



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2012 of 2011

NEBATI LUGAYE ADAMBER..... CLAIMANT

VERSUS

1. NJOMBE & SONS ESTATE AGENTS LTD

2. MR. WAHOME E. NGAGA..... RESPONDENT

JUDGEMENT

The Claimant herein has filed a claim against the Respondent for unfair termination. He seeks payment of notice, annual leave, travelling allowance, severance pay, house allowance and overtime all totaling to Khs.142,636. He further seeks 12 months' salary as compensation in the sum of Shs.168,000.

The Respondents filed a Memorandum of Reply and a counterclaim. The Respondents denied owing the Claimant the sums claimed and counter claimed for Shs.44,000 being sums owing from the Claimant to the Respondent.

The parties were heard by Hon. Justice Mukunya on 29th may 2012 when the Claimant appeared in person and testified on his own behalf while the Respondents was represented by Ms. Maangi and called 1 witness Mr. Ejidio Ngatia Wahome, the 2nd Respondent who is also the Chairman of the 1st Respondent.

The Claimant testified that he was employed as a driver to the 2nd Respondent on 8th May 2010 and was terminated without notice on 28th February 2010. He admitted having been paid in lieu of leave and also owing the Respondents Shs.30,000/=. He testified that he was terminated when he asked for more money.

Mr. Ejidio Ngatia Wahome testified for the Respondent that the claimant was his driver. The Respondent had financial problems and used to demand loans. He talked to the Claimant about it but there was no improvement. The Claimant demanded money every week. He further testified that he was not happy with the Claimants driving. He admitted not giving notice to the Claimant but stated that the Claimant owed the company Shs.30,000/= which was more than the notice. He stated that the Claimant had only worked for 11 months and was not qualified for annual leave. He stated that the Claimant is not entitled to severance pay either. He testified that parties never agreed on house allowance and the same was therefore not payable to the Claimant. He further testified that the Claimant was not entitled to weekend overtime as the Claimant drove him to Othaya only once every 3 months.

The parties appeared before me on 13th November 2012 when the case was scheduled for final submissions and agreed to present the submissions before me and to have the judgement written by me.

I have read the record of proceedings and the pleadings and I have considered the submissions by the parties before me. There is no dispute that the Claimant was employed by the 1st Respondent as driver to the 2nd Respondent, that his salary was Shs.14,000/= per month, that he was terminated on 28th February 2013 and that at the time of termination he owed the Respondents Shs.30,000/= in salary advances. The Claimant admitted having been paid 1 months' salary in lieu of leave. The 2nd Respondent also admitted that the Claimant was not given notice or paid in lieu thereof upon termination. The issue for determination is therefore whether the Claimant is entitled to his claim of Shs.142,636 and compensation of Shs.168,000/= on the one hand and the Respondents to Shs.44,000 as claimed in the counter claim.

The Claimants prayers are:-

1. **1 months notice**

The Respondents admitted not giving the Claimant Notice. The Claimant is therefore entitled to Shs.14,000 being 1 months' salary in lieu of notice.

2. **Annual Leave**

The Claimant admitted that he was paid 1 month's salary in lieu of annual leave. The Respondents have attached a letter written by the Claimant asking for payment of the same. He is therefore not entitled to the claim for leave and the claim is dismissed.

3. **Leave travelling allowance**

The Claimant did not mention this head of claim at all in his testimony or submit any proof of the same. Leave travelling allowance is also not provided for as a right under the Employment Act. The prayer is therefore rejected as not having been proved.

4. **Severance pay**

The Claimant was not declared redundant and is not entitled to severance pay. The prayer is rejected.

5. **Housing Allowance**

The Claimant gave evidence that he was never paid house allowance. Respondents witness admitted the same but stated that parties never agreed on house allowance at the time of entering into the contract. House Allowance is provided for in Section 31 of the Employment Act 2007. It is also provided for under the Regulation of Wages (General) Order which sets minimum rates of pay. The minimum wage for a driver (cars and light vans) under which category the Claimant fell was Shs.8274 for March and April 2010 and Shs.9101 from May 2010 to February 2011. The Claimant was paid Shs.14,000 per month. The basic minimum wage plus 15% house allowance as prescribed by law is still below the salary paid to the Claimant. The Claimant has therefore not proved that he was paid a salary not inclusive of house allowance and the claim is hereby rejected.

6. **Overtime**

The Claimant testified that he reported to work at 8.00 a.m. and left at 8.00 p.m. He further testified that he sometimes worked on weekends. The 2nd respondents confirmed in his testimony that the Claimant reported to work at 8.30 a.m. and that sometimes he worked late and was given bus fare of Shs.200. He also testified that occasionally the Claimant dropped him at Railways Golf Club and to Othaya. There is therefore an element of overtime that was worked by the Claimant for which he was not paid. I will therefore presume that on average he worked 2 hours overtime for 6 days a week for the 11 months that

he worked. This would add up to 528 hours. Overtime is payable at the rate of 1.5 times the normal hourly rate. The Claimants hourly rate at 52 hours per week was Shs.62.20 per hour. For 264 hours at the rate of 1.5 times the hourly rate the Claimant is entitled to Shs.49,280. I award him the same on account of overtime.

7. Compensation

The Claimant has urged the Court to grant him 12 months' salary as compensation for unfair termination. From the evidence on record, the Claimant was never given a hearing. However he has also admitted to being a financial embarrassment. He had worked for only 11 months, a time that is too short for him to have developed a reasonable expectation for long term employment. I find that this is not a reasonable case for payment of compensation in the sum of 12 months or at all. I reject the prayer.

Respondents counterclaim

The Claimant admitted to owing the respondents 30,000/=. I will therefore give judgement against the Claimant in the sum of Shs.30,000/= as admitted by him. The respondent is entitled to offset this amount from the payment due to the Claimant.

I therefore give judgement to the Claimant in the total sum of Kshs.63,280 and for the Respondent for the counterclaim in the sum of Shs.30,000. The Respondent shall offset the same from the payment due to the Claimant and pay to the Claimant Shs.33,280 being the difference. This should be paid within 30 days failing which the Claimant may execute the decree.

Orders accordingly.

Read in open Court and signed on this 1st day of February, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

In the presence of:- _____ for Claimant

_____ Respondent