



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1261 OF 2013

CAVINE OUMA WERE.....CLAIMANT

VERSUS

PIONEER PLUMBERS LIMITED.....RESPONDENT

JUDGEMENT

1. The issues in dispute herein are the unlawful, wrongful and unfair termination of the claimant's employment and the non-payment of his terminal dues.

2. The claimant's case is that from August 2008 he was employed by the Respondent as a general Labourer working as a Plumber on a daily basis kshs.250.00 which was increased to Kshs.356.00 over time until his termination in June 2011. At the time the Claimant asked for permission to attend to the burial of his mother which was granted but during the burial, his sister also dies and he called the Respondent through the Foreman seeking extension of leave to enable him attend the second burial. Upon return to work the Foreman told the Claimant to report to the head office where he was informed that he had been terminated. That this was unfair as the Claimant was away for lawful course and no notice or warning had been issued. The Claimant is seeking;

a. One month salary in lieu of notice at kshs.13, 110.50;

b. Lave days at Kshs.33, 028.38;

c. 2 years gratuity at kshs.16, 136.00;

d. Underpayments at Kshs.52, 136.00;

e. Compensation at Kshs.181, 530.00; and

f. Interest and costs.

3. In evidence, the Claimant testified that he learnt of employment at the Respondent firm through his cousin and was taken as a casual. He commenced work in August 2008 but he was never issued with a letter of employment. He was paid a daily wage every Saturday. In July 2011 his mother died and was given permission to attend the burial. While at the burial, his sister died and he called the Foreman who allowed him more time away. The Respondent officer Mr Asin was informed by the Foreman. Mr Ochieng was the Foreman and he confirmed that permission had been granted. After reporting back, the Claimant was asked by Ochieng to go to the head office but the secretary told him to go away and leave

his number and would receive a call but he was never called. He decided to go back to the office but was not allowed to the premises. There was no notice or reasons given for being kept away from his work.

4. Upon employment he was deployed at Mogotio Road Westlands to do plumbing duties at a construction site and was later moved to langata Road at Galaria in Karen area. The worksheets do not have the Mogotio road site but this was his starting point. He remained at the Respondent from 2008 to 2011 in continuous employment.

5. The Claimant also testified that he went to the Labour Office to seek advice and when the Respondent was summoned they refused to attend. Further demands were made where the Respondent paid Kshs.25, 000.00 instead of kshs.115, 194.00 that was due to the claimant. Upon the labour officer noting that the Respondent had paid the wrong amount, they wrote to the Respondent but they refused to pay the difference. The Claimant is thus seeking the balance due at Kshs.89, 494.88.

6. In cross-examination, the Claimant stated that while at Galaria area he was supervised by Christopher who was the Foreman in charge. He was given permission to go home by Ochieng but never called Aswin to seek time off. The Claimant could not recall when his mother died and when he asked for time off to attend the burial. He was however given a week off to attend but while away he lost his sister and asked for extension of time which the foreman granted.

Respondent's case and Counter-claim

7. In defence the Respondent admitted that they had employed the Claimant but as a casual labourer when he assisted the plumber from 25th September 2010 to 11th March 2011 when he absconded duty. The Claimant did not give notice before absconding only to return later and when he was allocated new duties he refused to attend. When the Respondent was summoned at the labour office, such details were noted.

8. The Respondent also stated that the Claimant remained a casual for the 6 months he was in employment. The Claimant did not apply for leave and absconded duty, he was not terminated and when he came back he refused deployment. The Respondent was made to pay Kshs.25, 000.00 by the Labour Officer to avoid back and forth and the threat that had been issued of filing suit and other sanctions.

9. In counter-claim, the Respondent is seeking the repayment of kshs.25, 000.00 paid to the Claimant to settle the matter under threat. This money was paid to avoid sanctions that were not lawful and should be repaid back.

10. In evidence, the Respondent called Muthya Zumbi a Plumber employed by the Respondent and has worked with the Respondent for over 30 years. In 2010 he was working with the Respondent as the site foreman at Galleria mall. He was in charge of the project. The Claimant was not part of the project. The previous projects done by the Respondent he was aware and the Claimant was not there. The Claimant was only employed to dig trenches and not as a plumber. He started in September 2010 to 4th January 2011 based on records. He was in charge of the Claimant at the site and he was only a casual.

