



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 355 of 2010

DANIEL NJUGUNA MUCHIRI CLAIMANT

V

SAGAR BAKERY LIMITED RESPONDENT

JUDGEMENT

By a Memorandum of Claim dated 6th April 2010 and filed in Court on 7th April 2010, the Claimant alleges that he was wrongly dismissed by the Respondent. He prays for the following orders:-

(a) Special damages of Shs.2,296,000.

(b) General damages.

(c) Costs.

(d) Interest on (a), (b) and (c) at Court rates.

(e) Any other or further relief as the Honourable Court may deem fit and first to grant.

The particulars of special damages are given as follows:-

(i) Salary arrears	-	Shs.163,500
(ii) Notice	-	Shs.30,000
(iii) Public holidays	-	Shs.308,000
(iv) Gratuity	-	Shs.210,000
(v) House Allowance	-	<u>Shs.756,000</u>

TOTAL:- Shs.2,489,500

The Respondent filed a reply to the claim on 16th August 2010 in which it admits employing the Claimant but avers that the Claimant was summarily dismissed on 29th July 2009 when he assaulted a Director of the Respondent. The Respondent denies that the Claimant is entitled to the prayers sought. The Respondent further avers that the Claimant reported the dispute to the Labour office and there was a settlement of Shs.442,000 out of which the Claimant was paid Shs.193,500/=.

The Claimant testified on his behalf on 11th November 2010 before Hon. Justice Mukunya. The case was transferred to me and parties agreed to proceed from where the case had reached before Hon. Justice Mukunya.

Mr. Devji Hardy Pater testified on behalf of the Respondent before me on 25th January 2013.

The Claimant's case is that he was employed by the Respondent as a Manager in 1995 that he was not issued with a letter of appointment. His salary was Shs.30,000/=, he was entitled to 21 days annual leave per year, 1 (one) rest day per week, rest on public holidays, Shs.15,000/= per year as service pay. That he was also entitled to house allowance at 15% and 1 (one) month's notice in the event of termination of employment. He further testified that on 22nd July 2009 the Managing Director Mr. Devji and his son reported to the place of work and asked the Claimant to see him before going home, that he went to see Mr. Devji at 6.30 p.m. when he was informed that his employment had been terminated, that he was not given any reason. He further testified that as at 22nd July 2009 he was owed Shs.213,500 in unpaid salaries, 14 years annual leave and off days at Shs.728,000, public holidays of Shs.308,000, house allowance of shs.756,000. That he reported the matter to the Labour Office at Kerugoya who wrote a demand letter to the Respondent on 27th July 2009, that the Respondent replied and admitted owing the Claimant Shs.294,000 made up of notice, (Kshs.30,000), 2 years public holidays (Kshs.22,000), 2 years

annual leave (Kshs.42,000) and arrears of salary Kshs.152,000 and 2 years rest days (Kshs.42,000). Refer to Claimants Appendix 1 and 2. The Claimant stated that he did not agree with the Respondent, that the Labour Officer called a meeting on 13th October 2009 which was attended by both the Claimant and the respondent and agreement was reached on salary and notice. The Claimant was paid Shs.193,500 by post dated cheque. That the respondent agreed to pay a total of Shs.442,000 being 4 years public holidays and service pay for 14 years. That the Claimant has not paid the money. He denied that he assaulted the respondent's managing director Mr. Patel on receiving a letter of dismissal.

Mr. Devji Hardy Patel for the respondent testified that the Claimant was the Respondent's employee and his salary was Shs.30,000/= per month, that he was employed in 1995 and left employment in July 2009, that the Claimant failed to report for work from 17th July 2009 to 22nd July 2009. That the Respondent was making bread, that bread started disappearing and when he asked the Claimant about it the Claimant beat him up. He reported the matter to the police and was given a police medical examination which was filed at Kirinyaga District Hospital. That later he got a call from the Labour Officer and an agreement was reached for Shs.442,000 pursuant to which the Respondent paid the Claimant Shs.193,500. The balance was to be paid in installments. He however did not pay the balance as he does not have money.

Under cross examination Mr. Patel denied that the Claimant worked on Sundays. He testified that the Claimant took leave every month to travel to his home in Molo. He testified that the Claimant was running the business. He denied writing the agreement reached at the Labour Office and stated he was only asked to sign. He denied that the Claimant was using his motor vehicle Registration No.KAW 130V for the Respondent's business. He further testified that he left Kerugoya immediately after reporting the assault and did not follow up the police report because he was threatened by the Claimant, that he has never gone back since then. He further testified that he did not pay the balance of the money agreed at the Labour Office as he does not have money.

I have considered the pleadings, the testimony of the witnesses on record and the documents submitted as exhibits by both parties.

The issues for determination are whether the Claimant was unfairly terminated and whether he is entitled to the reliefs sought.

