



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1356 OF 2011

LEODIP LEMUSE.....CLAIMANT

VS

WADIA CONSTRUCTION COMPANY.....RESPONDENT

AWARD

Introduction

1. On 6th March 2013, I ruled that the Directors of Wadia Construction Company who were named as the 1st Respondent were wrongly joined in this case. I therefore struck out the 2nd Respondent from the proceedings and granted the Claimant leave to amend his pleadings accordingly. This award therefore relates to the Claimant's claim against the 1st Respondent, Wadia Construction Company.

2. The Claimant amended his claim on 12th March 2013 and the case proceeded on 19th December 2013 when the Claimant's case was taken. When the matter came up for defence hearing on 19th February 2014, there was no appearance for the Respondent and the Court therefore directed the Claimant to file final submissions.

The Claimant's Case

3. According to the Claimant, he was employed by the Respondent as a night watchman on or about 11th July 2008 at a salary of Kshs. 7,500. The Claimant, who was deployed to guard the Respondent's construction site along Lusaka Road in Nairobi's Industrial Area, was not issued with a written contract of employment.

4. The Claimant claimed that during the entire period of his employment with the Respondent, he worked for seven days per week without any off day or leave. He worked on public holidays with no compensation. Further, he was not provided with uniform nor protective clothing.

5. Following completion of construction at the site where the Claimant worked on 1st February 2011, the Respondent moved from site and terminated the Claimant's employment. The Claimant stated that he was not paid his terminal dues. Before filing this case, the Claimant referred his case to KUDHEIHA Workers Union who sought audience with the Respondent. The Respondent eventually agreed to pay the Claimant Kshs. 60,000 in settlement of his claim. An agreement was drawn and executed but no payment was made to the Claimant. In his sworn testimony the

Claimant denied refusing to collect this payment as alleged by the Respondent in the Memorandum of Reply.

6. The Claimant therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 7,500
- b) Service pay @ 15 days pay for 2 years.....Kshs 7,500
- c) Off days worked but not compensated
(4x34 monthsx7,500) 30.....Kshs 34,000
- d) Salary underpayment (8,051-7,500x32).....Kshs 17,632
- e) Overtime worked but not compensated
(4.30 pm-7.00 am less 8 hoursx7,500 x30 daysx34 months).....Kshs .102,800
- f) Uniform valued @ 6,000x2x 3 years.....Kshs 36,000
- g) Compensation for unfair termination
(12 months x 7,500).....Kshs 90,000
- h) House allowance (15x7,500x34 months).....Kshs 38,250

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The Respondent's Case

7. In the Memorandum of Reply filed on 1st March 2012, the Respondent admitted having employed the Claimant but denied that he worked for seven days per week. The Respondent further averred that the Claimant was issued with uniform, protective clothing and attendant security apparatus and was paid for any public holiday worked.

8. With regard to the Claimant's terminal benefits, it was the Respondent's case that the Claimant was given adequate termination notice and that he was paid all his terminal benefits save for Kshs. 60,000 which was agreed upon and documented in an agreement dated 20th April 2011 (marked Appendix L-5 in the Claimant's documents). The Respondent claimed that the Claimant had refused to collect the said payment from the Respondent's office.

9. The Respondent denied terminating the Claimant's employment. Rather, the Claimant having been employed on contract to guard a specific construction site, once the construction was completed, the Claimant's services were no longer required and the contract lapsed upon completion of the assignment.

Findings and Determination

10. From the evidence on record, it is not in dispute that the Claimant was employed by the Respondent but the terms and conditions of employment were not documented as required by law. Section 9(2) of the Employment Act, 2007 places the responsibility of drawing a contract of employment on the employer and where the employer fails to discharge this mandate the Court will adopt the Claimant's account on the terms and conditions of employment as per Section 10(7) of the Act.

11. From the Respondent's Memorandum of Reply, it would appear that the Claimant's employment was terminated because there was no more work for him to do. In my view, this would fall under what is commonly known as redundancy.

12. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

13. The law recognises redundancy as a valid ground for termination of employment. However, Section 40 of the Employment Act, 2007 sets the following conditions which must be met by an employer before terminating an employee's employment on account of redundancy:

a) ***Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***

b) ***Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***

c) ***the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***

d) ***where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***

e) ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***

f) ***the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***

g) ***the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

14. Where an employer fails to meet these conditions, then the termination of employment becomes unfair within the meaning of Section 45 of the Act. There is no evidence that the Respondent complied with any of the conditions set out in Section 40 of the Employment Act, 2007 and I therefore find the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Act and award him 3 months' salary in compensation. I also award him 1 month's salary in lieu of notice.

15. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the

place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

- (2) *This section shall not apply to an employee whose contract of service-*
- (a) *contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or*
- (b) *is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).*

16. The Claimant was not issued with a written contract of employment and as was held by **Mbaru J** in the case of **Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR** where an employer fails to document the terms and conditions of employment, it is left to the Court to interpret these terms. From the evidence presented to the Court, I did not find any expressed intention that the Claimant's salary was inclusive of house allowance. I therefore award the Claimant house allowance at 15%. This puts the Claimant's monthly salary at Kshs.8,625 which the Court adopts for purposes of tabulating this claim.

17. There was no evidence that the Claimant was a member of any pension scheme and his claim for service pay is therefore also allowed. The claims for salary underpayment, overtime compensation and uniform allowance were not proved and are dismissed.

18. Cumulatively, I make an award in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation for unfair termination..... Kshs. 25,875
- b) 1 month's salary in lieu of notice..... Kshs. 8,625
- c) House allowance (31 months).....Kshs. 34,875
- d) Service pay (2 completed years of service).....kshs 8,625
- Total.....Kshs 78,000**

19. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MAY 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*