



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO.696 OF 2011

MR. HUDSON ONYACHI.....
CLAIMANT

VS

REV. OLAFS KENNERUP & 1 OTHER.....RESPONDENT

Mr. Nyabena for Claimant

M/S Kagoye for Respondent

AWARD

This claim dated 6th May 2011 was filed on 9th May 2011 seeking the following relief;

- a. Salary arrears for June 1997;
- b. Notice Pay;
- c. Overtime of Kshs.186,624 hours;
- d. Severance pay;
- e. Payment in lieu of 63 days leave;
- f. Payment for 198 Public Holidays worked;
- g. Compensation for unlawful dismissal; and
- h. Certificate of Service.

The claims are particularised in appendix 'V' to the Memorandum of Claim totaling Kshs.7,250,578/=.

In his sworn testimony, the Claimant told the court that he was employed by the Respondent on 2nd February 1990 as a night guard on a salary of Kshs.1,200/= per month. That on 6th August 1997, he received a letter of appointment and his salary was increased to Kshs.2,500/= per month.

That he worked continuously until 12th October 2010, when he went for his wife's funeral. He was given 3 day's leave to attend the funeral. That upon his return from the funeral he was not allowed to continue working even though the 1st Respondent had sent him Kshs.1,500/= as fare back to work.

He was not given any reason for the termination nor did he get an opportunity to explain his case to the Respondent before the termination. He reported the matter to the union. The union wrote to the Respondent on 1st February 2011 but when he was called to a conciliation meeting he did not attend. It is his case that the termination was wrongful and unfair and he is entitled to compensation for unfair dismissal.

Terminal Benefits

The Claimant testified that he was not paid any terminal benefits upon termination as follows;

Overtime

The claimant, told the court that he used to work daily from 6.30 a.m. in the morning to 6.30 p.m. in the evening. This comprised 12 hours per day for a period of 12 years. That for 6 years, he worked for 15 hours a day from 5.00 p.m. in the evening to 8.00 a.m. in the morning. During this time, the Respondent was away from Kenya and he had to guard his house all the time. He was not paid for extra hours worked and claims payment of overtime tabulated at 186,624 hours in the sum of Kshs.7,231,680/=.

He explained that his salary was increased gradually from Kshs.1,200 to 1,500; 2,500; 3,000; 4,000; and finally to 8,000. Furthermore, the Claimant told the court that he worked during weekends and Public Holidays.

He claims payment for 198 public holidays calculated at 11 holidays per year for 18 years.

Leave

The Claimant testified that he used to go on leave but was not granted leave for the year 1997, 2003 and 2006. He was entitled to 21 days for each year.

Severance Pay

He told the court that he was not registered with NSSF during 18 years of service and therefore claims payment of severance pay at the rate of 15 days for each completed year of service in the sum of Kshs.83,700/=.

Notice Pay

The Claimant told the court that he was not allowed to return to work from his wife's funeral and is therefore entitled to one month's salary in lieu of notice.

Certificate of Service

The Claimant testified that he did not receive any Certificate of Service and prays the court to compel the

Respondent to grant him one.

Salary Arrears June 1997

The court was informed by the Claimant that he did not receive a salary for the month of June 1997. This was conceded by the 1st Respondent in that the 2nd Respondent who at the time was the employer of the Claimant refused to pay his salary and also forced the 1st Respondent to resign as pastor and trustee.

Respondent's Case

The Respondents filed a memorandum of Response dated 23rd May, 2011 wherein the 1st Respondent denies the claims made by the Claimant in total.

The 1st Respondent testified under oath that he was a missionary with the Baptist Bible Mission of East Africa and came to Kenya in 1986. He went to Nakuru in 1985 and started the Bible Baptist Church at Nakuru, the 2nd Respondent.

That in 1992 he was allocated land along Kabarak Road and Prison Road Nakuru and started building there in October 1992. He employed casuals for the purpose and the Claimant was one of them.

In 1994, he hired the Claimant as a night guard for the 2nd Respondent whereas he was a pastor and trustee. The Claimant worked at the Church from 1994 upto 1996. That between 1995 and 1996. That in the year 1997 he was out of the Country but the Church continued to pay the Claimant.

He told the Court that he came back on 17th July 1996. That in the year 1997, there was a conflict within the Church and the 1st Respondent was asked to resign which he did on 24th June 1997. He confirmed that in the month of July 1997, the Claimant was not paid salary by the Church due to the conflict as he was seen to be supporting the 1st Respondent. His employment was terminated by the Church and he was not paid severance.

The dispute between the 1st and 2nd Respondent was decided in favour of the 1st Respondent by the High Court and the 1st Respondent was reinstated to the Church land. On 6th August, 1997, he hired the Claimant temporarily to take care of the land. The 1st Respondent lost, the case on appeal, the claimant was arrested and ejected from the Land.

The 1st Respondent wrote him a recommendation letter on 26th November 1997 but he did not find work.

On 6th December 1997 the 1st Respondent decided to hire him as a guard at his home at Milimani

Estate in Nakuru. He worked there for 2 years. The 1st Respondent then moved to the Garden Estate in Nairobi and the Claimant came along with him. The Claimant worked at the Garden Estate until the year 2000.

