



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 543 OF 2014

SAMUEL KARIHE

CLAIMANT

v

SAMBA ENTERPRISES LIMITED

RESPONDENT

JUDGMENT

1. Samuel Karihe (Claimant) sued Samba Enterprises Ltd (Respondent) on 30 October 2014 and he stated the issues in dispute as
 1. One month's pay in lieu of notice.
 2. Overtime.
 3. Public holidays.
 4. Annual leave for years worked.
 5. Compensation based on sections 49(1)(c) of the Employment Act No. 11 of 2007 Laws of Kenya.
2. The Respondent was served and it filed a Memorandum of Appearance on 27 November 2014 but no Response was filed.
3. On 28 November 2014, the Court fixed the Cause for hearing on 21 July 2015. The Claimant was directed to serve a hearing notice.
4. When the Cause was called up for hearing on 21 July 2015, Mr. Onyancha holding brief for Mr. Nganga informed the Court that the Respondent wanted to attempt out of court settlement.
5. The Court declined to allow time for out of court settlement because the Respondent had failed to file a Response. A Response should have been filed on or around the time the Memo of Appearance was being filed. The rules of this Court do not envisage filing of Memorandum of Appearance but rather a Response.
6. The Claimant's case was that he was employed by the Respondent on 11 May 2011 as a barman and that he worked until 11 August 2014 when he was called while at home on off duty and directed not to resume duty until further communication.
7. According to the Claimant, on receipt of the information he sought clarification from the Respondent's Manager. The Manager told him he did not know the reason.
8. On the termination of employment, the Claimant stated that he was not given notice of termination of employment nor pay in lieu of notice. In this respect, he asserted that the termination of employment was unfair, and therefore that he was seeking compensation.
9. On terms and conditions of employment, the Claimant informed the Court that he used to report to

- work at 5.00pm and clock out at 6.00am or 8.00am to 6.00pm. He would also work during public holidays (34 in total).
10. He stated that he worked 3192 hours overtime and was seeking Kshs 491,076/90.
 11. He also stated that he did not proceed on leave during the 3 years of employment and he was seeking Kshs 42,000/- on that account.
 12. Further, the Claimant stated that he was earning Kshs 20,000/- and this did not include house allowance. On account of house allowance, he was seeking Kshs 114,000/-.
 13. The Claimant was cross examined and he reiterated what he testified on during examination in chief but denied he was told of any lost drinks as the reason for termination of employment.
 14. He admitted receiving a recommendation letter and that he had secured alternative employment.
 15. The Respondent failed to file a Response. No reason was tendered for the failure neither was leave sought to file one out of time.
 16. The legal consequence is therefore that there are no real disputes of fact. The facts as asserted by the Claimant in testimony are uncontroverted and unchallenged.
 17. As between the Respondent and its legal advisers, they are the only ones who are privy as to why no Response was filed. Consequently, they know who has failed the other in this particular Cause.
 18. However, advocates must be alive to their professional duty to the clients from whom they have taken instructions and what to do in case instructions are not forthcoming.
 19. Section 35 of the Employment Act requires an employer to give written notice of termination of employment. In so far as none was given, the Court finds that the termination of the Claimant's employment was unlawful and unfair.
 20. Further, section 41 of the Act obligates an employer to comply with procedural fairness. The Respondent did not demonstrate that a hearing was held. On this score as well, the termination of employment was unfair.

Appropriate remedies 1 month pay in lieu of notice

21. This is due because no written notice was given nor was a hearing held to enable the Claimant make representations.

Overtime (normal and public holidays)

22. The testimony of the Claimant on working hours and work during public holidays was not controverted or challenged.
23. He has made a case for an award of the overtime as pleaded.

Leave

24. Again this head of claim was not controverted. By dint of section 10 of the Employment Act, 2007, this award is merited.

House allowance

25. By operation of sections 10 and 31 of the Employment Act, the Claimant was entitled to a contract of service with certain particulars including whether the wage was inclusive of house allowance.
26. None was issued and the Court finds in favour of the Claimant.

Wages for 12 days

27. The Claimant admitted he was paid wages for August 2014. This head of relief is therefore legally untenable.

Compensation

28. This is a discretionary remedy and the factors to be considered have been outlined in section 49(4) of the Employment Act, 2007.

29. In the view of the Court and putting into consideration the other dues awarded, this is not an appropriate case to award compensation.

Conclusion and Orders

30. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

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| a. 1 month pay in lieu of notice | Kshs 20,000/- |
| b. Overtime | Kshs 651,487/15 |
| c. Leave | Kshs 42,000/- |
| d. House allowance | Kshs 114,000/- |

TOTAL **Kshs 827,487/15**

31. Costs do not follow the event in this Court. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 11th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Alwala instructed by Wambeyi Makomere & Co. Advocates

For Respondent Mr. Onyancha instructed by Nganga & Associates

Court Assistant Nixon