



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 287 OF 2014

PETER ASUKA.....CLAIMANT

v

MUTUNGATI FARMERS CO-OPERATIVE SOCIETY.....RESPONDENT

JUDGMENT

1. The Claimant commenced legal proceedings against the Respondent on 7 July 2014 alleging unfair termination of employment, underpayments and seeking damages and other entitlements.
2. Filed together with the Claim was a motion seeking injunctive relief and which application was heard and determined by Ongaya J.
3. The Respondent filed a Response and Counterclaim on 24 July 2014 and this prompted the Claimant to file a Reply to Defence and Defence to Counterclaim on 11 August 2014.
4. The Cause was heard on 10 February 2015, 9 April 2015 and 7 July 2015. The Claimant filed his submissions on 31 July 2015 while the Respondent's submissions were not on file by today morning.
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *when were Claimant's employment terminated, whether the dismissal of the Claimant was unfair, whether the Claimant was underpaid and appropriate remedies/orders.*

Date of termination

6. In paragraph 3 of the Memorandum of Claim, it was pleaded that the Claimant served until January 2013. In a letter dated 11 June 2014 and produced by the Claimant, the Claimant was informed by the Respondent's advocate that he left employment on 17 September 2012.
7. During testimony, the Claimant was content with simply stating that he was informed that he had been dismissed by the Respondent's Chairman and avoided giving any dates.
8. The Respondent pleaded that the Claimant deserted duty from 17 September 2012. The Respondent produced ultimatums issued to the Claimant to explain his whereabouts dated 1 October 2012 and 15 October 2012 and a dismissal letter dated 30 October 2012.
9. The Claimant's wife in testimony alluded to the Claimant doing odd jobs from around September/October 2012.
10. He could not have been engaging on other gainful employment while working for the Respondent.
11. It is also instructive that the Claimant has not sought any wages after October 2012 which he would have naturally sought if he indeed worked upto or considered himself still under Respondent's employment upto January 2013.

12. For these reasons, the Court finds that the effective date of separation was 30 September 2012 and not January 2013.

Whether dismissal was unfair

Procedural fairness

13. The Claimant was dismissed through a letter dated 30 October 2012. The reason given was desertion.
14. In his testimony, the Claimant stated that there was no hearing prior to the dismissal and that it is the Respondent's Chairman who informed him of his dismissal.
15. Prior to the dismissal, the Respondent had written to the Claimant on 1 October 2012 a show cause letter to explain his whereabouts or face disciplinary action. The Respondent wrote another letter to the Claimant on 15 October 2012 informing him that he had failed to report on duty and that he risked dismissal without benefits.
16. The Claimant denied receiving the show cause letters or that his wife received the letters on his behalf.
17. The Respondent's Chairman in his testimony stated that the show cause letters were delivered to the Claimant's wife and she acknowledged receipt in a delivery book, a copy which was produced.
18. The Respondent's Manager also testified. She stated that she delivered the notices to the Claimant's wife and that she signed the delivery book.
19. The Claimant's wife was called to testify after the Respondent's case to clear the air on whether she took delivery of the 2 notices. She denied receiving the notices or signing the delivery book.
20. The Court has considered the differing versions on whether the 2 notices were delivered. A perusal of the copy of delivery book does not indicate any tampering.
21. Further, it was not suggested that court action was contemplated at the time of writing the show cause notices so it cannot be a case of the Respondent manipulating records to demonstrate delivery of the letters.
22. In this regard, the Court finds that it is more probable that the Claimant's wife acknowledged receipt of the show cause notices.
23. With the conclusion, the Court finds that the Respondent gave the Claimant an opportunity to make representations before the decision to dismiss him was taken but he failed to respond and therefore he cannot impeach his dismissal on the ground of failure to follow a fair procedure.

