



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 513 of 2010

MR. NATHAN OZIGE OLIEGO LORA..... APPLICANT

VS

M/S ELDORET GRAIN LIMITED RESPONDENT

JUDGMENT

The Claimant Nathan Ozige Oliego Lora filed his memorandum of claim dated 7th May, 2010 on the 10th May, 2010.

The issues in dispute are as follows:

1. Failure to remit NSSF and NHIF.
2. Failure to insure.
3. Failure to provide house allowance.
4. Failure to pay salary for November 2008 to August 2009.
5. Unfair termination.

The claimant stated in his memorandum of claim that on or about 25th November 1998 he was employed by the respondent as loader at a salary of Ksh.1800/= per week. That during that period, the Respondents used to promise to pay house rent at the end of the month which they never did. During the same period, the claimant contends that the Respondent also promised to issue the claimant with NSSF and NHIF cards which they also never did.

The claimant further contends that the Respondent also never provided insurance to him and whenever the claimant was injured, he had to fend for himself. The claimant also gave evidence in court and indicated that he had worked for Respondent for over 10 years and was a member of the Kenya Union of Food and Allied Workers Union. When he was dismissed he reported the case to his Union. The Union General Secretary wrote to the Ministry of Labour and reported a dispute. A conciliator was appointed to handle the dispute and he called for a meeting. No agreement was reached. He now seeks from court an order for reinstatement, compensation for wrongful termination. His gratuity, house allowance and remittance of his NHIF and NSSF.

When cross examined by counsel for Respondent, the claimant told this court he was not given notice

before being dismissed. He says he was a member of a Union and used to remit his membership dues. He indicated that he did not involve the Respondent when he joined the Union. He also indicated that he did not work under one Godfrey Taabu Ojwang and in master roll, the name of Godfrey Taabu at page 44 shows he was also paid as a worker.

He says he used to be paid as per hours worked. He says he used to report to stores clerk in the morning and after finishing work he used to report to personnel and be paid. The claimant also told court that Kennedy Obeda and one Mugadiri were loaders like him. He indicated that he was sacked with Mugadiri as they loaded maize. He indicated that Taabu Obeda were workers like himself despite the Respondent Exh 1 which shows that the two had an agreement with Respondents to recruit loaders. The claimant told court that he was entitled to 14 days notice and was never given.

The claimant called one witness a Union representative who told court that as Secretary General of the Union, he was called by the Conciliator to resolve this case but the Respondent never turned up. In cross examination he told court that claimant was their member since 2008. He says claimant ceased to be a casual when he was being paid every week and worked for periods of over 24 hours. He says the off days the claimant is entitled to is 1 day per week x 52 x 10 years = 520 days. He says whenever claimant was off duty he was not paid.

The Respondent did not file any memorandum of Reply to the defence despite being served. They however attended court and called 4 witnesses. The witnesses informed court that the claimant was sub contracted as a loader to the Respondent by the 2nd witness and 4th witness of Respondent. That the claimant was actually dismissed after he off loaded grain with high moisture content contrary to company policy.

DW 1 in particular told court that he is Marketing Manager of Respondent and the Respondent never employed the claimant. He further told court that the claimant refused to have NSSF deducted from him. DW2 says the claimant was being paid by him and not by the Respondent.

The DW3 said he was working with claimant when they were dismissed but he was reinstated when he apologized. He says the person who was paying them was DW2 and not the Respondent.

Having heard the evidence of both parties, the issues for determination are:

1. Whether the claimant was an employee of Respondent.
2. Whether the claimant was unfairly terminated by the Respondent.
3. What remedies if any, the claimant is entitled to.

On the first question, the claimant indicated to court how he worked for Respondent since 1998. He indicated that he was being paid by the Respondent and the muster roll produced in court by the Respondents witnesses of how the workers were being paid, show claimant and the Respondent's witness 2, 3 and 4 being paid on the same sheet and signing against it.

It beats logic to imagine that the Respondent witness No. 2 was the one who had contracted claimant for this work and yet sign on payment sheet like his employees.

When DW1 gave evidence in court, he also indicated that the Respondent were remitting NSSF payments for 10 people but claimant refused to have his dues remitted. This also points to the fact that Respondent was the employer of the workers for which they remitted NSSF. They would have done the same for the claimant had he agreed.

DW2 also indicated to court that the insurance for workers was taken out by the Respondent and the Respondent could not take out insurance for workers who were not in their employment. Though there is an agreement produced in court showing that there was a contract between the Respondents and DW2, the

Claimant, was not in the picture of its nitty gritty. The claimant believe he was an employee of the Respondent and all the circumstances pertaining to this case point to the fact that the Respondent was employer of claimant.

Having found that the claimant was an employee of Respondent, I go to the next question. Was the dismissal of claimant by Respondent unfair?

The claimant came to work as usual and it is alleged he off-loaded some grain with high moisture content. He was told to leave. The Claimant had worked for Respondent for 10 years. Having committed a mistake of off loading grain in unauthorized manner that would not in my view constitute an act of gross misconduct as envisaged under Section 44 of the Employment Act. In any case the claimant was not accorded any hearing over what had led to his dismissal. He was just ordered to leave work. This was in breach of his rights of natural justice of a right to be heard. I therefore find that the dismissal of the claimant by the Respondent was unlawful and wrongful.

What remedies then is the claimant entitled to?

First and foremost the Respondent failed to remit claimant's NSSF dues as expected. This in itself is an omission with penalties under the NSSF Act. I will therefore find for claimant and order respondent pays him as follows:

1. 1 month salary in lieu of notice
= 1800/= per week x 4 = Ksh.7,200/=
2. 12 months compensation for unlawful termination
7200 x 12 = Ksh.86,400/=
3. Since the respondent did not remit NSSF dues,

I order claimant to be paid severance pay of

15 days for each year worked

$$= \frac{1}{2} \text{ of } 7500 \times 10 = \text{Ksh.37,500/=}$$

4. House allowance equivalent to 15% salary
= 15% of 7200 = 1125 x 12 x 10 = Ksh.135,000/=

TOTAL = Ksh.266,100/=

5. The Respondents will pay costs of this suit.

Dated, signed and delivered this 22nd day of November, 2012.

**HELLEN WASILWA
JUDGE**

Appearances:

Claimant in person

Kathili

for Respondent

