



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

AT NAIROBI

CAUSE NO. 717 OF 2013

DANIEL OUMA ORAWO.....CLAIMANT

VERSUS

MIDROCK WATER DRILLING COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination of the Claimant and failure to pay terminal benefits.
2. The claim is that the Claimant was employed on 15th September 2007 by the respondent, a company doing construction work of drilling water wells in arid areas and has go-down offices in industrial area in Nairobi. The Claimant was the Senior Water Driller and was paid Kshs.14, 500.00 per month and was increased to Kshs.21, 628.00 until 11th October 2012 when he was terminated. That before the termination he was not given notice or the reasons for the same and is seeking the following;
 - a. *2 months' notice pay*
 - b. *130 days of annual leave for 5 years*
 - c. *12 months compensation*
 - d. *Gratuity for 5 years*
 - e. *3600 hours of work overtime*
 - f. *3840 Sunday work*
 - g. *880 hours public holidays worked.*
3. In evidence to support his case, the Claimant testified that he diligently served at the Respondent but was chased away on 11th October 2012 without pay for 3 months – July, August and September. He was kept on half (1/2) pay while he was at the site in Turkana where he was told to come to Nairobi for the drilling machine. His family was in Nairobi and had to keep a house in Nairobi and another one at the site. He was only paid Kshs.4, 000.00 and the balance is due. That there is a balance of Kshs.9, 000.00 for July 2012.
4. The Claimant also testified that while he was at the drilling site, he was paid a bonus because he

would be at work from 1am to 6pm for a whole week without a break. No overtime was paid and for 5 years he did not take leave.

5. The Claimant challenged the defence that he did not steal any property of the Respondent as no such matter was brought to his attention. When the alleged property got lost he was stopped at work and was recalled back on 29th March 2013. The Respondent wanted the Claimant to resume work. That he refused to work until his unpaid dues were settled. That he wants to be paid his overtime; pension; notice at 2 months and compensation.

6. In cross-examination the Claimant confirmed that he was working at various sites all over the country especially in the arid and semi-arid areas in North Kenya in the company of 5 other employees of the respondent. While at work they all had a lunch break, he would be in the head office in Nairobi at the workshop where he would report at 8am and his role would be to oversee the mechanical work on the drilling machines. He would take up to 2 months at the workshop. He was employed as a Driller but would help the Mechanic while in Nairobi.

Respondent's case

7. In defence the Respondent stated that they had employed the Claimant but deny the claims as outlined. The Claimant was not terminated unfairly and thus not entitled to notice pay at 2 months' salary. The Claimant took his 21 days annual leave; he absconded duty and no gratuity is payable and only worked for 45 hours a week and no overtime pay is owing. All staff rest on weekends and public holidays and none can claim for such pay including the claimant. Sometime in October 2012 the Claimant was suspected of having stolen property worth 21 million and was dismissed. On 14th March 2013 the Respondent re-employed the Claimant after discovering that he was not involved in the theft and was required to assist with investigations. The due salary was agreed at kshs.96, 900.00 for the period of 11th October 2012 to 14th March 2013 of which the Claimant was paid 50% and 50% was to be paid upon resumption of work. Upon the payment of 50%, the Claimant disappeared and failed to report back to work. Despite being called to resume duty, the Claimant failed to do so and eventually he absconded duty. There was no termination and hence no claim is due.

8. In evidence, the Respondent called Oliver Oduor their Operations Manager as their witness. He stated that he worked with the Claimant who was a Driller and would be sent to various sites in Northern Kenya. He would work according to the Respondent policy from 8am to 5pm with a lunch break. Noting the hostile weather in Northern Kenya, the Respondent would ensure their employees worked within the required timelines and take the necessary breaks. In the course of his work, the Respondent lost property worth 21 million Kenya shillings but upon investigations, the Claimant was found not culpable. He had been verbally dismissed on 11th October 2012 and was later recalled back. It was agreed that the arrears due should be paid at 50% as the Respondent was suffering from liquidity problems but once the Claimant received his 50% he never reported back to work. The Claimant was also paid Kshs.12, 300.00 as an advance, he signed the re-appointment letter but he absconded duty. He was terminated on 14th April 2013.

Submissions

9. Only the Claimant filed written submissions despite both parties agreeing to do so on 14th July 2015. On 11th August 2015, the Respondent was absent from Court and despite the Court during that such submissions be filed by 14th August 2015 no written submissions had been filed.

10. The Claimant submitted that the Claimant was dismissed by the Respondent over alleged theft but was absolved and recalled back to work but his arrears were not paid. The Respondent then admit withholding the dues in arrears where 50% was paid. There is an admission of owing Kshs.48, 450.00 and this should be awarded as held in **Moses Ojanji versus Wasso Security Co. Ltd, Cause No.2820 of 2012.**

11. The Claimant also submitted that due process was not followed in his termination contrary to section 45(20) of the Employment Act. Before termination the Claimant was not heard or given a chance to give his defence a fact admitted by the Respondent when they called the Claimant back to work to assist in investigations over the alleged theft. Such failures cannot be addressed by re-employment as the Respondent purported to do.

12. The claim for leave and overtime are due as the duty is on the employer to prove that indeed such leave and overtime were paid or taken. In this case, the Claimant was emphatic that he did not take his leave and he worked overtime. The Claimant is also entitled to service pay for every year worked as he was terminated for reduced work.

Determination.

13. A variety of issues were raised in this case. First the Claimant stated that he was terminated from employment on 11th October 2012 over alleged theft. He was recalled back to work on 14th March 2013 but he refused to resume duty until his arrears were paid. Therefore from 11th October 2012, the Claimant never rendered any further service to the respondent.

14. On their part, the Respondent admit that indeed they wrongly terminated the Claimant on 11th October 2012 but upon such realisation, they re-employed him back and offered to pay arrears of Kshs.96,900.00 in two instalments. However upon the Claimant being paid 50% and a further advance of kshs.12, 000.00 he did not report back to work and has since absconded duty.

15. In these circumstances, the Claimant is seeking payment for notice pay; annual leave; gratuity; overtime; public holidays worked; Sundays worked and compensation. The issue of salary arrears due only arose at the point of submissions. Salary arrears is not a matter that has been outlined in the claim.

16. I note the claim was filed by the Claimant in person, the demand letter is drawn by *A.O. Jacob Kenya Labour Consultants*, of P.O. Box 74014-00200, Nairobi, the same address the Claimant has stated to his address of service. This person called *A.O. Jacob Kenya Labour Consultant* is not an entity to be entertained by this court, this has been a matter of concern in previous proceedings before this Court and the same arises here. See **Timothy Anyika Munyeka versus M/S Nairobi Pacific Hotel, Cause No.4 of 2013**. Where such a non-entity has drawn pleadings or issued a demand notice, once the legal representative such as the claimant's advocate herein came on record, the right thing to do was to amend the pleadings and ensure that they were in tandem with the claim or claims the Claimant wished to pursue. To leave the pleadings as they are drawn or facilitated by a non-entity, even where the claim is filed in the name of the claimant, the glaring errors are apparent.

17. On the claim as framed, it is trite that before termination, the provisions of section 41 of the Employment Act must be followed. The employee must be issued with notice of the misconduct committed even where the employer intends to summarily dismiss such an employee. In cases where there is no such notice and the employee is terminated the resultant issue of unfairness of such a process is apparent. In this case however, the Claimant was terminated apparently due to alleged theft. Such is a serious issue for an employer to allege and to proceed and terminate an employee. To recall or re-employ such an employee after undertaking investigations and upon realisation that such an employee is a potential witness and not the thief is further evidence that indeed due process before termination is important. Where the employer suspects an employee to have stolen, or grossly misconducted self, suspension is allowed pending investigations and once such investigations reveal that the employee was not responsible, then recall back to work is allowed as held in **Frederick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR** and also reiterated in a similar case of **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the Court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response.

Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

18. What is important to show is that in each case, an employer respects the rule of law. Due process thus requires that once an employee is placed under suspension, such an employee must be recalled to show cause and where such show cause is issued, fair administrative action must comply with the provisions of section 41 of the Employment Act. The employee must be heard in person and in the presence of his representative. Such a provision is mandatory and not subject of any alteration by any policy or law that is contrary to the Employment Act, 2007. See **David Kenani versus The AG & Another, Cause No.933 of 2013.**

19. In this case therefore, the termination of the Claimant by the Respondent so as to commence investigations is an unfair labour practice contrary to article 41 of the Constitution. This also goes contrary to the clear provisions of section 41 of the Employment Act and thus unfair as under section 54 of the Act.

20. The termination of the Claimant on 11th October 2012 was therefore unfair. The recall back to work does not cure the same. The re-employment should have been on new terms and the agreement to pay for the time away while he Claimant had been terminated is neither here nor there. Once the Claimant was terminated on 11th October 2012, his terminal dues became due and owing as at the date of termination. A new employment should have commenced on 14th March 2013. When the Claimant failed to report back to work, this should have been treated as separate misconduct and not be related to a contract that had essentially been terminated.

Remedies

21. On the finding that the Claimant was unfairly terminated, compensation is due. This shall be awarded based on his last pay at kshs.21, 628.00 for 3 months.

22. The claim for notice pay on a finding that the termination was unfair due to the non-issue of notice is due. There was a contract of employment that stipulated notice period for termination at one month. I find no rationale for a claim for two months' notice pay. This shall be awarded at one month at kshs.21, 628.00.

23. A claim for annual leave. Leave is not earned when one travels to the rural home. The Claimant cannot claim for any leave simply because he was never able to go to his rural home in Isebania. Where his family remained in Nairobi and he was able to take time off or leave to be in Nairobi and not Isebania, such leave was utilised for the same purpose. The choice on how to use leave was on the Claimant and not on the Respondent as the employer. However, the duty is upon an employer to keep a record of leave days taken and where such is claimed, in response or reply in defence, an employer should attach such a record. I find no such record here to confirm that indeed the Claimant took his annual leave or that he was paid in lieu of taking such leave. Section 28 of the Employment Act is however clear with regard to an employee claiming his annual leave, this should not go over and above the 18 months period. In this case I shall only award such due leave at kshs.43, 256.00.

24. Service pay and or gratuity is due as under section 35(6) of the Employment Act. On the other hand a claim for severance pay is only due under section 40 of the Act in cases of redundancy. In cross-examination, the Claimant admitted that the Respondent paid his NSSF dues. In such a case gratuity or service pay is not due and I also find that this was not a case of redundancy. There shall be no award for service pay; gratuity; or severance pay. Such is declined.

25. The claim for overtime pay is on the basis that the Claimant worked from 7am to 6pm. The Claimant testified that he worked at various sites all over the country but would be vocationally at the head office when a machine broke down. Such period would last for up to two months as the mechanics worked on

the machine. While at the head office he had no specific role other than to oversee the mechanics at work. It is therefore not clear how the overtime hours of 5400 have been computed or arrived at. Such a claim is for the Claimant to articulate and cannot be left to the Court to assume. On cross-examination, the Claimant admitted that he worked in a team of 5 other employees, the drilling work involved other such employees and he could not do it alone. The Respondent witness also testified that they have a work place policy on work hours and noting the hostile weather in the areas where they have drilling work, they had to ensure their employees were taken care of. This then raises doubts in the claim for overtime. Without clarity by the claimant, this shall be declined.

26. Work for Sunday and public holidays, though claimed and noting above assessment for overtime, the duty rests with the Claimant to prove the same. He cannot just pick all Sundays in a calendar year and claim to have worked on such time. Account must be clearly given particularly where he notes that he would have work at the head office in Nairobi for periods of over two months. To claim work for Sunday or public holidays without stating which such Sundays or public holidays he was at work lacks merit. This is declined.

27. Demand was done by M/S Jacob Kenya Labour Consultant, this is not a trade union, an advocate or a person defined as having *locus standi* before this court. Costs shall not be awarded.

Conclusion

Judgement is entered for the Claimant in the following terms;

- a. **Compensation at kshs.64, 884.00;**
- b. **Notice pay at Kshs.21, 628.00;**
- c. **Leave pay at kshs.43, 256.00;**
- d. **Costs shall not be awarded.**

Delivered, dated and signed in open Court at Nairobi this 28th Day of September, 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant - Lilian Njenga

Said h/b Wangira for the Respondent

Okemwa for Claimant Absent