



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 48 OF 2013

PETER J. OTIENO.....CLAIMANT

v

UNITED (EA) WAREHOUSE LTDRESPONDENT

JUDGMENT

1. Peter J. Otieno (the Claimant) filed a Memorandum of Claim against United (EA) Warehouse Ltd (the Respondent) on 14 March 2013 and the Claimant stated the issue in dispute as *non-payment of salary in lieu of notice, leave, unlawful termination and compensation*.
2. The Respondent was served and it filed a Memorandum of Appearance on 3 April 2013 through Cootow & Associates, Advocates and a Response on 22 April 2013. I just need to reiterate that the Industrial Court (Procedure) Rules, 2010 do not provide for the filing of a Memorandum of Appearance but rather a Memorandum of Response. Indeed the Notice of Summons issued under the hand of the Deputy Registrar directed the Respondent to file a Response within fourteen days from the date of service. The main objective being the expeditious disposal of employment disputes and keeping the proceedings simple.
3. I heard the parties on 12 June 2013 and reserved my decision for 5 July 2013.

Pleadings and evidence

4. The Claimant pleaded and submitted (he declined to give sworn testimony despite the court explaining to him the implications) that he was employed by the Respondent on 16 December 2007 as a security guard at a salary of Kshs 7,000/- per month and that he was given a letter of appointment only in January 2008.. It was also pleaded that he did not go on leave/holidays in the course of the employment and that the wages did not include house allowance.
5. The Claimant further pleaded and submitted that his services were terminated unfairly on or around 31 January 2012 and that the Respondent has failed to pay his terminal benefits.
6. On why the termination was unfair, it was the case of the Claimant that he was not given any notice; paid in lieu of notice or given reasons for the dismissal and that if any reasons were given they were without basis.
7. The Claimant therefore seeks a declaration that his termination was unlawful and that he was entitled to one month leave after every 12 months, underpayments, salary in lieu of notice, severance pay, house allowance, leave and overtime all totaling Kshs 118,592/- ,and also compensation.
8. The Respondent on its part pleaded and its witness testified that the Claimant was employed with effect from 1 February 2008 to 30 April 2008,(Respondent's Exh. 1) on a three month contract but subject to the business environment. The Claimant's contract was renewed through a letter dated 5 November 2010 (Respondent's Exh. 4) from 1 November 2010 to 30 January 2011. It appears that there was no written contract from 1 May 2008 up to end of October 2010 when a written contract

- effective 1 November 2010 to 30 January 2011 was entered into.
9. The Respondent's witness further testified that after the expiry of the three month contract, the contract was renewed and the Claimant reengaged until 31 January 2012 when the Claimant was informed through letter of even date (Respondent's Exh. 2) that he would be terminated due to reduced business volume.
 10. According to the Respondent, the Claimant was not terminated but his contract expired through effluxion of time, and regarding leave, it was contended that the Claimant used to go on leave and an approved leave application form dated 7 October 2011 was produced (Respondent's Exh. 3). The form show that the Claimant applied for and proceeded on 14 days leave from 11 October 2011 to 27 October 2011. The form indicates that the leave days were to be recovered from the Claimant's October salary.
 11. The Respondent stated that the Claimant was not entitled to any of the reliefs sought.

Statutory burden on complaints of unfair termination/wrongful dismissal

12. The statutory burden placed upon an employee who complains of unfair termination or wrongful dismissal is set out in section 47(5) of the Employment thus

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

13. This is the statutory burden and to meet it an employee must bring forth evidence on why the termination is unfair or dismissal wrongful. To discharge the statutory burden, an employee or claimant could prove that the termination or dismissal was for one of the reasons set out in section 46 of the Employment Act. The reasons set out in section 46 of the Act are in brief a termination based, on a female employee's pregnancy; on an employee going/proposing to go on earned leave; employee's membership or proposed membership of a trade union; employees participation or proposed participation in activities of a trade union outside working hours or within working hours with consent of employer; employee seeking/(acting in) an office in a trade union/as a workers representative; employee's refusal or proposed refusal to join or withdraw from a trade union; employee's race, colour, tribe, sex, religion, political opinion, nationality, social origin, marital status or HIV status; initiation of legal proceedings against employer and participation in a lawful strike. If a Claimant proves any of these reasons, the termination would be automatically unfair.
14. If an employee is unable to bring himself under any of the reasons listed in section 46 of the Act, the employee must convince the Court that the employer did not act in accordance with justice and equity thus making the termination unfair by virtue of section 45(4)(b) and (5) of the Act. Justice and equity are such broad concepts that the Court will have to decide each case on its own circumstances and peculiarities.
15. Once an employee has discharged the statutory burden placed upon him, the second limb of section 47(5) of the Employment Act comes into play and an employer will have to discharge the statutory burden of justifying the grounds of termination or dismissal.
16. In discharging the statutory burden, the statute has imposed on an employer what may be the equivalent of an evidentiary burden under the Evidence Act. I say so because the rules of evidence are not strictly applicable in proceedings in the Industrial Court by virtue of the Industrial Court Act section 20.
17. Other sections of the Employment Act have also imposed statutory obligations upon an employer. Section 41 of the Act require that the employer comply with the procedural fairness safeguards set out therein or what has been referred to as natural justice in public/administrative law; section 43 of the Act require an employer to prove the reasons for the termination or dismissal and section 45 of the Act require an employer to prove that the reasons for termination or dismissal were valid and fair.
18. There are other provisions of the Employment Act which have placed other statutory or evidentiary burdens upon an employer but I will discuss them, when necessary when dealing with appropriate relief and the individual heads of claim. I will now discuss whether the Claimant has

demonstrated that the termination was unfair.

Whether the termination was unfair/dismissal wrongful

19. The Claimant did not suggest or plead that his termination was for any of the reasons set out in section 46 of the Employment Act and therefore his case falls for determination under section 45(4)(b) and (5) of the Act on whether the termination was in accordance with justice and equity.
20. One of the reasons given by the Claimant for challenging his termination was that he was not given notice. Section 35(1)(c) of the Employment Act provides that where the contract is to pay wages periodically or at intervals of or exceeding one month, it is terminable by the giving of at least 28 days notice in writing or payment in lieu of notice.
21. The letter terminating the Claimant was written on 31 January 2012 and it informed the Claimant that the contract was not going to be renewed. I must therefore have recourse to the contract which was expiring on 31 January 2012.
22. All that was presented before the Court was a contract of employment dated 29 January 2008 (Respondents Exh. 1) and it was stated to expire on 30 April 2008. There is no documentary evidence from either party on what happened after 30 April 2008. This is because the next contract of employment produced before the Court is the one dated 5 November 2010 (Respondent's Exh. 4) and it is stated therein that it was to expire on 30 January 2011. Again there is no documentary evidence on what terms or how the relationship between the Claimant and the Respondent was to be regulated after 30 January 2011. The Court cannot assume that there was a verbal renewal of this contract or what its terms and conditions were.
23. But what the Court can state is that between 30 January 2011 and 31 January 2012 when the Respondent terminated the Claimant, was a period of nearly 12 months and that section 9 of the Employment Act requires all contracts for a period or a number of working days which amount in the aggregate to the equivalent of three or more months or which provides for performance of specified work which cannot be completed within three months to be in writing.
24. And section 9(2) of the Employment Act places the obligation of drawing up the contract on the employer. Section 10(2) (e) of the Act requires the contract to specify its form and duration.
25. I could go on and on but the short of it is that I am unable to concede to the position advanced by the Respondent that the contract it purported to terminate through its letter of 31 January 2012 was a fixed term contract which had come to an end through expiry or effluxion of time. This contract which was being terminated and which should have been in writing was not produced in Court.
26. The result of the foregoing is that sections 35(1)(c), 41, 43 and 45 of the Act become implicated and looking at the overall material placed before me, the conclusion I reach is that the termination of the Claimant was not in accordance with justice and equity. It was unfair.

Appropriate relief/individual heads of Claim

Salary in lieu of Notice

27. The Claimant sought the equivalent of three months pay as notice. However, the Claimant did not lay any contractual basis for seeking the equivalent of three months wages as notice, and therefore I have to revert to the statutory regime. The statute has laid out what has been referred to in academic/scholastic sphere as the irreducible minimums.
28. The irreducible minimum set out in section 35(1)(c) as read with sections 36 and 49(1)(a) of the Employment Act is the remuneration the Claimant would have earned but for the notice. Rather than give 28 days' wages, the tradition, custom and practice has been to give the equivalent of one month remuneration. The Claimant was earning Kshs 7000/- per month at the time of termination.
29. However, according to the Labour Institutions General Amendment Order, Legal Notice No. 64 of 10 June 2011, the basic wage for a day watchman was set as Kshs 7,586/- exclusive of house allowance. 15% of the basic wage is Kshs 1,137/- .The total remuneration would thus be Kshs 8,723/- per month. I would therefore award the Claimant the sum of Kshs 8,723/- as one month salary in lieu of Notice.

Severance pay

30. The termination letter dated 31 January 2012 made reference to reduced volume of business activity and also to the fact that the contract was not being renewed. The Claimant opted not to give any sworn evidence but preferred to make submissions. With the material placed before me I am unable to conclude that the Claimant was declared redundant and therefore entitled to severance pay. The claim is therefore declined.

House Allowance/Underpayments

31. In the body of his claim/submissions, the Claimant made reference to underpayments. The initial contract of employment indicated that the salary of Kshs 5000/- per month was consolidated. This was basically in accord with section 31 of the Employment Act, but the housing element should have been stated.