11. The second witness called was Ashwin Patel working in Stores as Supply materials. He did not send the Claimant away and he was never the secretary of the Respondent with duties of allocating work and did not direct casuals at the site. Christopher Muthya was responsible as foreman at the various sites. He had no authority to terminate any employee as he is also an employee.

12. The third witness was Christopher Mubea the Respondent Site Superintendent. His duties are to visit the construction sites and to draw and design for the plumbers. At each site there are three people who are involved – foreman in charge of casuals and the plumbers, the site Superintendent and the managing director who can visit the sites at any moment. The claimant herein was at the site in 2011 at Galleria project and Karen. He was under the foreman. The claimant did not report to work in 2011 and new casuals were taken. All hiring was done by the foreman. Ashwin Patel is not responsible for hiring or firing as he is a Store Keeper for the respondent.

13. The 4th witness was Zulfikar Miyanji the accountant for the Respondent since October 2009. His duties are to make payments and management of the Respondent accounts. Once the employees are paid, the Respondent has a schedule that each has to put thumb mark. This was necessary as some employee disputed their signatures and it became a problem and a thumb print is unique hence its use. Each employee is issued with a card that the foreman has details. When the employee is absent, the records indicate as much. The Claimant started work on 25th September 2010 at the Galleria project. He remained at work from this date to 11th March 2011.

14. The witness also stated that on 4th July 2011 he received a letter from the labour office to which he replied and subsequent letters advised Respondent to pay Kshs.25, 700.00 failure to which sanctions would follow. The Respondent did a cheque for the amount but later received another letter that there was an error and advised that Kshs.89, 450.00 should be paid. There was no justification to the new demands and the Respondent opted to have the matter addressed by the court. The payment of Kshs.25, 700.00 was not in admission of the Claimant but to avoid any sections from the labour Offices. The Respondent has thus filed a counter-claim for this amount which should be repaid back by the claimant.

Submissions

15. Only the Claimant filed their submissions on 15th July 2015. Despite directions on 30th June 2015 for both parties to file submissions, the Respondent did not comply.

16. The Claimant submitted that under section 10 of the Employment Act the Claimant was not issued with an employment letter or contract with particulars of his duties. Employment commenced in 2008 and confirmed by the letter of the Labour officer issued to the respondent. The Claimant was not a casual employee s this changed upon serving for a long period.

17. The Claimant also submitted that he was granted permission by the Forman Mr Ochieng to attend burial at home and while at home he also lost his sister when he called the foreman seeking extension of time. He was however chased away upon resumption of duty. He was not issued with notice or given any reasons for the termination. That while employed by the Respondent his NSSF dues were not paid for in violation of his rights as an employee. The Claimant is thus entitled to notice pay and compensation; leave days, gratuity and underpayments.

18. The Claimant also submitted that the counter-claim should be dismissed.

Determination

19. The respondents admit that they had employed the Claimant as a casual for 6 months from 25th September 2010 to 11th March 2011. This is contested by the Claimant who stated that he was employed from August 2008 to June 2011. It was the evidence of the Claimant that he commenced work with the Respondent and was deployed at Mogotio Road site for plumbing duties but he could not recall who his work colleagues were or the dates of such employment. What is clear is the Labour Officer in an effort to resolve this matter intervened and asked the Respondent to produce work records with regard to the Claimant vide letter dated 29th September 2011. In reply the Respondent shared documents and asserted employing the Claimant as above. The Claimant on this note does not pursue the issue of his work duration and his inability to recall the applicable dates do not aid his case. I take it from the records and the labour Officer records that employment dates were settled as from 25th September 2010 to 11th March 2011.

The submissions by the Claimant that the letter of the Labour Officer confirmed the date of employment of the Claimant by the Respondent is not correct. It is not for the labour Officer to confirm such dates, the duty was on the Claimant to state and assert his date of employment noting that this was a contested issue by the respondent. In the absence of any such confirmation, the records made available to the Court indicate employment as running from 25th September 2010 to 11th March 2011.

20. Casual employment is regulated under section 37 of the Employment Act. Where an employee remains under casual terms for a period exceeding 3 consecutive months and the nature of work done on daily basis does not end, such casual employment is converted to full time work by operation of the law.

