



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1804 of 2011

CLAIMANT

Augustine Njagi Nyaga

RESPONDENT

M/s Sahajanad Timber & Hardware Co. Ltd

AWARD

Background

1. The proceedings herein were taken by retired Justice Chemmutut. It will therefore be helpful if I gave a brief background.
2. The Claimant filed the Claim herein on 26 October 2011. On 28 February 2012 the file was placed before the Judge. During this appearance, the Claimant appeared in person and Mr. John Mwangi Kabuu appeared on behalf the Respondent. It appears Mr. Kabuu is either a director or Manager of the Respondent. The Respondent was ordered to file its Reply to the Claim by 21 March 2012 and hearing was set for 18 September 2012.
3. On 18 September 2012 the file was placed before me. This is because Justice Chemmutut had ceased to hold office as a Judge of the Industrial Court. The Respondent Claimant appeared in person while there was no representation for the Respondent. Having satisfied myself that the hearing date was taken in the presence of a representative of the Respondent I allowed to hearing to proceed.
4. I note that the Respondent did not comply with the order given by retired Justice Chemmutut to file its Response to the Claim by 21 March 2012. The Cause therefore proceeded as undefended and the Claimant gave sworn testimony.

The Claimant's case

5. It is stated in the pleadings and is the evidence of the Claimant that he was employed by the Respondent as a carpenter with effect from 7 August 2007. He was certified by the Director of Industrial Training with a Certificate of Proficiency in carpentry and joinery which is equivalent to Government Trade Test Grade 1.
6. According to the Claimant, he was being paid at a daily rate of Kshs 400/-. The Claimant contends that this was below the minimum rate of Kshs 564.40 set out in Legal Notice No. 38 of 1 May 2006.
7. The Claimant further contends he was entitled to a further Kshs 84.70 per day as 15% housing allowance under the Legal Notice. In short, the Claimant case is that he was entitled to Kshs 649.10 per day and therefore he was underpaid by Kshs 249.10 per day for the period 7 August 2007 to 30 November 2007 which he calculates at a total of Kshs 23,913.60.

8. It is the Claimant further assertion that the Respondent raised his salary to Kshs 500/- per day with effect from 1 December 2007 up to 30 April 2009. It is his case that this was an underpayment of Kshs 149.10 and this went on for 17 months and therefore he is entitled to Kshs 60,781.80/-

9. He further asserts that from 1 May 2009, vide Legal Notice No. 70 of 1 May 2009, the minimum daily rate was raised to Kshs 765.40 inclusive of 15% house allowance while the Respondent continued paying him at a daily rate of Kshs 500/- until 7 October 2009 when his services were terminated. In consequence therefore for the period 1 May 2009 to 7 October 2009 he is claiming a total of Kshs 31,848/-

10. The Claimant is also seeking Kshs 19,990/- being one month's salary in lieu of notice; Kshs 37,629/- being outstanding annual leave for 2 years; Kshs 21,312/- severance pay and Kshs 59,233.20 house allowance; Kshs 68,593 being 103 weekly resting days he worked; Kshs 3770/- tools allowance; Kshs 26,900/- for loss of tool box and Kshs 243,090/- being 12 months maximum compensation.

11. In total he is seeking Kshs 536,278.80 and a Certificate of service.

12. The Claimant has relied on Legal Notices Nos 94 of 27 August 2004; 38 of 1 May 2006 and 70 of 1 May 2009.

13. Regarding the circumstances of his termination, the Claimant testified that he fell sick on 26 September 2009 and was given 7 days sick off. When he reported back on duty on 8 October 2009, he testifies the Respondent's Operations Manager a Mr. John Kaburu turned him away and rejected his medical sick-off.

Issues for determination

14. The issues which emerge for determination are whether the Claimant was unfairly terminated and if so what remedies should be awarded.

15. Before reviewing the case for unfair determination I wish to note that the claim is broadly hinged on the ground that the Claimant held Government Trade Test Grade 1. The Claimant has based his Claim on the wages equivalent to those of Government Trade Test Grade 1 while all he has exhibited are Certificates of (successful completion) of Proficiency as an Apprentice in carpentry and joinery. But the Claimant did not produce any evidence that he had been issued with a Trade Test certificate as provided under the Industrial Training (Trade Testing) Rules 1977. In fact the Claimant did not establish or demonstrate any principle or policy, convention, law or industrial relations issue or management practice he relied on to support his contention that a certificate of proficiency test at final level in apprenticeship is equivalent to any Government Trade Test.

16. I therefore come to the conclusion that the Claimant was a carpenter/joiner and any wages or benefits payable to him would be calculated at the set rates for carpenters/joiners.

Whether termination of Claimant was unfair

17. The only evidence I have on this issue is the testimony of the Claimant that he was sick and when he reported back to work he was sent off by a Mr. Kabuu Manager of the Respondent. He was not given any notice or hearing and I cannot reach any other conclusion except that the termination was unfair.

One month salary in lieu of Notice

18. At the time the Claimant's services were terminated on 7 October 2009, he pleaded that he was on a daily wage of Kshs 500/-. I have already reached the conclusion that the Claimant was a carpenter/joiner and the prescribed rate through Legal Notice No. 70 of 2009 for an ungraded artisan was Kshs 397/90 inclusive of housing allowance. The Claimant was therefore earning well above the minimum rate.

19.The Regulation of Wages (Building and Construction Industry) Order 2004 also relied upon by the Claimant provided for a 45 hour working week inclusive of five hours on Saturday. Relying on this provision and the fact that the Claimant was entitled to one rest day per week and the practice I will adopt an average 26 days of work per month.

20.I do therefore find that the monthly wage of the Claimant was Kshs 500 multiplied by 26 which is Kshs 13,000/- and award him this sum as one month salary in lieu of notice.

Annual leave for 2 years 2 months

21.Similarly all that I have is the pleading and evidence of the Claimant that he never went on leave during the period he was employed by the Respondent. Regulation 8 of the Regulation of Wages (Building and Construction Industry) Order 2004 provides for 26 working days leave after every twelve months consecutive service with full pay.

22.Having already made a determination on the monthly equivalent wage of the Claimant, calculating the amount due in respect of accrued leave is a mathematical task. It is 54 days. To arrive at the amount payable therefore I would multiply the daily wage of Kshs 500/- by 54 and arrive at a sum of Kshs 27,000/-

Severance pay

23.There was no claim that the Claimant was declared redundant. Under section 40 of the Employment Act, 2007 is clear that severance pay is payable on redundancy. I decline to make any award under this head of claim.

House Allowance

24.I have had some difficulty with this head of Claim. Under Legal Notice No. 70 of 2009 relied on by the Claimant it is prescribed expressly that the daily wage is inclusive of house allowance.However,under the Regulation of Wages (Building Construction Industry) Order 2004,Legal Notice No. 94 of 2004,house allowance is fixed at Kshs 1300/- per month. I would go with Legal Notice No. 70 of 2009,it being latter in time, and therefore I do hold that the wage paid to the Claimant was inclusive of house allowance.

Underpayments

25.There was a claim for Kshs 55,761/60 being underpayments. Having reached the conclusion that the Claimant did not establish that he was the holder of a Government Trade test certificate and was therefore a carpenter/joiner whose earnings were above the stipulated minimums, I also decline to make an award under this head.

103 weekly rest days

26.The Claimant sought Kshs 68,593/- as unpaid rest days. But in his evidence the Claimant stated that he was working 6 days in a week and not 7 days. In this regard it is my considered opinion that he has not established or met the threshold required of him to prove this aspect of his claim.

12 months' maximum compensation for unfair termination

27.I have determined that the termination of the Claimant was unfair. Sections 49(1) of the Employment Act set out the remedies where a summary dismissal or termination of employment is unjustified while section 49(3) sets out the remedies where summary dismissal or termination is found to be unfair.

28.I must confess that I find the drafting of section 49 (1) and (3) is not neat. There is apparent obscurity. The question which arises in my mind is whether these two subsections are exclusive of each other. But that is a question for another time, my task now is to exercise my discretion to make an award under this

head of claim. An award of compensation under section 49(1)(c) of the Employment Act is discretionary. Section 49(4) has set out some of the factors to be considered in making an award under this head. Some of these are the length of the employee's service with the employer, opportunities available to the employee and the wishes of the employee.

29. Considering these factors and the pleadings filed herein I decline to exercise my discretion in favour of the Claimant. I must confess that at some point I considered directing the Commissioner of Labour to carry out an inspection under section 35 of the Labour Institutions Act as it appeared to me the drafters of the Complaint herein wanted to pull a fast one on the Court. The pleadings were done in such a way not to clarify but to cloud the issues in contestation.

Tools Allowances and loss of tool box

30. Regulation 21 of the Regulation of Wages (Construction and Building Industry) Order, 2004 makes provision for payment of a tools allowance in situations where an employer has not provided tools at the rate of Kshs 145/- per month for carpenters. The Claimant has therefore satisfied me that he merits an award of Kshs 3770/- for the 26 months he served the Respondent.

31. On the claim for Kshs 26,900/- for loss of tool box, the claimant did not lay either a contractual or legal basis for the same in the evidence or pleadings and I decline to grant the prayer.

Conclusion

32. Consequent upon the foregoing I do find the termination of the Claimant unfair but prayers (c),(d),(e), (f)(g) and (i) are declined and the Claimant succeeds in respect of the other prayers as follows and is awarded:

(a) One month's salary in lieu of Notice	Kshs 13,000/
(b) Accrued 54 days leave	Kshs 27,000/-
(c) Tools Allowance for 26 months	Kshs 3770/-
TOTAL	Kshs 33,770/-

33. There will be no order as to costs.

Dated and delivered at Nairobi this 9th day of November 2012