It is the 1st Respondent's case that the Claimant only worked for him for a period of 3 years between 1997 and 2000. He told the court that he left for the United States of America in the year 2000 and he paid the Claimant Severance pay on 8th July 2000. He produced the payback to demonstrate this payment which included severance pay at 15 days' salary for each completed year of service for 3 years in the sum of Kshs.7,955; payment in lieu of leave in the sum of Kshs.2,785 and travel allowance in the sum of Kshs.2,000/=

The 1st Respondent further testified that he came back from USA in the year 2001 and employed the Claimant as a Guard at Kahawa Sukari. The letter of appointment was dated 6th October 2001 and was produced as evidence. The Claimant worked till the 2nd of March 2010. On this date, the family of the 2nd Respondent relocated to Parklands to an Apartment. The new home was a gated community with shared guard services and therefore the Claimant had become redundant. He served one month's notice and left on 2nd March, 2010.

The 1st Respondent paid the Claimant severance pay for 8 years in the sum of Kshs.40,815/=; salary upto the 2nd March 2010 in the sum of Kshs.9,070/=. During the time, the Claimant worked from 6.30 p.m. in the evening to 6.30 a.m. in the morning and worked 6 days a week. He got 1 day off per week.

The 1st Respondent told the court that he paid him 20 hours overtime every month and he signed for it. Whilst at Parklands, he met the Claimant regularly and he tried to assist him to get a job. He gave him a letter of recommendation. The 1st Respondent sold his extra household items to him and transported them for him to Marurui.

In conclusion, the 1st Respondent told the court that the Claimant had worked for him for a total of 11 years and had paid him all his terminal benefits. It is only the salary for June 1997 that was owed to him by the 2nd Respondent, the Church. The 1st Respondent told the court that at that time he was not the employer of the Claimant as he had resigned as a Pastor and had been dismissed as a trustee.

With regard to the 63 days claim in lieu of leave, he told the court that the Claimant was entitled to 21 days each year but had always given him one month leave. He produced receipts for 2006 & 2008 for leave allowance and transport allowance. He paid him whenever he went on leave. He said he had all of them in his records but had difficulties finding them.

During the period he was in USA, he told the court that he paid the Claimant in lieu of leave and he does not owe him any leave days at all. He demonstrated that the overtime was paid together with the monthly salary and the Claimant had signed for it. These payments were made by one, Mr. Kennedy Oyogo, on his behalf whenever he was away. Mr. Oyogo effected these payments till the year 2010. The 1st Respondent therefore refutes that the Claimant is owed any overtime at all. A substitute guard stood

in for him during off-days, and holidays. The 1st Respondent therefore, categorically denies that the Claimant worked during holidays. He testified that the overtime claimed in the sum of Kshs.7,231,680/= would require 200 years of work.

With respect to the Claim that that he terminated the Claimant's work unfairly, he reiterated that the Claimant stopped working when he moved to Parklands where his services were no longer required. That he had assisted him in every way including in trying to get alternative employment for him. Eventually, he offered him work at a church in Ruiru, but he did not respond to the offer.

He told the court that he felt very spitted by a man he had helped for so many years even when circumstances were against both of them. He also told the court he had made every effort to resolve this matter out of court but the Claimant was not co-operative.

Conclusions of fact

The court has made careful analysis of the evidence by the Claimant and that of the 1st Respondent on the employment history of the claimant.

The court has come to the inevitable conclusion that the claimant was an employee of the 2nd Respondent from 1994 until June 1997 and was paid all his dues during that period except the salary for the month of June 1997. That this salary was owed to him by the 2nd Respondent and the 1st Respondent who at the time had been dismissed as a trustee and pastor of the church had no responsibility to pay him.

That between the year 1997 and the year 2000 he was employed by the 1st Respondent at Garden Estate in Nairobi as a Security Guard and was paid all his terminal benefits on 8th July 2000 when the 1st Respondent left for USA.

That the Claimant was re-employed by the 1st Respondent on 6th October 2001 as a Security Guard at Kahawa Sukari when the 1st Respondent came back from U.S.A. and was given a letter of appointment in that respect.

It is the court's finding that the Claimant remained in the employment of the 1st Respondent until the 2nd March 2010 when the 1st Respondent relocated to Parklands in a Gated Community where the services of the Claimant were no longer required.

The court has come to the conclusion that the Claimant was paid all his terminal benefits upon termination of his employment at the time. It is also the court's finding that the claimant was not owed any days in respect of leave and he was fully paid for extra hours worked.

The court is satisfied that a standby guard was always hired to relief him on days when he was given off and during holidays. The Court also agrees with the evidence by the 1st Respondent that the claimant served 1 month's notice upon termination and was not only relocated to his home at Marurui but also was allowed to buy extra household goods from the 1st Respondent.

The Court is satisfied that the 1st Respondent even in difficult circumstances provided decent employment for the claimant. That the 1st Respondent had fulfilled all the statutory requirements with regard to the employment of the Claimant.

The claimant has in the circumstances failed to prove that he is owed any terminal benefits by the 1st Respondent or at all except the one month's salary for June 1997 in the sum of Kshs.5,000/= by the 2nd Respondent. The same claim is however statutory barred and is also dismissed.

In the converse, the 1st Respondent has established on a balance of probabilities that he terminated the employment of the Claimant for a valid reason and the termination was in terms of a fair procedure as provided under Section 45(2)(a) & (c) of the Employment Act.

The entire claim is dismissed with no order as to costs.

It is so ordered.

Dated and Delivered at Nairobi this 12th day of July, 2013.

Mathews N. Nduma

Principal Judge – Industrial Court