



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 229 of 2012

BENSON ODHIAMBO ONYANGO..... CLAIMANT

VERSUS

INSTARECT COMPANY LIMITED..... RESPONDENT

JUDGEMENT

The main facts of this case are not contested. The Claimant was employed by the Respondent as a general labourer in June 2004 at a monthly salary of Shs.4,670. The employment was on a one year renewable contract. The last contract expired on 9th October 2007. Thereafter the Claimant continued working without a contract until 1st April 2011 when he received a letter from the Respondent reproduced here below:-

18th April 2011

Mr. Benson Odhiambo

C/o Instarect Ltd

NAIROBI

Dear Mr. Odhiambo,

RE: EXPIRY OF FIXED TERM CONTRACT

We refer to our letter dated 14th December 2006 in which your employment as general worker with this company on fixed term contract was extended with effect from 10th October 2006 to 9th October 2007.

The management therefore wishes to inform you that following the expiry of the above contract, your terminal dues will be paid as follows:-

- (i) 26 days leave earned but not availed as at 30th April 2011.
- (ii) 1 month's pay in lieu of notice.

Yours faithfully,

For and on behalf of Instarect Ltd

Lorna Mathenge

ADMINISTRATOR

Cc: Managing Director
Accountant

The Claimant was later paid salary for April and Shs.3,780 as leave/notice. He sought an explanation on how the figure of Shs.3,780 was arrived at but was not given any.

The Claimants last salary was Shs.7,560.00 inclusive of house allowance. The Claimant prays for the following:-

- | | | | |
|----|------------------------------------|---|----------------|
| a) | 1 months' salary in lieu of notice | - | Shs.7,560.00 |
| b) | Pending leave for 1 year | - | Shs.5,250.00 |
| c) | House allowance | - | Shs.94,500 |
| d) | Unremitted NSSF | - | Shs.107,150.00 |
| e) | 12 months' salary | - | shs.400.00 |

The parties were heard on 29th November 2012 when the Claimant testified on his own behalf while Peter Kariuki Wainaina, a senior accountant with the Respondent testified for the Respondent.

The issues for determination are the following:-

- (1) Whether the termination of the claimant's employment was unfair.
- (2) Whether the Claimant is entitled to the prayers sought.

The letter of termination of the Claimants contract is dated 18th April 2011. It is terminating a contract which lapsed on 9th October 2007 and continued without a contract until April 2011. A fixed term contract which expires and continues without a renewal becomes a month to month contract and is therefore governed by the provisions of the Employment Act. Termination of such contract must therefore comply with both Section 35 and 41 of the Employment Act.

The Respondent did not comply with both Sections. In any event the contract that the Respondent was terminating had long lapsed and was replaced with a new contract which was not referred to in the purported letter of termination.

For these reasons the termination of the Claimants employment was unfair.

I now look at the remedies sought by the Claimant.

1. Notice

The Claimant was never given notice and there was no payment in lieu of the notice. He is therefore entitled to Shs.7,754.45 being 1 months' salary in lieu of notice at the rate of consolidated minimum wage applicable at the time.

2. Pending leave

In the letter of termination the Claimant was advised that his outstanding leave was 26 days. He is therefore entitled to payment in lieu of leave at Shs.(7,754.45÷30x26) = 6,720.50.

3. House allowance

The Claimant was paid a consolidated minimum wage which was inclusive of house allowance. He is therefore not entitled to house allowance. However the consolidated minimum wage from 1st May 2010 to 30th April 2011 when the Claimant stopped working was Shs.7,754.45 as opposed to Shs.7,560 which he was paid. He is therefore entitled to the underpayment of Shs.194,45 per month for the period of 12 months during which he was underpaid. This amounts to Shs.2,333.40 which I hereby award him.

4. Unremitted NSSF

The Claimant did not adduce any evidence to prove this claim. In any event the National Social security Fund can claim the money directly from the Respondent.

The claim for unremitted NSSF is therefore dismissed.

5. Compensation

The Claimant has prayed for maximum compensation for wrongful dismissal. I find that this is on the higher side as the Claimant had only worked for 7 years. In my opinion 6 months compensation is reasonable in the circumstances and I award him the same in the sum of Shs.46,526.70.

In the final analysis I give judgement to the Claimant against the Respondent in the sum of Shs.55,580. From this sum the Respondent is entitled to recover the sum of Shs.3,780 being the amount paid to the Claimant as leave/notice pay, leaving a net sum of Shs.51,800.10.

In addition I award the Claimant Shs.10,000/= to cover for filing expenses and disbursements making a total sum of shs.61,800.10.

The same should be paid within 30 days from today failing which the Claimant may execute the decree.

Orders accordingly.

Read in open Court and signed on this 6th day of March, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

_____ Claimant

_____ Respondent