



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**CAUSE NO 62 OF 2018**

**ISAAC BARASA MUKHWANA.....CLAIMANT**

**VERSUS**

**AJESH A. AGRAVAT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant, Isaac Barasa Mukhwana filed his Memorandum of Claim on 6<sup>th</sup> August 2018, seeking a number of prayers in the form of terminal dues. The Respondent, Ajesh A. Agravat filed a Reply on 22<sup>nd</sup> May 2019.

2. The matter went to full trial where the parties testified on their own behalf. Additionally, the Respondent called Mwakusala Mphoswa. The parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by Krystalline Salt Works Limited as a Security Personnel on 2<sup>nd</sup> June 1998.

4. The Claimant further states that the property at which he was stationed was sold to the Respondent in January 2008. The Claimant claims that his services were transferred and subsequently retained by the Respondent on the same terms he had agreed upon with Krystalline Salt Works Limited.

5. The Claimant avers that on 31<sup>st</sup> July 2017, he issued a one month's notice to the Respondent, notifying him of his intention to retire from employment.

6. Upon expiry of the notice period, the Claimant went to the Respondent's office on 4<sup>th</sup> September 2017, to claim his terminal dues. He was paid Kshs. 40,000. The Claimant states that he disputed the amount but the Respondent ordered him out of his office.

7. The Claimant claims that throughout his employment with the Respondent, he was not paid house allowance and was not allowed to go on leave. He further claims to have worked during rest days and public holidays, without compensation. He adds that he worked overtime also without compensation.

8. The Claimant states that the Respondent deducted his salary on account of National Social Security Fund (NSSF) but did not make any remittances. He further accuses the Respondent of reducing his salary from Kshs. 10,000 to Kshs. 7,000, despite a promise to revise it upwards to Kshs. 15,375.

9. The Claimant's claim against the Respondent is as follows:

- a) Underpayment.....Kshs. 330,719.93
- b) House allowance.....151,241.69
- c) Public holidays pay.....70,571.05

d) Rest days pay.....	345,189.84
e) Annual leave pay.....	93,476.65
f) Overtime.....	388,328.40
g) Severance pay.....	171,525.00
h) NSSF contributions.....	21,600.00
i) Certificate of service	
j) Costs	

**The Respondent’s Case**

- 10. In his Reply dated and filed in court on 22<sup>nd</sup> May 2019, the Respondent denies having employed the Claimant and states that there was no privity of contract between him and the Claimant.
- 11. The Respondent further states that he is not aware of the employment terms between the Claimant and Krystalline Salt Works Limited.
- 12. The Respondent states that the property at which the Claimant alleges to have worked is owned by Fair Dales Limited where he is a shareholder and/or director. The Respondent maintains that the Claimant was employed by Fair Dales Limited, as a casual worker.
- 13. The Respondent states that the Claimant was paid all his terminal dues upon his terminating his casual employment. The Respondent adds that the said dues were calculated on the basis of nine (9) years, being the Claimant’s employment period with Fair Dales Limited.
- 14. Regarding the claim for house allowance, the Respondent states that the Claimant was provided with a house at the premises known as Casino Flats at all times when Fair Dales Limited required his services.

**Findings and Determination**

- 15. There is no dispute regarding the mode of the Claimant’s exit from employment, which was by way of retirement notice issued by him on 31<sup>st</sup> July 2017. What falls for determination is the following:
  - a) Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by the Court;
  - b) The nature and status of the Claimant’s employment;
  - c) Whether the Claimant is entitled to the remedies sought.

**Employment Relationship?**

- 16. The Respondent denies the existence of an employment relationship between himself and the Claimant and states that the Claimant was in fact employed by his Company, Fair Dales Limited.
- 17. In support of its case, the Respondent produced an Indenture of Transfer dated 10<sup>th</sup> September 2007, showing transfer of the property where the Claimant had been assigned, to Fair Dales Limited. However, in response to a demand letter issued by *Kituo Cha Sheria* on behalf of the Claimant, the Respondent’s Advocate, S.R Shikely states that the property had been purchased by the Respondent. Moreover, the Respondent received the Claimant’s retirement notice without any objection and even went ahead to release him and further facilitated payment of Kshs. 40,000 which he referred to as a gift to the Claimant.
- 18. Section 2 of the Employment Act defines an employer as:

*“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company” [emphasis added].*

- 19. By his own admission and conduct, the Respondent placed himself within the realm of employer as defined in law and he cannot escape from this responsibility by pleading the corporate shield. That settles the first issue.

**Nature and Status of the Claimant’s Employment**

- 20. The other line of defence advanced by the Respondent is that the Claimant was a casual employee.

21. Section 2 of the Employment Act defines a casual employee as:

***“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”***

22. According to this definition, casual employment is not defined by the frequency of pay only but more importantly by the duration of employment. In his testimony before the Court, the Respondent stated that the Claimant worked for his company five days a week from 2007 to 2017. There was nothing in this arrangement to suggest that the Claimant was a casual employee.

23. It is important at this stage to deal with the issue of the Claimant’s length of service with the Respondent. On his part, the Claimant states that upon purchase and transfer of the property where he was assigned, the Respondent took responsibility over the Claimant’s accrued benefits from the date of his employment by the former employer, Krystalline Salt Ltd.

24. To support this proposition, the Claimant produced a letter dated 31<sup>st</sup> January 2008 issued to him by the General Manager of Krystalline Salt Ltd, Bhimji K. Varsani. This letter purported to transfer the Claimant’s services to the Respondent on subsisting terms and conditions of service.

25. There was however no evidence that the Respondent was involved in any such agreement. That being the case, the Claimant had no basis upon which he could claim any benefits relating to his employment with Krystalline Salt Ltd from the Respondent.

26. The only finding to make therefore is that upon his taking up employment with the Respondent, the Claimant entered into a fresh employment relationship, with its own terms and conditions. And the only benchmark against which to measure these terms and conditions is the one set in law. With this in view, I will now examine the Claimant’s specific claims.

### **Specific Claims**

27. The Claimant claims underpayment in the total sum of Kshs. 330,719.93. He however did not adduce evidence towards establishing the basis of the claim which consequently fails and is dismissed.

28. In response to the Claimant’s claim for house allowance, the Respondent states that the Claimant was housed at his place of work. The Respondent’s testimony in this regard was corroborated by Mwakusala Mphoswa, who was the Claimant’s colleague at work. Apart from his word, the Claimant did not adduce any independent evidence to debunk the Respondent’s assertion that he was housed. The claim for house allowance is consequently disallowed.

29. In order to prove the claims for public holidays, rest days and overtime, the Claimant needed to specify the actual dates worked and adduce relevant evidence to support the claims. He failed to achieve this standard of proof and the claims therefore collapse.

30. The Respondent’s defence to the claim for leave pay is that because the Claimant was a casual employee he was not entitled to annual leave. The Court’s finding above is that the Claimant was not a casual employee and the claim for leave pay is therefore allowed.

31. The Respondent admitted that no NSSF dues were remitted to the Claimant’s account during the Claimant’s entire period of employment with the Respondent. In such a case, the only thing I will do is to make an award for service pay in favour of the Claimant.

32. In the end, I enter judgment in favour of the Claimant as follows:

a) Leave pay for 9 years (350x21x9).....Kshs. 66,150

b) Service pay for 9 years (350x15x9).....47,250

**Total.....113,400**

33. This amount will attract interest at court rates from the date of judgment until payment in full.

34. The Claimant is also entitled to a certificate of service plus costs of the case.

35. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY JULY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft

Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Isaac Barasa Mukhwana (the Claimant in person)

Miss Thuku for the Respondent