In his testimony the Claimant alleges that he was terminated from employment on 22nd July 2009 and that the termination was verbal. The Respondent's witness on the other hand alleges that the Claimant was dismissed on 29th July 2009 after assaulting the Managing Director and that he absented himself from work from 17th to 22nd July 2009, that when he was asked about loss of bread he assaulted the Managing Director and another person which resulted into his dismissal.

From the evidence on record it is not clear whether the Claimant was dismissed on 22nd July as he alleges or 29th July 2009 through the letter of dismissal of that date which is annexed to the Claimants Memorandum of Claim. It is the responsibility of the person alleging a fact to prove that fact. If the Claimant was dismissed by letter dated 29th July 2009, then the dismissal would be for valid reason and the circumstances would be such that it would not be possible to give him a hearing after assaulting the Managing Director. If it is according to the Claimant's version, then it would be an unfair dismissal.

Since there is conflicting evidence on the date and manner of dismissal of the Claimant one being written and the other verbal, I find that the Claimant has not proved that his dismissal was unfair.

The Claimant has claimed the following:-

- (a) Salary arrears - Shs.163,500
- (b) Notice - Shs.30,000
- (c) Off days - Shs.728,000
- (d) Public holidays - Shs.308,000
- (e) Gratuity - Shs.210,000
- (f) House allowance - Shs.756,000

Both parties agree that following the report by the Claimant to the Labour Office, the Respondent undertook to pay the Claimant Shs.442,000 being the amount he could afford. I will deal with this issue later. For now I wish to consider the specific prayers.

(a) Salary arrears

The Respondent did not deny owing the Claimant salary arrears as claimed. I therefore find that the Respondent owes the Claimant the sum of Shs.163,500.

(b) Notice

Having found that the Claimant has failed to prove that his dismissal was unfair, he is not entitled to pay in lieu of notice.

(c) Off days

The Claimant did not state how he arrived at the figure of Shs.728,000. It is a strict rule of evidence that special damages must be specifically proved. It is not clear how many days are claimed and at what rate.

The claim is also in respect of off days for 14 years. The Employment Act at Section 90 bars any claim that is more than 3 years. Even if I were to give judgement for only 3 years, I still would not know the number of days and the rate at which it is calculated.

I find that this claim has not been proved and dismiss it.

(d) Public Holidays

Like the claim on off days above, this claim goes back 14 years and part of it is statute barred while the part of the claim that is valid is not tabulated so that I cannot tell how many days have been claimed and what rate has been used.

I therefore dismiss the claim.

(e) Gratuity

The Claimant has not proved that gratuity was part of his terms of employment as gratuity is not provided for by law. I however think that by this head the Claimant intended to pray for service pay. He would be entitled to the same as the Respondent has not shown that the Claimant was a member of either the National Social Security Fund (NSSF) or some other gratuity or retirement benefits Scheme sponsored by the employer.

The rate for payment of service pay is not provided in the Employment Act but the practice has been to

use 15 days salary for each year worked
severance pay.

as provided for in Section 40 of the Act in respect of

I therefore find that the Claimant is entitled to Kshs.210,000 being 15 days salary per year worked for 14 years.

(f) House Allowance

The Claimant has claimed house allowance at the rate of 15% of his salary. The Claimants contract was verbal and therefore it would be governed by the provisions of the Employment Act that are presumed to apply to every contract of employment. Section 31(2) provides that an employer may pay a consolidated wage. For an employee to presume that a house allowance is payable in addition to the basic salary, there must be express agreement to that effect or the employee's wages would have to be below the statutory consolidated wage as provided for in the Regulation of Wages (General) Order as it is only these minimum rates of pay which are subject to 15% house allowance by law. Having earned his salary for 14 years without house allowance and having not demonstrated that he at any time demanded payment of house allowance in addition to the basic minimum wage, I must find that the Claimants salary was consolidated and therefore inclusive of house allowance as provided for in Section 31(2) of the Employment Act.

In conclusion therefore I would find that the Claimant is entitled to a total of Shs.373,500/=. However, as I mentioned earlier, there was an agreement for the Respondent to pay the Claimant the sum of Shs.442,000. The Claimant stated in his testimony that this was not accepted by him.

There is however no indication anywhere that he objected to the agreement. On the contrary he accepted a sum of Kshs.193,000 after the signing of the agreement. The logical conclusion is that he accepted the settlement and received part payment pursuant to the settlement.

I therefore find that there was a valid settlement of the claim by the Claimant reached through the conciliation of the Labour Officer Kerugoya District, a Mr. L.N. Nthaka, that the Claimant received Shs.193,000 in part payment of the same and that he is therefore estopped from claiming additional compensation over and above the sum agreed.

In any event, the sum agreed to is higher than the amount I have found that the Claimant is entitled to which is Shs.373,500.

I therefore give judgement to the Claimant in the sum of Kshs.442,000 less Kshs.193,000 already received leaving a balance of Kshs.249,000 which I award him.

Orders accordingly.

Read in open Court and signed on this 8th day of May 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Daniel Njuguna Muchiri

In the presence of:- _____ **Claimant**

No appearance

_____ **for the Respondent**