012 until August 2012 when he was laid off. The wages were paid on a weekly basis and were subject to mandatory statutory deductions.

9. The respondent therefore denies that the claimant was employed on permanent monthly basis as he claims or at all.

10. The respondent reiterates that the claimant was lawfully laid off upon completion of Thika-Magumu Road project in mid-August 2012 and notice was issued to all staff on 5th December 2011. The services of the claimant were pursuant to this notice discontinued together with all other casuals on 23rd March 2012.

11. On or around 14th May 2012 Kenneth made part payment of the outstanding certificates and the claimant was re-engaged by the respondent on a casual basis on the understanding that his employment would be terminated upon completion of Thika-Magumu Road project. This new engagement was after two months lay off which fact negates the claimant allegation that he had been in continuous employment.

Leave

12. The respondent states that the claimant was paid in lieu of accrued leave days as follows;

Year 2011

i. (22.5 days x 450) Kshs.10,125.

ii. Redundancy lumpsum Kshs.6,375.

Total Kshs.16500.

Year 2012

i. (2.5 days x 500) January to March Kshs.3,750.

ii. Service pay Kshs.3,375.

iii. Redundancy lumpsum Kshs.7,100.

Total 14,225.

May to July 2012

i. Leave pay for 6.5 days x 650 Kshs.4,225.

13. The claimant acknowledged receipt of the above payments and in full and final settlement of his terminal benefits.

Overtime

14. In response to the claim for overtime, the respondent states that, the claimant work was mechanical and no overtime was authorized for or worked by the claimant. The respondent therefore denies that the claimant worked from 7 a.m. to 6 p.m. daily as alleged or at all.

Holiday

15. The respondent states that the claimant was entitled to payment of actual days worked and no payment was due in respect of holidays taken and not worked.

NSSF refund

16. The respondent states that all NSSF deductions made were actually remitted from 2010 onwards. Evidence was tendered in this respect.

Certificate service

17. The respondent states that the certificate of service was duly prepared but the claimant declined to collect it. The same is tendered for collection at the firm's office.

Three months notice

18. The claimant denies that the claimant was entitled to payment in lieu of three months notice or any notice at all. The claimant was duly notified that the Thika-Magumu Road construction project would come to an end and he was entitled to not more than one month's notice or pay in lieu thereof in terms of Section 40 (b) and (c) of the employment Act, 2007.

Compensation

19. The respondent states that the termination of employment of the claimant and other casuals was lawful and the claim ought to be dismissed with costs to the respondent.

House allowance

20. The respondent states that the daily wage paid weekly to the claimant was inclusive of house allowance and therefore this claim has no merit and it be dismissed.

21. The respondent therefore prays that all claims by the claimant be dismissed for want of any merit. It is clear that the claimant was a casual and was not employed by the respondent continuously for four (4) years.

Determination

22. The issues for determination are as follows:-

- a) Whether the claimant was a casual employee from the year 2010 or was employed on a permanent and continuous basis for a period of four (4) years from 2008.
- b) Whether the termination of the employment of the claimant was lawful and fair.
- c) Whether the claimant is entitled to the reliefs sought.

23. The court will deal with the three issues together.

24. The respondent filed a notice of motion dated 17th March, 2015 on 19th March 2015 seeking leave to file supplementary list of documents and that he be allowed to further cross examine the claimant.

25. The application was granted. The respondent produced copy of a memorandum of claim in Cause No. 2349 of 2012 between Michael Owino Alego (the claimant herein) and Kenya Builders and concrete company Limited.

26. In this suit, the claimant alleges that he was employed by the respondent as a mechanic at a monthly salary of Kshs.15,000 on or about July 2009 and worked for the respondent continuously until August 2010.

27. The respondent became aware of this suit upon conduct of a random search of the claimant on the internet.

28. Counsel for the respondent cross-examined the claimant on this new revelation. The claimant acknowledged having filed this suit but states that he did not work for Kenya Builders and concrete Company Limited during the period July 2009 to August 2010.

29. The evidence completely destroyed the credibility of the claimant and he came across as a person who was not telling the truth to court. He came across as a person who would go to any length to unjustly enrich himself by making false monetary claims against two different employers for work done during the same period while at the same time alleging that he worked for the respondent in this case as a permanent employee and continuously.

30. The court in the circumstances beliefs the evidence by respondent vide RW1 Florence Awino, an accountant employed by Kabuito Contractors Limited, the present respondent that the claimant was employed by the respondent from November 2010 and worked intermittently as a casual until he was laid off upon completion of Thika-Magumu Road on 23rd March 2012.

31. The claimant was again re-engaged on 14th May 2012 after two (2) months period and left the employ

of the respondent in July 2012.

32. The court believes the oral and documentary evidence tendered by the respondent in respect of all the terminal benefits claimed by the claimant.

33. In this regard, the court is satisfied that the claimant having worked for the respondent from November 2010 to July 2010, was paid all monies due to him in respect of leave days not taken and house allowance which was embedded in the daily gross pay.

34. The claimant was upon termination paid severance pay in terms of section 40 of the Employment Act, 2007 as demonstrated in the documents tendered by the respondent.

35. Furthermore, the respondent has demonstrated that all NSSF dues deducted from the wage of the claimant was duly remitted.

36. Termination of employment of the claimant was upon completion of Thika-Magumu road project, in accordance with the law and practice in the construction industry.

37. The claimant and all other employees were duly and in good time notified of the anticipated expiry of the project. It is also important to note that the respondent at the time experienced delayed payments by the government and was justified to lay-off the staff towards the end of the project. The claimant was later shortly re-engaged to finalise the same.

38. Accordingly, the claimant has not proved that he is entitled to any of the reliefs sought except with regard to the claim in respect of unpaid holidays which the respondent admits did not pay the workers because they did not do any work during the holidays. This is wrong in law, the respondent having acknowledged that the claimant worked continuously between November 2010 to 23rd March 2012.

39. The court awards the claimant Kshs.23,400 in respect of salary for holidays not worked during this period.

40. The conduct by the claimant in bringing two (2) suits against two different employers for alleged work done during the same period is despicable and deserves censor. Having regard to this, the final orders of the court are as follows;

- a) The court awards the claimant Kshs.23,400 in respect of unpaid holidays with interest at court rates from date of filing suit till payment in full.
- b) The respondent to give the claimant certificate of service within thirty (30) days of this judgment.
- c) No order as to costs.

Dated and delivered at Nairobi this 4th day of November 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE