



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA (BIMA TOWERS)

CAUSE NO. 35 OF 2013

RASHID KATITE MTAVA.....CLAIMANT

v

GHANYSHAM BUILDERS LTD.....RESPONDENT

JUDGMENT

1. Rashid Katite Mtava (Claimant) filed a Claim against Ghanysham Builders Ltd (Respondent) on 20 February 2013 through the firm of Nyagaka & Co. Advocates and the issue in dispute was stated as terminal dues.
2. The Respondent was served and on 7 May 2013 it filed a Memorandum of Reply.
3. On 2 September 2013, the Court pursuant to consent of the parties granted leave to the Claimant to file an Amended Statement of Claim. Respondent was granted corresponding leave to file an Amended Response. The Claimant was also allowed to rely on a Collective Bargaining Agreement entered into between Kenya Association of Building & Civil Engineering Contractors Group and Kenya Building, Construction, Timber, Furniture & Allied Industries Employees Union.
4. Consequently, the Claimant filed an Amended Memorandum of Claim on 12 September 2013 and the Respondent filed an Amended Response on 20 November 2013.
5. On 27 May 2014 the Claimant filed a Notice to Act in Person.
6. The Cause was heard on 23 July 2014. The Claimant opted to make submissions while the Respondent called two witnesses.

Claimant's case

7. The Claimant's case as pleaded is that he was employed by the Respondent as a painter in 2000 and that in February 2010 he was relieved of his duties unfairly and without payment of full final dues and that he was paid only Kshs 69,560/-
8. The Claimant also pleaded that he was being paid Kshs 370/- per day instead of Kshs 642/-, an underpayment of Kshs 7,072/- per month for 3 years.
9. The Claimant further pleaded that he is entitled to Kshs 50,076/- on account of leave not taken for 3 years, 2 months pay in lieu of notice in the sum of Kshs 33,384/-, gratuity for 10 years amounting to Kshs

96,300/-, National Social Security Fund contributions deducted but not remitted amounting to Kshs 2,400/- and unpaid holidays amounting to Kshs 14,124/-.

Respondent's case

10. The Respondent's case is that the Claimant was employed as a helper in the paints section in 2000 and was dismissed in 2010 for abusing a supervisor. After dismissal, the Claimant was offered Kshs 56,980/- on account of service, pay in lieu of notice and accrued leave but he declined and reported to his union, Kenya Building, Construction, Timber, Furniture & Allied Industries Employees Union.

11. After discussions with the Union, the Respondent paid the Claimant 8 year's gratuity, accrued leave and notice all totalling Kshs 69,560/- in full settlement for which the Claimant signed a discharge on 8 March 2010 (Respondent's exhibit 3).

12. The Respondent denied that the Claimant was underpaid and that the daily rate of Kshs 370/- used to calculate his wages was within the gazetted minimum wages.

13. Regarding National Social Security Fund contributions, the Respondent produced records (Respondent's exhibit 5) from 2007 which show payments were made and acknowledged by the National Social Security Fund.

14. On leave, the Respondent produced records (Respondent's exhibit 4) to show that the Claimant was paid leave on a weekly basis.

Evaluation

15. The claim presented by the Claimant who had the benefit of legal counsel initially was not one complaining of unfair termination but one seeking certain payments on separation. The Court will therefore examine each head of claim individually.

16. But before the examination, the Court need to determine whether the Claimant was a labourer (helper) as contended by the Respondent or a painter as pleaded by the Claimant.

Labourer or painter

17. The Claimant's employment letter was not produced in Court. Pursuant to section 9 of the Employment Act, 2007, the Respondent was under a statutory duty to draw up a written contract of service and set out the particulars set out at section 10. Because none was produced the Court takes it none was drawn up.

18. Because of the failure and pursuant to section 10(7) of the Employment Act, 2007, the Court finds that the Claimant was a painter and not labourer/helper.

Underpayments

19. The Claimant seeks Kshs 254,592/- on account of underpayments. He bases this claim on the provisions of a Collective Bargaining Agreement. Pursuant to section 59(1)(b) and (c) of the Labour Relations Act, the Collective Bargaining Agreement is applicable.

20. The Court has found that the Claimant was a painter. The Collective Bargaining Agreement exhibited/produced for the period starting 1 January 2009 set the lowest daily wage for general tradesmen including painters in 2009 at Kshs 395/- and Kshs 423/- for 2010.

21. It is not disputed that the Claimant was being paid at the rate of Kshs 370/- per day. He was being underpaid by Kshs 25/- per day for 2009 and Kshs 53/- per day in 2010.

Accrued leave

22. The records produced by the Respondent show that the Claimant was paid in lieu of leave and this head of claim is unmerited.

Pay in lieu of Notice

23. The Claimant sought two months pay in lieu of notice amounting to Kshs 33,384/-. The Claimant had served the Respondent for more than 3 years and pursuant to clause 18(iii) of the Collective Bargaining Agreement, he should have been given two months notice or paid two months wages in lieu of notice.

24. The Respondent in submissions admitted that one month wage in lieu of notice was paid. The Claimant is entitled to another month wages in lieu of notice.

Gratuity

25. The Claimant sought Kshs 96,300/- on account of gratuity for 10 years. Pursuant to clause 18(iv) of the Collective Bargaining Agreement, the Claimant is entitled to gratuity calculated at the rate of 15 days pay for each year of service.

26. The Claimant was paid gratuity for 8 years and signed a discharge voucher. This was after mutual discussions. The Court declines to find in favour of the Claimant in this regard.

Unremitted National Social Security Fund contributions

27. The Claimant did not provide any particulars to support this claim. The National Social Security Fund Act has elaborate provisions for unremitted contributions and the Claimant should pursue this with the Fund.

Unpaid public holidays

28. No evidence to support this head of claim was produced and it is dismissed.

Conclusion and Orders

29. The Court has reached the conclusion that the Claimant was underpaid and should also have been paid two months wages in lieu of notice.

30. The appropriate order in this case is to direct the Respondent to compute the underpayments and file the computations in Court for adoption as an award of the Court on or before 1 October 2014. The award herein will be in addition to the monies already paid to the Claimant.

31. The computations should include a further one month wages in lieu of notice.

32. This Cause to be mentioned in Court on 2 October 2014.

33. No order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day of September 2014.

Radido Stephen

Judge

Appearances

For Claimant in person

For Respondent Mr. Nanji instructed by Kishore Nanji Advocate