Substantive fairness

24. The reason given for the Claimant's dismissal was desertion. According to the Claimant, he was dismissed after an incident involving a thief he had caught and that he did not abscond from work.
25. The Claimant's wife in her testimony stated that the Claimant was doing casual jobs for other people from around September/October 2012.
26. The Respondent's witnesses on the other hand maintained that the Claimant had deserted work and relied on the 2 show cause notices.
27. The parties again have given inconsistent narratives as to whether it was a case of desertion. The genuineness of the show cause letters was not challenged by the Claimant. His problem was that the letters were not delivered.
28. Considering the time the letters were written and that legal action had not been contemplated, the Court finds that it is more consistent with the version given by the Respondent that the Claimant deserted work.

29. And having failed to turn up for work, the Claimant was repudiating the contract. He was in breach of a fundamental obligation. The Respondent made reasonable attempts to get him to explain his whereabouts/resume work or risk dismissal but he did not.
30. The Court therefore finds that the Respondent has proved desertion as valid and fair ground/reason for dismissal.

Underpayments

31. In the Memorandum of Claim, the Claimant pleaded that from 2003 to 2011, he was earning Kshs 3,030/- per month while the prescribed minimum wage for a watchman was Kshs 6,999/-. He thus seeks Kshs 428,652/-.
32. For the period 2012 to 2013, the Claimant pleaded that his wage was Kshs 5,000/- per month and thus he was underpaid by Kshs 452,640/-.
33. Underpayments should be pleaded with clarity especially where a party has the benefit of legal counsel. The months and years should be set out. The relevant Wages Orders should also be stated.
34. In the present case, the Claimant made reference to a minimum wage of Kshs 6,999/- but he did not identify the particular Wages Orders (he only cited Legal Notice No. 64 of 2011). The Court is aware that the minimum wage did not remain static from 2003 to 2013 and the cited Legal Notice applied only from 1 May 2011 to 30 April 2012.
35. He did not provide any clarity in his testimony. Considering the casual state of pleadings and testimony in respect to underpayments, the Court is unable to make a finding that the Claimant was underpaid.
36. Further, underpayments are a continuing injury and by virtue of section 90 of the Employment Act, 2007, the claim should have been commenced within 12 months of the cessation thereof.
37. The Claimant having been dismissed on 30 October 2012 should have brought legal proceedings on or before November 2013. Even assuming as pleaded that the dismissal was in January 2013, the 12 months would have lapsed around January 2014 while the legal action was commenced on 7 July 2014.

Overtime

38. The Claimant stated that he used to work from 6.00pm to 6.00am instead of 8 hours every day. The Respondent's Chairman admitted as much in his testimony.
39. The Claimant also sought overtime worked during public holidays and rest days.
40. It is not disputed that the Claimant was a security guard.
41. The Court has previously stated that it is a notorious fact that guards work in 2 shifts of 12 hours in this country. This fact is so notorious that the Court can and should take judicial notice of it.
42. The Claimant pleaded claim to overtime of 4 hours per day for 10 years. He quantified the amount as Kshs 141,924/-.
43. However, as regards overtime during public holidays and rest days, no evidence was led as to which public holidays were involved or the formula used to arrive at the computations.
44. The Claimant failed to adduce sufficient evidence on these heads of claim.
45. These heads of claim (overtime) also constitute continuing injury which should have been claimed within 12 months.

Injunctive relief

46. The Claimant's occupation of Respondent's property/housing was contiguous and dependent on an employment relationship as envisaged under section 31 of the Employment Act.

47. Once that relationship ended, he can only stay on such property upon the consent of the Respondent on such terms as to lease/rent as agreed.

48. The injunction sought therefore cannot be granted by the Court.

Appropriate remedies

Underpayments

49. This head of claim is statute barred.

Overtime

50. The Court finds the claim for overtime statute barred as well.

Damages

51. With the conclusion that the dismissal was not unfair, damages as an award becomes legally untenable.

Conclusion and Orders

52. The Court finds and holds that the dismissal of the Claimant was procedurally and substantively fair.

53. The Memorandum of Claim is dismissed.

54. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 11th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Murimi instructed by Murimi, Ndumia, Mbago & Co. Advocates

For the Respondent Mr. Ikua instructed by Ikua, Mwangi & Co. Advocates

Court Assistant Nixon



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