



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 166 OF 2016
JACTONE BENSON ADUDA.....CLAIMANT
VERSUS
BEDROCK HOLDINGS LTD.....RESPONDENT
JUDGMENT

1. On 13 October 2015, Bedrock Holdings Ltd (the Respondent) wrote to Jactone Benson Aduda (the Claimant) to notify him of the termination of his employment on health grounds.
2. The Claimant was aggrieved, and he sued the Respondent on 16 June 2016, alleging unfair termination of employment and breach of contract.
3. The Respondent filed a Response on 14 December 2016, and the Cause was heard on 17 December 2020 and 18 March 2021.
4. The Claimant and the Respondent's Head of Human Resources testified.
5. The Claimant filed his submissions on 24 May 2021, while the Respondent had filed its submissions on 14 April 2021.
6. The Claimant identified 2 Issues for adjudication:
 - i. Whether the termination of the Claimant's employment was illegal and unprocedural"
 - ii. Whether the Claimant is entitled to the terminal dues amounting to Kshs 1,044,848/-"
7. The Court has considered the pleadings, evidence and submissions.

Breach of contract

Overtime

8. The Claimant, a supervisor (guard), sought Kshs 479,520/- alleged to be overtime for 8-years of service.

9. In the filed witness statement, which was adopted as part of the evidence, the Claimant did not disclose the working hours agreed with the Respondent or hours prescribed by law beyond which he would be entitled to overtime.

10. The Claimant did not equally make any reference to this head of the claim for overtime during oral testimony.

11. Without placing an evidential foundation to this head of the claim, the Court finds no basis for granting relief in respect to overtime.

House allowance

12. On account of overtime, the Claimant prayed for Kshs 305,182/-.

13. Section 31 of the Employment Act, 2007 obligates the employer to provide an employee with housing or to pay an allowance to cover housing allowance unless the contract contains a provision indicating that the salary is consolidated (or a similar provision is set in a collective bargaining agreement).

14. The Respondent did not issue a contract to the Claimant in the terms envisaged by section 31 of the Employment Act, 2007.

15. A copy of the Claimant's payslip produced in Court did not have an item of house allowance.

16. The Respondent, however, contended that 15% of the wage paid to the Claimant constituted house allowance under *other allowances*.

17. The Claimant did not interrogate the Respondent's witness on the testimony that a house allowance of 15% of basic salary was part of the *other allowances* as shown in the payslip.

18. The Court finds that the Claimant's wage included an element to cover house rent.

Underpayments

19. The Claimant was a supervisor (guard). He asserted that he was paid Kshs 10,000/- monthly and was thus underpaid monthly by Kshs 912/- over the 8-years of service.

20. Legal Notice No. 197, which was in place when the Claimant separated with the Respondent in 2015, prescribed a minimum wage of Kshs 9,780/- for day watchman and Kshs 10,911/70 for a night watchman (Claimant did not disclose whether he was a day or night watchman).

21. The prescribed monthly wages do not include a house allowance.

22. Assuming that with 15% house allowance was not factored in the wage, the Claimant was earning above the prescribed minimum wage.

Rest days

23. Each employee is entitled to at least one rest per week.

24. A copy of the muster-roll produced by the Respondent indicates that the Claimant was taking at least four rest days in a month.

25. Relief is declined.

Leave

26. The Claimant pleaded that he was entitled to commuted leave for the 8-years that he served the Respondent.

27. The Respondent produced some leave records which suggest that the Claimant was granted 26 days leave in 2015 and that after the leave, he had no outstanding leave days.

28. The Respondent's witness was not questioned on the leave records, and the Court finds that the Claimant had no accrued leave days by the time of separation.

Gratuity/service pay

29. The copy of Claimant's payslip produced in Court show he was contributing towards the National Social Security Fund and therefore, by dint of section 35(5) & (6) of the Employment Act, 2007, he would not be entitled to service pay.

30. If there was any other basis for payment of gratuity or service pay, the same was not disclosed, and relief is declined.

Severance pay

31. The Claimant did not separate with the Respondent on account of redundancy, and therefore the plea for severance pay is misplaced.

Unfair termination of employment

32. Physical incapacity is one of the grounds contemplated in law for the termination of employment.

33. However, pursuant to section 35(1) of the Employment Act, 2007, written notice of at least 28-days is required.

34. The Respondent did not demonstrate that it gave the Claimant the written notice, and the Court finds that the termination of the Claimant's employment on account of ill health was procedurally tainted.

35. The Claimant served the Respondent for about 8-years, and he was paid terminal dues. He was also past 60 years, the retirement age in the public sector and most private sector organisations.

36. In consideration of these factors, the Court is of the view that the equivalent of 4-months gross salary as compensation would be appropriate (gross wage was Kshs 15,570/-).

Conclusion and Orders

37. The Court finds that the Claimant did not prove that the Respondent was in breach of contract.

38. However, the Court finds and declares that the termination of the Claimant's employment was procedurally unfair. The Claimant is awarded:

(i) Compensation **Kshs 60,280/-**

39. The Claimant filed submissions outside the agreed TIMELINE. HE IS DENIED COSTS.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF

DECEMBER, 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant W.O. Ochuka & Co. Advocates

For Respondent The Federation of Kenya Employers

Court Assistant Chrispo Aura



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