



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1389 OF 2012

KRISTOFA BUKACHI OKUMALI.....CLAIMANT

-VERSUS-

CHINA WU YI (K) CO.LTD.....RESPONDENT

Claimant in person.

Mrs Ochieng for Respondent.

JUDGMENT

It is common cause that the Claimant was employed by the Respondent on 1st June 2011 and he worked continually until the 4th August 2012. At the time of termination of his employment he earned Kshs. 12,000 per month.

It is also not in dispute that the Claimant worked as a mason and that the Respondent was a construction company involved in various building projects in Nairobi.

The Claimant alleges that his employment was unlawfully terminated when he questioned his supervisor as to why he had deducted his two days in a job card.

The Claimant testified under oath in support of his case and told the Court that he worked as a mason at Yaya Centre. That he was initially paid Ksh.250 per day until the month of April 2012 when the daily rate was increased to Ksh.400/=. That he was paid on 15th and 30th of every Month.

That he reported to work at 7.30 am up to 6pm in the evening and worked for 7 days a week. That he did not get any off-days and was not paid over time for extra hours worked.

Furthermore the Claimant testified that he worked during public holidays and was not paid double rate, as per the law. During the entire period he served the Respondent, he did not take leave and was not paid in lieu thereof.

The Claimant added that he had no pay slip but signed a book whenever he was paid.

He told the Court further that he was not paid for the days worked in the month of August 2012 and claims arrear salary in respect of 7 days which included 3 days carried forward from July 2012.

On the 5th /8/2012, the claimant reported to work as usual but was not allocated any work and therefore lodged this matter.

He denied that he was violent towards his supervisor as alleged by the Respondent and told the Court that he had done his work properly all times while he worked for the Respondent.

The Claimant relied on an amended statement of claim dated 3/9/2012 and filed on the same date with annexures thereof. The documentation shows that he was registered with National Security Fund (NSSF) with effect from 17/1/2011.

He also attached Legal Notice No. 71 of 2012 which shows that as an ungraded Artisan he should have been paid a monthly salary of Ksh. 11,580,30. However he told the court that he was paid Ksh. 12,000 per month and claims under payments for the entire period worked.

The Respondent filed a response to the amended statement of claim dated 21/11/2012 on 23/11/2012.

The Respondent admits that the Claimant was paid Ksh. 12,000/= per month and that he worked continuously up to the 4th August, 2012.

The Respondent however denies that the Claimant was dismissed for questioning his supervisor about deduction of two days wages in the job card but avers that he was summarily dismissed for assaulting the supervisor when he was asked why he was not doing his work as required.

The Respondent did not call any witness in support of its case and does not have any attachments to the statement of defense to counter the various claims by the Claimant.

This being the case the evidence by the Claimant is largely uncontroverted.

On the circumstances leading to the summary dismissal of the claimant, the version told by the Claimant is mutually destructive to the averments and submissions from the bar by counsel for the Respondent .

The Court has in the circumstance no basis of doubting the version told by the Claimant since mere averments in the statement of defense do not suffice to counter the testimony of the claimant given under oath.

The court finds that the Claimant has satisfied the requirements under Section 47(5) of the Employment Act to show on a balance of probabilities that his employment was unlawfully and unfairly terminated by the Respondent when he demanded his rightful wages from the supervisor.

The Respondent on the other hand failed to call the supervisor to testify in support of its case and has accordingly failed to establish the reasons for dismissing the Claimant summarily and the Respondent further failed to show that the reason for the summary dismissal was justified taking all the circumstances of the case into account.

Accordingly, the termination of the employment of the Claimant was contrary to Section 45(2) (a) and (c) of the Employment Act in that it was not for a valid reason and was not done in accordance with a fair procedure.

Having found that, the claimant is entitled to:

- i. *Payment of one (1) month's salary in lieu of notice*

in the sum of Ksh. 12,000/=.

- ii. *Payment of leave days for one (1) year calculated at the rate of 21 days per year in the sum of Ksh.12,000/=.*
- iii. *Salary for seven(7) days in the sum of Ksh.3,230/=.*
- iv. *Payment of one (1) off day in a week which calculates to (sixty four)days in one year and 1 month in the sum of Ksh. 29,538/=.*
- v. *Holidays worked at double the rates in the sum of Ksh. 6,460 /= and;*
- vi. *Overtime worked from 7.30am. to 6pm. every day in the sum of Ksh.69,300/=.*

The Legal Notice relied upon shows that the minimum monthly rate for unqualified Artisan in Nairobi at the time of termination was Ksh. 11,580.30/=

It is common cause that the Claimant was paid Ksh. 12,000 per month. The claim for underpayment payments is not proven. No claim for housing allowance was pleaded and the Court will not consider the same.

Equally the Claimant produced evidence to show that he was registered with NSSF as from 16th June 2011. The claim for severance pay fails accordingly.

As concerns the claim for compensation for unlawful termination, the Claimant worked for the Respondent for a relatively short time . He is a mason with experience and would have no difficulties finding alternative work. He however lost his job in an unlawful and unfair manner and the Court awards him 4 months' salary as compensation for unlawful and unfair dismissal in terms of Section 49(1) (c) of the Employment Act in the sum of Ksh. 48,000/=

In the final analysis, the Respondent is to pay to the Claimant the following:

1. *Ksh.12,000/= in lieu of notice*
2. *Ksh. 12,000/= in lieu of leave.*
3. *Ksh. 3,230/= for 7 days salary arrears.*
4. *Ksh. 29,538/= in lieu of off days.*
5. *Ksh. 6,460 in lieu of public holidays.*
6. *Ksh. 69,300/= for overtime.*
7. *Ksh. 48,000/= compensation.*
- 8.
9. *Total Award. 180,528/=.*

8. *Costs of the Suit.*

It is so ordered.

Dated and delivered at Nairobi this 21st day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE INDUSTRIAL COURT

