



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 214 OF 2012

CHARLES AGINI MUSODAH.....CLAIMANT

VERSUS

MANJIT SINGH SADHU.....RESPONDENT

JUDGMENT

1. The Claimant seek Judgment from this Court directed to the Respondent to pay him Kshs.737,606 as compensation for what he deems was wrongful dismissal for employment.
2. The Claimant in his evidence before Court stated that he was employed by the Respondent as a night guard from 3rd August, 2004 guarding Respondent's premises at a salary of Kshs.6,000/= which was increased gradually. The contract of employment was verbal.
3. According to the Claimant, in the course of his employment he requested for a pay rise since he was occasionally engaged in other chores apart from guarding which he had been tasked to do. It was his evidence that he worked up to 2011, May when his contract was terminated. According to him he was neither given a hearing nor a termination letter. The Claimant denied absconding work and that he owed the Respondent notice pay. He also denied owing any loan to the Respondent.
4. When asked about the vouchers, the Claimant denied signing any and stated that the signature on the vouchers were not his. He however on being asked by Court stated that he used to sign salary vouchers but he never saw them.
5. Concerning working hours, it was his evidence that he used to report to work at 5.30 p.m. and left at 6.30 a.m. and on public holidays he used to work from 5.30 p.m. to 8.00 a.m. the following day. It was his further testimony that he was never paid any house allowance.
6. In cross-examination, he stated that he was a night guard not a gardener. He denied that he only became a watchman in 2008. He further stated that he left work on 5th May, 2011 and not March, 2011.
7. Regarding his duties, he stated that apart from guarding, he was also used as a gardener, cleaner and dog caretaker. He conceded that he did not state these other duties in his statement of claim.

8. Asked why he never filed any response to the vouchers attached to the memorandum of response, he denied failing to do so and denied his evidence was an afterthought. He said he reported the forgery of his signature to the police.
9. The Respondent on his part testified that the Claimant was employed in 2004 as a gardener working during the day. According to the Respondent, the Claimant was not a watchman. He denied dismissing the Claimant for asking for a payrise. He stated that the Claimant wanted to be a watchman. The Respondent testified that the Claimant asked him for some Kshs.23,000/= for prayers which he gave and later he asked for Kshs.5,000/= on account of the fact that his father was unwell which he was also given. But upon giving him money on the last account, the claimant came back to the Respondent's premises drunk and was asked to go and sleep in his room.
10. According to the Respondent, he left for work the next day at 6.00 a.m. but when he returned later in the day he found the claimant gone and he never came back since then.
11. It was his evidence that he paid the Claimant Kshs.4,800/= as leave allowance for 24 days in 2005 and that the money advanced to the Claimant was treated as service pay.
12. The Respondent further stated that from 4th October, 2008, the claimant became a watchman and used to report to work at 6.00 p.m and leave around 4.30 a.m. when he would return to his room and sleep. He stated that there was a daytime gardener and watchman who would come and relieve the Claimant. He maintained that he never dismissed the Claimant and that he absconded duty.
13. In cross-examination he admitted that he never issued the Claimant with any written contract nor did he give him any payslip upon payment of his monthly dues. The contract of employment was verbal.
14. He stated that as a gardener the Claimant used to work then leave for home but as a watchman he was given a room to sleep after work.
15. He stated that the Claimant left work in March not May and that when he left work he never came back despite many calls that he should do so.
16. Concerning payment of wages, it was the Respondent's evidence that he was paid through the vouchers and that the Claimant always signed them. He denied the vouchers were doctored.
17. So much has turned on the question whether the Claimant was a night guard or a gardener or both however looking at the claim as filed the issue is that the Claimant was a watchman and his services were terminated in a manner he considered as unfair in that he was not given any notice nor a letter to show cause why he should not be terminated.
18. As much as there may be some semblance of divergence, it would seem that in the course of the relationship with the Respondent, the claimant at some point was a gardener and or a watchman. What may not be clear is whether he handled both tasks upon engagement or through transition from one to another.
19. The Claimant in his pleading does not allege that he was employed as a watchman yet paid the wages, of a gardener or that he handled both tasks yet paid only as a watchman. His claim for compensation as tabulated in his memorandum of claim is for terminal dues as a watchman.
20. In order to resolve this dispute therefore, the Court will consider the claimant as a night guard for the Respondent and proceed to assess whether the termination of his services was in consonance with the Employment Act and if not what would be the measure of compensation permissible by law.

21. Section 9 of the Employment Act requires that a contract of service for a number of days whose aggregate is three or more months shall be in writing. Section 10(7) of the Act further provides that in any legal proceedings, if an employer fails to produce a written contract or written particulars prescribed in subsection 1 the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer.

22. The Respondent in this case conceded that he never issued the Claimant with any written contract although they had been in employer-employee relationship since 2004.

23. The Claimant in his memo of claim seeks an order for payment of one month's notice, leave for 7 years, public holidays; house allowance, overtime, service and 12 month's compensation for wrongful termination of service. Apart from the 12 month's wage compensation which is a matter of discretion of the Court, in absence of written contract as stipulated by Section 9 of the Act and further considering the provisions of section 10(7) the Claimant's prayers are awardable by the Court in absence of proof to the contrary.

24. The Court awards the Claimant as follows:-

Kshs

| | |
|--|----------------|
| (a) One month's salary in lieu of notice..... | 8,500 |
| (b) Leave for 7 years | 59,500 |
| (c) Service..... | 25,000 |
| (d) 5 months' salary for wrongful dismissal..... | <u>42,500</u> |
| TOTAL..... | <u>135,500</u> |

25. The claims for off duty, public holidays, house allowance and overtime are not allowed since the Respondent reasonably demonstrated that the Claimant as a watchman was offered a housing and was only working at night and never worked during public holidays.

26. It is so ordered.

Dated at Nairobi this 6th day of February 2015

Abuodha J. N.

Judge

Delivered this 6th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge