



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2094 OF 2014

PETER KIHICO CLAIMANT

VERSUS

BLESSED T. C WORLD-CLASS SPARES LIMITED RESPONDENT

JUDGEMENT

1. The issues in dispute is the unlawful and unfair dismissal of the Claimant and the non-payment of terminal dues and compensatory damages

2. The Memorandum of Claim was filed on 21st November 2015. The Respondent entered appearance on 16th December 2014 and filed their defence on 14th January 2015. Hearing date was allocated for 24th September 2015, the Respondent advocates were served but did not attend. The Claimant filed an Affidavit of Service sworn by Geoffrey Anami and filed on 21st September 2015 noting the Respondent was served on 13th March 2015. Hearing proceeded on the basis that the Respondent were aware of the hearing and opted not to attend. After the hearing, the court directed the Claimant to issue a mention notice to the Respondent to confirm filing of written submissions. Such notice was served upon the Respondent on 26th October 2015 but they remained absent on 29th October 2015.

3. The claim is that in May 2009 the Claimant was employed by the Respondent as a General Labourer and worked as such continuously at a salary of kshs.9,000.00 until his termination. That this was below the legal minimum for Nairobi County which is kshs.13, 202.00 per month as under legal Notice No.196, regulation of wages order 2013. On 24th July 2014 the Claimant was summarily dismissed without notice or being given the reasons. This was in violation of the claimant's rights and constitutional provisions. There was no show cause letter as to why the Claimant had to be summarily dismissed; there was nothing wrong to warrant the summary dismissal; there was no notice given to enable the Claimant explain anything that may have arisen; and the summary dismissal was extremely hash and unwarranted as he had served the Respondent for 5 years without any disciplinary case.

4. The Claimant is seeking;

- a. *notice pay at Kshs.13, 202.00;*
- b. *Payment in lieu of untaken leave from 2009 to 2014 at kshs.66, 010.00;*
- c. *Service/gratuity for the period of employment at kshs.33, 005.00*
- d. *House allowance for the period of employment of 63 months at kshs.124, 759.00*
- e. *Salary underpayment based on statutory minimum June 2011 to august 2013 at kshs.32, 214.00*
- f. *Underpayment September 2013 to September 2014 Kshs.50, 424.00*
- g. *Unpaid public holidays for 10 days a year at Kshs.22, 003.00*
- h. *Compensation for 12 months at Kshs.158, 424.00.*

5. The Claimant made demand to the Respondent but there was no response. The Claimant is thus seeking his terminal dues together with costs and interest.

6. In evidence the Claimant stated that upon employment by the respondent, he had duties of a messenger and salesman – the two roles combined since 2009 until 24th July 2014. On his last day he reported to work as usual and at 0800 hours he found his boss Ignatius Togu at work and he had left his colleague with a message, Ezekiel Mburu. The Claimant was directed to his place of work, but Ignatius asked Ezekiel to go to the stores and get some stocks while the Claimant was asked to leave. The Claimant protested but his boss was adamant without giving any explanation. He was told to go home and wait for a call. After 7 days he got his salary of kshs.9, 000.00 through Mpesa.

7. The Claimant also testified that he was never called back to work and the only payment he received was not inclusive of his terminal dues. The summary dismissal was not warranted as he had no notice, warning or given any reasons for the same. His dues were not paid despite the unlawful summary dismissal. His salary was underpaid; no NSSF or NHIF were paid; and he never took any annual leave for the entire duration he was employed by the respondent. He would report to work at 0730 hours and only leave after 0600pm Monday to Saturday without being paid any overtime. His salary was paid in cash and did not sign for it and could not tell how the Respondent accounted for it as no contract of payslip was issued. All public holidays found the Claimant at work without extra pay. Since his summary dismissal he has not been able to secure new employment as a Certificate of Service was not issued.

Defence

8. The defence filed by the Respondent is that there is no proof of employment between the Claimant and the respondent. That the Claimant being a casual labourer earning a daily wage was not entitled to leave, overtime pay, payment in lieu of notice, gratuity and any other benefits claimed.

Submissions.

9. Upon the close of his case, the Claimant submitted that this was a case of summary dismissal without the Claimant being afforded the reason, notice or a hearing. The Claimant reported don duty on 24th July 2014 only to be told to leave and never to be seen at the Respondent premises. He was later paid through Mpesa for July 2014 and no terminal benefits have been paid. Section 41 of the Employment Act was not followed and this was unfair termination. The Claimant is entitled to notice pay; leave pay as he never took his annual leave; house allowance; and compensation for unfair termination.

Determination

10. The evidence on record is that the Claimant was employed by the Respondent from May 2009 to 24th July 2014. He was in continuous employment without any break. Section 37 of the Employment Act thus apply and such employment converted to full time employment with all the requisite benefits of the law. Where there was no written contract of employment between the parties herein, which written contract of employment should have been issued by the Respondent as the employer, the employee, and Claimant cannot be faulted for the same. The non-issuance of such a document works to the advantage of the Claimant as all the legal entitlements must be read as per the applicable law.

37. (1) notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

the contract of service of the casual employee shall be deemed to be one where wages are

paid monthly and section 35 (1) (c) shall apply to that contract of service.

(2) ...

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee. [Emphasis added].

11. By operation of section 37 read together with section 35 and 41 of the Employment Act, before the Claimant was terminated for any misconduct, he was supposed to be given notice, hearing and a chance to be heard in his defence. Where the Respondent failed to comply with mandatory provisions of the law, the same became an unfair labour practice contrary to section 45 of the Employment Act. In this case the Claimant reported to work in the morning and his supervisor Ignatius told him to stop work and go home he would be recalled. This never came to be as what the Claimant received was his July 2014 salary via Mpesa. I therefore find the summary action by the Respondent was unfair and contrary to the law.

Remedies

12. By operation of the law and upon the conversion of the claimant's employment, as a general labourer undertaking the duties of sales and messenger, he was entitled to a basic pay per the regulations of wages orders. All underpayments are therefore due. The Claimant is awarded the underpayment for June 2011 to August 2013 at Kshs.32,214.00 and the underpayment for September 2013 to July 2014 all at Kshs.42,020.00 all underpayments been Kshs.74,234.00.

13. Notice pay is due where there was summary dismissal without adherence to section 42(2) of the Employment Act. The notice pay due is Kshs.13, 202.00.

14. Leave is a legal entitlement. Where not taken or compensated, upon unfair dismissal, this is due. The Claimant is awarded Kshs.66, 010.00.

15. All employers must comply with the provisions of section 35(5) read together with subsection (6) as where there are no statutory deductions, upon termination, service pay is due. The Claimant is awarded Kshs.33, 005.00.

16. Where an employee is made to work during the public holidays, extra pay other than overtime is payable. The untaken public holidays are awarded Kshs.22, 003.00.

17. Upon the finding that the Claimant was unfairly dismissed, he was not paid his terminal dues and was not issued with a Certificate of Service immediately, compensation is due. Such is assessed at 10 months' salary all at Kshs.132, 020.00.

Judgement is entered for the Claimant as follows;

- a. **A declaration that the summary dismissal was unfair;**
- b. **Compensation awarded at Kshs.132, 020.00;**
- c. **Notice pay at Kshs.13, 202.00;**
- d. **Underpayments all at Kshs.74, 234.00;**
- e. **Unpaid leave Kshs.66, 010.00;**
- f. **Service pay Kshs.33, 005.00;**
- g. **Pay for work during public holidays Kshs.22, 003.00;**
- h. **The Respondent shall issue the Claimant with a Certificate of Service within 7 days;**
- i. **Costs of the suit awarded to the claimant.**

Orders accordingly.

Dated signed and delivered in open Court at Nairobi this 12th day of November 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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