



REPUBLIC OF KENYA



Nzuki v Protech Industrial Equipment Limited (Employment and Labour Relations Cause 1217 of 2018) [2024] KEELRC 674 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 674 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1217 OF 2018**

**MN NDUMA, J
MARCH 14, 2024**

BETWEEN

JONAH WAMBUA NZUKI CLAIMANT

AND

PROTECH INDUSTRIAL EQUIPMENT LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 18/8/2018 seeking the following reliefs:
 - i. Overtime pay Kshs. 1,169,290.20
 - ii. Annual leave pay Kshs. 63,020.95
 - iii. Notice pay Kshs. 15,000/=
 - iv. Underpayment Kshs. 74,238.24
 - v. Damages for unlawful termination Kshs. 236,892/=
 - vi. NSSF contribution Kshs. 4,400/=
 - vii. Certificate of service
 - viii. Costs of this suit
 - ix. Any other relief the court may deem fit and just to reward
2. The claimant (CW1) testified that he was employed by the respondent on 25/1/2011 as a driver and worked continuously until sometimes in March 2016 when he resigned from employment. The claimant earned a gross salary of Kshs. 19,741 at the time of resignation.



3. CW1 said he worked well, but was mistreated by the respondent during his employment. That he worked overtime without compensation and was not granted annual leave days. That the respondent forced him to perform extra duties. That respondent deducted statutory contribution including NSSF but did not remit the same to the fund.
4. That the claimant was surcharged for any damage of the respondent's vehicle, whether caused by himself or by a different driver including normal wear and tear.
5. That when he got sick off, his salary was deducted for the days he was not at work.
6. That his employment became untenable and he could no longer deliver his normal duties and was forced to quit work. That he was constructively dismissed from employment and claims compensation in respect thereof.
7. That the claimant prays to be paid terminal benefits as set out in the statement of claim.
8. Under cross-examination, CW1 said he reported to work daily from 8 a.m. to 5 p.m. That after 5 p.m., the director asked him to work at his home. That he was not paid for that extra work but had no choice, since the director was his boss. That even when he got compassionate leave upon death of his brother his salary was deducted. That NSSF was only deducted for 22 months.
9. CW1 said he did not give notice of resignation to the respondent. That he telephoned the boss twice and he did not pick the call and so he left. CW1 said he did not write any letter of resignation.
10. That he be awarded as prayed.
11. The respondent filed statement of defence and counter claim on 17/10/2018 in which he denies all the particulars of claim. That the claimant phoned the respondent on 29/2/2016 and terminated his employment without giving proper notice as per the contract of employment. That the claimant deserted his employment. That the claimant pays the respondent Kshs. 19,741/= in lieu of one month notice of termination. That the claimant suit be dismissed with costs.
12. RW1 Allan Juma Wesonga testified that he was an accountant of the respondent from the year 2007. He adopted a witness statement dated 15/10/2018 as his evidence in chief and produced exhibit '1' to '3' as his evidence. He stated that the claimant was a driver of the respondent from 25/7/2011. That the claimant initially received Kshs. 16,259/= but the salary was increased over the years.
13. That the claimant was negligent in his duties and caused several accidents and was surcharged for the loss incurred by the respondent as a result of the accidents. The claimant was also given warnings for negligent driving. The claimant also absented himself from work without permission. That claimant often absconded work and faked sickness whenever he was questioned.
14. RW1 said that the claimant was treated well and was not mistreated as alleged or at all. RW1 stated that all statutory dues deducted from the salary of the claimant were remitted. That the claimant was not dismissed from work but absconded work without notice. That the claimant did not resign as alleged or at all. That the respondent be awarded one month salary in lieu of notice not given by the claimant when he absconded work.
15. Under cross-examination, RW1 said the claimant worked upto 28/2/2016. RW1 said the claimant was surcharged upon admission of negligent driving and was given warning letters.
16. RW1 denied that the claimant's salary was deducted when he was given sick off.



17. RW1 said that the claimant was granted annual leave and records were kept. RW1 produced leave records for the claimant which shows that as of the year 2016, the claimant had only 8 leave days pending. RW1 said the claimant deserted work. That he was called on phone and he declined to come back.
18. RW1 said that respondent did not keep any police records for the accidents caused by the claimant.
19. RW1 prays that the suit be dismissed with costs

Determination

20. The parties filed written submissions which the court has carefully considered together with the evidence adduced by the parties. It is trite law that he who alleges bears the onus of prove in terms of section 107 and 108 of the *Evidence Act*, Cap 80 Laws of Kenya.
21. The case by the claimant is that he resigned from employment due to mistreatment by the respondent. The claimant worked for the respondent as a driver from the year 2011 up to 28th February 2016. The claimant did not provide any evidence of complaint he made to the respondent regarding the alleged mistreatment in the five (5) year period he served.
22. It is common cause that the claimant was surcharged in respect of the accidents he caused in the course of his duty. He however did not make any written complaint regarding this matter. The claimant stated that he was not granted any leave days, but RW1 provided evidence indicating that the claimant actually took annual leave and was left with only 8 days annual leave at the time he separated from the respondent.
23. Whereas the claimant alleges that he resigned from work due to mistreatment and was therefore constructively dismissed, RW1 testified that the claimant did not write any letter of resignation but simply deserted work.
24. The claimant did not produce any letter of resignation nor any letter of complaint regarding alleged mistreatment. The court finds that the evidence by RW1 that the claimant deserted work without notice as more credible in the circumstances of the case. The claimant has failed to prove on a balance of probability that he was forced to desert work by the respondent due to mistreatment. RW1 demonstrated that the salary of the claimant was increased on several instances in the time he was employed until the time he deserted work.
25. The claim for constructive dismissal lacks merit and is dismissed.

Terminal benefits

- i. Overtime

The claimant did not provide any evidence that he had demanded to be paid overtime during the period he worked for the respondent. This claim was only made after the claimant deserted work. The claimant has failed to prove that he was entitled to payment of overtime over and above the salary he was paid by the respondent.

- ii. Annual leave

The respondent demonstrated that the claimant was granted annual leave and was owed only 8 days leave at the time he deserted work. The court finds that the respondent only owed the claimant 8 days salary in lieu of leave days not taken in the sum of Kshs. 5,264/=.

- iii. Notice pay



The claimant deserted work and is not entitled to payment of one month salary in lieu of notice. The respondent did not provide a demand letter in respect of the claim for mode for payment of Kshs. 19,741/= in lieu of notice before filing the counter claim. The court finds that neither the claimant nor the respondent is entitled to payment in respect of their claim in lieu of notice.

iv. NSSF Contribution

The claimant demonstrated that the respondent deducted and did not remit Kshs. 4,400/= to NSSF. The court directs the respondent to refund the said sum to the claimant as claimed

v. Underpayment

The claimant did not provide any tangible evidence that he was underpaid by the respondent. To the contrary, the salary of the claimant as per the payslips produced was increased from time to time and had a component of basic pay and house allowance. The gross pay of the claimant was Kshs. 19,741/=.

The claimant did not demonstrate that the salary paid to him during the period he worked was below the minimum wage orders for the different years worked. The onus is on the claimant to discharge.

The claimant failed in this respect. The claim for underpayment is therefore dismissed for lack of merit.

vi. Compensation

Having found that the employment of the claimant was not terminated but he absconded from work, the claim for compensation has no merit and is dismissed.

26. In the final analysis, the suit by the claimant is dismissed for lack of merit except for payment of:-

- a. Kshs. 4,400/= being NSSF refund
- b. Kshs. 5,264 in lieu of 8 leave days not taken
Total Kshs. 9,664/=
- c. Interest at court rates from date of filing suit till payment in full.
- d. The respondent to pay $\frac{1}{2}$ the cost of the suit

DATED AT NAIROBI THIS 14TH DAY OF MARCH 2024

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Karie for claimant

Mrs. Mutu for respondent

Mr. Kemboi Court Assistant