32. But that is not the whole story. The statutory regime in Kenya has provided for statutory minimum wages, the irreducible minimums I referred to earlier, and therefore I need to examine the relevant Wages Orders from 2008 to 2012 to ascertain whether the wages paid to the Claimant were in compliance with the statutory minimum wages.

33. From 1 May 2009 to 30 April 2010, the minimum statutory minimum wage for employees in the category of the Claimant (day watchman) through Legal Notice No. 70 of 20 May 2009 was Kshs 6130/- exclusive of housing allowance. The housing allowance at 15% of the basic wage is Kshs 919/50, all totaling Kshs 7049/50. The effect of this is that the Claimant was being underpaid by Kshs 2049/50 per month. The total underpayments from 1 May 2009 to 30 April 2010 was therefore Kshs 24,594/-. The underpayments from February 2010 to 30 April 2010 were Kshs 6148/50.

34. From 1 May 2010 to 30 April 2011 the minimum wage for a day watchman was Kshs 6,743/- per month exclusive of house allowance. At 15% of the basic monthly wage, the house allowance during the period was Kshs 1011/- bringing the total to Kshs 7754/-. This is according to Legal Notice No. 98 of 18 June 2010.

35. The only evidence I have is that the Claimant's consolidated salary was increased to Kshs 7000/- per month effective 1 November 2010 to 30 January 2011. It is clear that the Claimant was being underpaid by Kshs 754/- per month from 1 November 2010 to 30 April 2011. At termination he was still earning Kshs 7000/- per month.

36. I would also assume that before 1 November 2010, the Claimant was being paid Kshs 5000/- per month. Therefore from 1 May 2010 to 30 October 2010, the Claimant was being underpaid by Kshs 2754/- totaling Kshs 16,524/- while from 1 November 2010 to 30 April 2011 he was underpaid a total of Kshs 4524/-. The total underpayment from 1 November 2010 to 30 April 2011 was Kshs 21,048/-.

37. From 1 May 2011 to the time of termination of the Claimant, the minimum wage was set at Kshs 7,586/- exclusive of house allowance. House allowance at 15% was Kshs 1137/- all totaling Kshs 8723/-. From this it is clear that the Claimant was being underpaid by Kshs 1723/- per month. From May 2011 to 31 January 2012 (9 months) when the Claimant was terminated he was underpaid by a total of Kshs 15,515/-.

38. Because of the provisions of section 90 of the Employment Act, the Claimant claims in respect of underpayments prior to January 2010 are statute barred. The section provides that

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained **or in the case of continuing injury or damage within twelve months next after the cessation thereof.**

39. The act of underpayments ceased on 31 January 2012 and therefore should have been challenged by end of January 2013. In this regard I would award the Claimant the underpayments from February 2010 up to January 2012 totaling Kshs 59,235/50.

Leave

40. The Claimant sought Kshs 28,000/- as payment for accrued leave for the 4 years he served the

Respondent. Annual leave of at least 21 days with full pay is a statutory right of every employee. Section 10(3)(a) of the Employment Act requires an employer to put into writing an employee's leave entitlement with sufficient particulars to enable precise calculation on termination. The Respondent produced the leave records of the Claimant for 2011 and the said record indicated that the Claimant went on leave for 14 days.

41. The Claimant was entitled to 21 days annual leave with full pay on or around 1 February 2009 (after initial 12 months completed service), another 21 days with full pay around 1 February 2010, 1 February 2011 and another 21 days on or around 1 February 2012. I therefore find that he is entitled to the equivalent of 3 months pay for the accrued leave which I assess in the sum of Kshs 26,171/-.

Overtime on public holidays

42. No foundation was laid in testimony or the documents relied on to establish exactly how many public holidays the Claimant worked and I decline to make any finding in favour of the Claimant.

Compensation

43. Compensation is one of the primary remedies for unfair termination of employment. The maximum compensation must not be more than the equivalent of 12 months' gross earnings. Section 49(4) of the Employment Act has set out the thirteen factors the Court should consider in awarding compensation.

44. Considering all the relevant factors and the fact that I have held that the termination of the Claimant was unfair, I would award him the equivalent of three month gross wages as compensation. I assess the same as Kshs 26,169/-.

Conclusion and Orders

45. From the foregoing I do find, hold and declare that the termination of the Claimant was unfair and award him

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|---|-----------------|
| a. One month salary in lieu of notice | Kshs 8,723/- |
| b. Underpayments | Kshs 59,235/50. |
| c. 3 months' accrued leave at salary on termination | Kshs 26,169/- |
| d. Three months' compensation | Kshs 26,169/- |

TOTAL

Kshs 120,296/50.

46. The claims for severance pay and overtime are declined.

47. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 12th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Claimant in person

Mr. Wafula instructed by Cootow & Associates for Respondent