



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 1690 OF 2012

PIUS TOBOSO MATENDECHERE CLAIMANT

-VERSUS-

JASWANT SINGH & BROTHERS LTD RESPONDENT

JUDGMENT

The claimant Pius Toboso Matendechere filed this case against the respondent Jaswant Singh & Brothers Limited alleging unfair dismissal. In the Memorandum of Claim dated 19th September and filed on 20th September 2012, the claimant seeks the following reliefs;

1. **The sum of Kshs 608,667.00 as particularized in paragraph 5 of this claim.**
- ii. **Exemplary damages**
- iii. **Cost of this suit**
- iv. **Interest of (i) and (ii) above**
- v. **Any other relief as the Honourable court may deem fit.**

The respondent filed its Memorandum of Defence on 13th November 2012 denying the claims.

The case was fixed for hearing severally when the case did not proceed due to the respondent's requests for adjournment. On 17th July 2014 parties agreed to attempt an out of court settlement which did not succeed. The parties appeared before me on 25th September 2014 when they agreed to make a final attempt at an out of court settlement failing which they would file written submissions. On 8th December 2014 parties confirmed that they had both filed written submissions. **Claimant's case:**

The claimant's case is that he was employed by the respondent on 14th November 2006 as a clerk and storekeeper at a monthly salary of Kshs 10,000/=. He served the respondent with loyalty and diligence until 28th November 2010 when the respondent terminated his employment without notice or lawful cause. The respondent also failed to pay his salary for October and November 2010. He seeks payment of Kshs 20,000/= being salary for October and November, 2010 Kshs 10,000 being pay in lieu of notice, house allowance for 48 months at the rate of Kshs 6,000/= per month, pay in lieu of annual leave for 4 years, service pay at 20 days salary per year worked and compensation for wrongful termination all totaling to Kshs 608,667/=.

The claimant avers that he was not issued with a letter of appointment contrary to the provisions of the law.

Respondent's Case:

It is the respondent's case that the claimant was employed as a store keeper from July 2008 at a gross salary of Kshs 9,300/=. The appointment was by appointment letter which the claimant signed. The letter set out the terms of the claimant's employment. The respondent averred that the claimant breached his terms of employment leading to the termination of his employment by letter dated 29th November 2010. The claimant's acts and omissions caused the respondent great loss.

The respondent admitted owing the claimant salary for October and November 2010 but denied that the claimant was entitled to notice as he had been dismissed summarily. The respondent denied owing the claimant house allowance as his salary was consolidated. The respondent further avers that between 2008 and 2010 the claimant absented himself without permission for 27 days, took leave of 5 days in 2009 and 13 days in 2010. The respondent admitted owing the claimant 33 leave days not taken.

The respondent denied that the claimant is entitled to service pay as he was a member of NSSF. The respondent further denied that the claimant is entitled to compensation as his dismissal was justified.

The respondent prayed that the claim be dismissed save for the admitted outstanding salary for October and November 2010 and annual leave of 33 days which the respondent sought leave to deposit in court.

The respondent further prayed for compensation for loss of property during the claimant's tenure as store keeper.

The respondent admitted being summoned to the labour office in respect of the terminal dues of the claimant. No agreement was reached at the meeting.

Determination:

The main facts of this case are not contested. The claimant was employed by the respondent as a store keeper. According to the claimant he was employed on 14th November 2006 and was not issued with a letter of appointment. According to a letter of appointment produced by the respondent the claimant was employed in July 2008. The letter does not contain a specific date in July 2008. The claimant was summarily dismissed from employment by letter dated 29th November 2010. The grounds of dismissal was loss of materials and equipments from the store which the respondent alleged was due to the claimant's negligence.

