



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 533 OF 2013

JUDGMENT

JONATHAN M. MWANDIME

VERSUS

BANBROS LIMITED

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

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JONATHAN M. MWANDIMECLAIMANT

VERSUS

BANBROS LIMITEDRESPONDENT

JUDGMENT

The Claimant Jonathan Mwandime Mwamburi filed this case against the Respondent Banbros Limited on 16th April, 2013 through the claim dated 11th April 2013. The claim is filed together with the Claimant's verifying affidavit sworn on the same day. The Claimant seeks the following orders against the Respondent:

- a. Sum of Kshs.164,865.00 being terminal benefits, overtime and house allowance
- b. Twelve (12) months salary compensation for loss of employment due to victimization and discrimination in employment.
- c. Costs and interest of the claim.

The Respondent who was served with summons on 23rd April 2013 did not file appearance or defence to the claim.

The case came up for hearing on 21st July 2014 when the Respondent was absent. After confirming that

the hearing notice was properly served upon the Respondent, I allowed the claimant to proceed with his case in the absence of the Respondent. The claimant was represented by Mr. Babu instructed by Wilfred K. Babu & Co. Advocate.

The Claimant testified that he was employed by the Respondent on 15th November 2000 as a Welder and Fitter. His job was joining and welding metals. He left employment on 28th January 2012. His last salary was Kshs.12,000/= per month paid weekly at the rate of Kshs.500/= per day. He worked continuously. He was terminated due to joining the Transport and Allied Workers Union. He was not paid for the last week.

He prayed for salary for the last week worked, notice, leave for the entire period worked and travelling allowances according to the collective bargaining agreement.

The claimant stated that under the collective bargaining agreement he was entitled to a salary of Kshs.14,000/= per month. He therefore claimed underpayments of Kshs.2,000/= per month.

The Claimant further testified that he was not paid house allowance. Under the CBA he was entitled to house allowance of Kshs.3,300 per month. He therefore prayed for payment of house allowance.

The Claimant also prayed for payment of overtime. He testified that he worked from 8.00 am to 8.00 pm. Sometimes he worked upto the following morning. He produced a copy of the records for reporting and leaving work.

The Claimant testified that after joining the Union, the Union called for a meeting which was held on a Friday at 1.00 pm outside the Respondent's compound. The Respondent's cashier by the name Jisrafi went to confirm who was at the meeting. On the following Monday when he reported to work he was told there was no work for him.

The Claimant stated that he reported to the Union after the termination of his employment and the Union requested for a meeting with the Respondent. The Respondent did not respond to the Union's letter. The dispute was reported to the Labour office. The Labour Officer wrote several letters which the Respondent did not respond to. The Labour Officer thereafter referred the case to the court.

The claimant also prayed for payment of service pay. He testified that when his advocates wrote a demand letter to the Respondent, the Respondent offered to pay service pay, one day's wages and notice all totaling to Kshs.35,500/= which he rejected.

The Claimant prayed for orders as prayed in his claim.

The Respondent having failed to respond to the claim or attend court on the hearing date the only issue I have to determine is whether the claimant is entitled to the prayers sought.

The first issue I have to determine is whether the Claimant was an employee of the Respondent.

The letter dated 3rd April 2013 addressed by a Mr. J. Singh, the Accountant of the Respondent confirms that the Claimant was indeed an employee of the Respondent.

I will now consider the prayers:

1. Payment in lieu of notice

The Claimant prays for payment of Kshs.14,164 being payment in lieu of notice based on the salary of Artisan Grade III according to the collective bargaining agreement. The claimant testified that this salary was Kshs.12,000/= at the rate of Kshs.500 per day. Although the Claimant produced his national Trade Test Certificate for Artisan Grade III there was no evidence that he was actually employed as Artisan Grade III.

The Respondent in their letter dated 3rd April 2013 addressed to the Claimant's Advocates offered to pay Kshs.13,000 as notice.

I therefore award the Claimant Kshs.13,000/= based on the offer of the Respondent.

2. Salary worked for 1 week

The Claimant has prayed for payment of Kshs.3,541.00 being salary for 1 week. The Respondent offered to pay salary for 1 day only.

In the absence of a defence, the claimant's allegation remains uncontested. I therefore award the claimant 1 week's salary of Kshs.500/= a day being Kshs.3,000/=.

3. Under payments

As I have observed above, the claimant has not proved that he was employed as Artisan Grade 3. All he stated is that he was paid a salary of Kshs.500/= a day amounting to Kshs.12,000/= per month. I therefore dismiss the prayer on underpayments on the grounds that it has not been proved

4. Leave

The Claimant has prayed for leave of 14 months. In the absence of a defence the Claimant's testimony is not contested. I award the Claimant was entitled to 26 days annual leave per year. For 14 months he was entitled to 30.3 days. At the rate of Kshs.500/= per day he is entitled to Kshs.15,166.70 which I hereby award him.

5. Leave Travelling Allowance

According to the collective bargaining agreement the Claimant is entitled to leave travelling allowance of Kshs.3,400/=. I award the Claimant Kshs.3,400/= being leave traveling allowance for 1 (one) year.

6. House Allowance

According to the collective bargaining agreement the Claimant was entitled to Kshs.3,300 per month on account of house allowance. The Kshs.500/= paid to him per day would not include house allowance if considered alongside the minimum wage for an unskilled artisan. I therefore award the Claimant house allowance for 14 months being Kshs.46,200/=.

7. Service Pay for 14 months

There is no evidence that the Claimant was a member of NSSF. He is therefore entitled to service pay of 15 days per year worked. Having worked for 14 months he is entitled to one year's service pay of 15 days. I therefore award the Claimant Kshs.7,500/=.

8. NHIF Deducted

The claimant alleges that he was deducted Kshs.200/= per month for NHIF. He has not demonstrated that the money was deducted or that if it was deducted, it was not remitted to NHIF. This he would have easily done by obtaining a certificate from NHIF. I therefore find that the Claimant has not proved that he was deducted NHIF and the same was not remitted. The result is that I dismiss the prayer.

9. Overtime worked but not paid

The Claimant alleges that he worked for 595 hours overtime for which he claims Kshs.43,218/=. To prove his claim he has annexed a handwritten tabulation of the hours worked. During his testimony he stated that he used to work from 8 am to 8 pm and on some occasions worked through the night until the

following day. According to documents attached to the claim, he worked from 8.00 am to 5.30 pm. There are only a few instances when he worked up to 6 pm. I am however inclined to reject the document as it is all handwritten in the same writing and there is no proof that the document was an extract from the Respondents records. For this reason I dismiss the claim for overtime.

10.Compensation

The Claimant has prayed for compensation of 12 months salary. Compensation is only payable if termination of employment was unfair. From the evidence adduced by the Claimant I am satisfied that the termination of his employment was unfair both procedurally and without valid reason.

However having worked for only 14 months, I however award the Claimant 12 months salary as compensation based on the fact that the ground for which he was terminated being membership of a Union is a breach of his fundamental rights to freedom of association enshrined in the Constitution. This will amount to Kshs.180,000/= based on a salary of kshs.500/= per day for 30 days per month for 12 months.

11.Costs and Interest

The Respondent will also pay the Claimants costs for this case. The amount awarded herein shall attract interest at court rates from date of judgment.

Orders accordingly.

Read in open Court this 7th day of November, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Makori holding brief for Babu for Claimant

No appearance for Respondent