



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1107 OF 2011

WARIO GORISE.....CLAIMANT

VS

VICKY NYAITHIRU KABETU

(DIRECTOR, MUTHITHI PLANTATION ESTATE).....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 11th August 2010, the Claimant sued the Respondent for wrongful and unlawful termination of employment as well as failure to pay employee dues. The Respondent filed a Statement of Response on 21st October 2010 and the matter was heard on 10th April and 4th June 2013, with the Claimant appearing in person and Mr. Thiga instructed by Waruhiu K'Owade & Nganga Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called Alice Wambui Kabetu. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent as a night security guard on 2nd November 1995 at a daily rate of Kshs. 110. He was not issued with a contract of employment. The Claimant testified that he used to work between 6.00 pm and 6.00 am, over seven days per week.

3. According to the Claimant, he was paid overtime compensation between 1995 and 1998. He also received payment in lieu of leave from 1996 to 1998. From 1999, he was not paid any overtime compensation, he did not go on leave and did not receive pay in lieu thereof.

4. On 9th September 2003, the Respondent, without lawful cause, verbally terminated the Claimant's employment. The Claimant was not paid his terminal benefits and was not issued with a certificate of service. It was the Claimant's case that his employment was terminated following his complaint to the Kenya Plantation and Agricultural Workers Union regarding the Claimant's leave and overtime compensation.

5. The Claimant claimed the following:

- a) 4 years annual leave (30 days x 4 years x Kshs. 110)...Kshs. 13,200
- b. Public holidays (10 days x 4 years x Kshs.110).....4,400

- c) Terminal benefits (4 years x 30 days x Kshs.110).....13,200
- d) Pay in lieu of notice (3 months x 30 days x Kshs.100).....9,900
- e) Overtime (2 hours x 365 days x Kshs. 20 x 4 years).....58,400
- f. Salary increment (Kshs. 20 x 365 days x 2 years).....14,600
- g) General and special damages
- h) Costs and interest
- i. Any other remedy the Court may deem just to grant

The Respondent's Case

6. In her Statement of Response, the Respondent stated that the Claimant worked intermittently during his period of employment. The Respondent's witness, Alice Wambui Kabetu testified that the Claimant was a standby guard. The Respondent admitted having terminated the Claimant's employment on 9th September 2003. The Claimant was paid terminal dues amounting to Kshs. 14,646.60 on 10th September 2003 which he duly acknowledged as full and final payment.

7. It was the Respondent's case that since the Claimant was a casual employee, he was not entitled to a written employment contract or a certificate of service. The Respondent added that this matter had been conclusively dealt with by the Minister for Labour, a fact that the Claimant had deliberately concealed from the Court. The Respondent also pleaded that the Claimant's case was statute barred.

Findings and Determination

8.The main issue for determination in this case is whether the Claimant's claim against the Respondent is sustainable in light of the conciliation process undertaken at the Ministry of Labour. The Respondent produced two reports by the Chief Industrial Relations Officer dated 24th May 1999 and 28th September 2008 respectively.

9. According to the first report, the Claimant's Union submitted that the Claimant was entitled to Kshs. 7,605 in terminal dues. This was adopted as the Conciliator's recommendation. In the second report, the Respondent's decision to pay the Claimant Kshs. 14,646 in final benefits was adopted.

Article 159(2)(c) of the Constitution of Kenya, 2010 provides that:

2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(a)

(b)

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to sub clause (3);

10. In similar fashion, Section 47(1) & (2) of the Employment Act, 2007 makes provision for resolution of employment disputes before a Labour Officer.

11. The Claimant who was represented by his Union and the Respondent submitted themselves to two separate conciliation processes whose outcomes are recorded in the reports by the Chief Industrial

Relations Officer dated 24th May 1999 and 28th September 2008.

12. There is no evidence that the Claimant objected to the recommendations made by the Conciliator. Moreover, the Claimant did not deny receiving the final benefits agreed upon in the two conciliation processes. Indeed, he admitted in cross examination that he was paid some money at the time his employment was terminated.

13. In the case of **Elizabeth Wanjiru Njogu Vs Kangei Nyakinyua Building Co. Limited (Industrial Court Cause No. 385 of 2011)** this Court stated that:

“A party who voluntarily submits himself to ADR and even reaps the benefits thereof cannot come to Court and question the process if they did not take issue during the process. The Court will only interfere with the process and/or outcome of ADR if manifest miscarriage of justice has occurred or where the Constitution or any written law has been contravened.”

14. In the case before me, I find that the Claimant willingly submitted himself to conciliation where his case was conclusively determined. He did not raise any issue with the conciliation processes. I therefore find his case filed two years after the last conciliation process an abuse of the court process and hereby dismiss it with no order for costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF JULY 2013

LINNET NDOLO

JUDGE

In the presence of:

.....**Claimant**

.....**Respondent**