21. The Claimant testified that he was employed as a plumber, first at mogotio road site, then at langata and galleria site and then Karen sites. His duties of a plumber are not clarified. What is clear is that he was employed on casual basis and from the records of the respondent, he was paid on weekly basis for digging trenches to install pipes. The duties of digging trenches for piles installation is not synonymous with one being identified as a plumber. Plumbing duties require the skill and ability for the position. The differentiations are however crucial as from it the Claimant is seeking underpayments for the position of a plumber as against that of a casual general labourer as paid for by the respondent. This is the claimant's case and the duty was upon him to prove it and in the absence of clear evidence in this regard, I take his evidence under oath when he testified as said that he was a general labourer working as a plumber. It can only be one and not either. The Claimant was thus a general labourer who commenced work as a casual and by application of section 37 of the Employment Act, this became full time employment.

22. The Claimant is seeking that he was terminated unfairly as he was not given notice or reasons for the same. It was the claimant's evidence that he travelled home to bury his mother, he was given permission by Mr Ochieng his foreman and while at home he lost his sister and sought extension of time through Ochieng. The Respondent secretary was aware of what had happened. The Claimant was however not clear as to when all these matters arose, the time he asked Ochieng for permission to go home for burial or even when he asked for such time exertion to attend to a second burial. This is clearly a case of a witness who was unable to articulate his own case well and even when given the benefit of not having any records, certain events that are outstanding as to when he travelled home for burial, details that are crucial in this case, the evidence remained hazy. The assertion by the Respondent that the employment period was from 25th September 2010 to 11th March 2011 should have alerted the Claimant to do his dates checking carefully to ensure that he had a clear outline of events. This he did not make any investment in.

23. What the Court is left with is that from 11th march 2011, the Claimant remained away from work and only came back sometime in September 2011 when the communication from the Labour Officer was sent to the respondent. There is not clear record of events from March 2011 to September 2011. Where was the Claimant within this period? The Court is left with unanswered questions and a gap the Claimant failed to fill.

24. In defence the Respondent state that the Claimant absconded duty. This is correct as by failing to account for the time from March to September 2011, the Claimant lost crucial records in support of his case. Where he was given time off to attend burial by Ochieng, this was for a week and the said extension was for 4 days. This does not fill the gap of over 5 months. Where the Claimant left for burial and took longer than had been allocated, there was nothing wrong for him to write to the Respondent and state that much. He cannot have kept out of employment for a period of over 5 months and expect to find his job waiting! Despite not having a written contract or letter of employment, the law can only protect the Claimant to a given extent. The time he remained in employment as a casual, where such time was continuous and unbroken, such time is protected.

25. In this case therefore, the Claimant cannot claim notice pay or a termination letter whereas he is the one who was away from his workplace for a long period without notice to the respondent. Notice pay or compensation is not due.

26. For the duration the Claimant was at work he was entitled to full pay, the underpayment claimed for a plumber is not due, what is due is payment pay for casual work in the construction sector and the wage guidelines is a daily rate of kshs.416.00 for 2011 and covering the period the Claimant was under the employment of the respondent. The Claimant testified that he was paid kshs. 356.00 As his last wages making a difference of kshs.60.00 per day. For the duration of 3 months when the Claimant was on full time employment the rate of kshs.416.00 shall apply and the due amounts in underpayment is awarded at kshs. 5,400.00.

27. Gratuity though claimed is not due as the Claimant had only served for less than one year. Such will not be awarded.

28. Leave is claimed for 2 years. On the basis that the Claimant remained out of work for durations long as not to warrant notice pay, and having failed to give notice of his long absence, to award leave for the half year served would be an injustice. This shall not be awarded.

Counter-claim

29. The Respondent is seeking the refund of Kshs.25, 700.00 paid through the labour officer. The Claimant did not outline how the computation of the claimed amount under the labour office arose. The payment of Kshs.25, 000.00 is not justified and to base the same of terminal dues that have no evidence is to benefit from a flawed process. This monies should be repaid back to the respondent.

30. This being a labour claim the due amounts owed to the Claimant at kshs.5, 400.00 should be subtracted from what has been paid by the claimant. The balance due is owing and outstanding.

In conclusion therefore, the claim is dismissed save that the Claimant is held entitled to kshs.5, 400.00 in underpayment. Judgement is entered for the Respondent for the refund of kshs.25, 700.00. What is due to the Respondent shall be less the stated underpayment. Each party shall bear their own costs.

Delivered, dated and signed in open Court at Nairobi this 10th August 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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