The claimant filed a labour complaint at Industrial Area Labour Office on 11th August 2011. The dispute was however not resolved at the labour office and the claimant filed this case by his Memorandum of Claim dated 19th September 2012 and filed on 20th September 2012. He prays for the following orders:-

- 1. The sum of Kshs 608,667.00 as particularized in paragraph 5 of this claim.**
- ii. Exemplary damages**
- iii. Cost of this suit**
- iv. Interest of (i) and (ii) above**
- v. Any other relief as the Honourable court may deem fit.**

In the respondent's written submission, it is conceded that the termination of the claimant's employment was not in accord with the provisions of the Employment Act. The respondent offers to pay the claimant the following;

- a. Salary for October and November 2010 - Kshs 20,000/=
- b. Salary in lieu of notice - Kshs 10,000/=
- c. Unpaid leave 33 days - Kshs 12,692/=

d. 3 months salary as compensation for

wrongful termination

- Kshs 30,000/=

TOTAL = KSHS 62,692/=

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The claimant however seeks payment of Kshs 608,667/= made up as follows;

- a. **Salary for October and November 2010**
- b. **Pay in lieu of notice of one month salary**
- c. **Unpaid house allowance for 48 months**
- d. **Pay for annual leave days for 4 years worked**
- e. **Service pay for 2 years (2007 & 2008)**
- f. **Compensation for 12 months salary for unfair termination**
- g. **Costs of the suit and interest till full payment**
- h. **Any other relief as the Honourable Court deems fit.**

The only issues I have to determine are therefore whether the claimant is entitled to the following:-

- i. **House allowance - Kshs 280,000/=**
- ii. **Annual leave pay for 4 years - Kshs 64,000/=**
- iii. **Service pay - Kshs 42,667/=**
- iv. **Maximum Compensation - Kshs 192,000/=**
- v. **Costs and interest.**

1. House Allowance:

The claimant submitted that he is entitled to house allowance as provided in Section 31(1) of the Employment Act. The respondent submitted that the Act provides for payment of consolidated wage inclusive of house allowance and that the claimant's letter provided that he would be paid a gross salary, that the salary was consolidated and the claimant was not entitled to a separate house allowance. The respondent relied on the decision of **Wasilwa J** in **Thomas Ndiege Oyugi V Riley Falcon Security Services [2013] eKLR**. The respondent further submitted that the claim was an afterthought as it was not included in the claim made by the claimant in his labour complaint to the labour office.

The claimant was paid a gross salary for the entire period he was in employment. There is no evidence that he ever asked for payment of house allowance during the tenure of his employment. This means he was aware that his salary was consolidated. This fortified by the fact that the claimant did not demand payment of house allowance in his labour complaints.

I agree with the decision of **Wasilwa J** that an employee paid a consolidated wage is not entitled to house allowance in addition as the salary is inclusive of house allowance. A gross pay means the salary is inclusive of all allowances including house allowance. I find that the claimant has not proved and is therefore not entitled to house allowance as his salary was inclusive of the same.

2. Pay in lieu of Annual Leave

The claimant prayed for payment in lieu of annual leave for 4 years. The respondent did not deny that the claimant never went on annual leave but stated that he absented himself from work for a total of 27 days between 2008 and 2010 and took leave of 5 days in 2009 and 13 days in 2010. It offered to pay for the balance of 33 days at Kshs 12,692.30.

No evidence was submitted by the respondent to prove that the claimant either absented himself from work or took leave in 2009 and 2010. Section 74(i) (f) requires employers to keep records "of an employee's annual leave entitlement, days taken and days due specified Section 28." In the absence of such records to prove that the claimant took leave, I find that he is entitled to annual leave of 78 days being the 33 days admitted, the 27 days alleged to have been recovered from leave when the claimant absented himself without permission, and the 18 days alleged to have been taken as leave. This would amount to Kshs 30,000/= using the formula of the respondent as follows:-

$$\underline{10,000} \times 78 = 30,000$$

26

I award the claimant the said sum of Kshs 30,000/=.

3. Service Pay

Service pay is payable under Section 35(50) as read with 35(6) of Employment Act. The claimant admitted that he was a member of NSSF as demonstrated by the respondent in the annexed remittance advises. The claimant is therefore not entitled to service pay and the prayer is dismissed.

4. Maximum Compensation

The respondent offered to pay compensation of 3 months salary in view of the admission of unlawful termination. The claimant however prays for maximum compensation of 12 months salary.

In view of the length of service of the claimant, and taking into account all the relevant circumstances of the case and the provision of Section 49(4) of the Act I award the claimant 6 months salary as compensation in the sum of Kshs 60,000/=.

Costs and interest

The respondent shall pay the claimant's costs. The decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

Dated and signed at Kisumu this 16th day of June, 2015

MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 7th day of July, 2015

HELLEN WASILWA

JUDGE

In the presence of:

N/A..... for claimant(s)

N/A..... for respondent(s)