



**Isack v Kesom Freight International (Cause E035 of 2022)
[2024] KEELRC 2149 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E035 OF 2022**

**AK NZEI, J
JULY 31, 2024**

BETWEEN

IBRAHIM HASSAN ISACK CLAIMANT

AND

KESOM FREIGHT INTERNATIONAL RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 6/6/2022 and filed in Court on 7/6/2022 and pleaded that he was employed by the Respondent as a night security guard on permanent terms of service with effect from May 2005 at a monthly salary of kshs. 15,000, but was never provided with a written contract of service pursuant to Section 9(1) and (2) of the Employment Act, 2007.
2. The Claimant further pleaded:-
 - a. That from the date of employment, for a period of 17 years, the Claimant was deployed to provide night watch and security services at the Respondent's Mombasa Branch Office situated at Spaki Area, opposite Associated Motors along Jomo Kenyatta Avenue.
 - b. That throughout the employment period, the Claimant worked from 6.00pm to 6.00am, hence working for 12 continuous hours daily, including Sundays and public holidays.
 - c. That from March 2022, the Claimant started experiencing difficulties in getting his salary paid as the Respondent's director relocated to (the) Nairobi Head Office without any communication to the Claimant, and that the Mombasa office was still operating.
 - d. That in contravention of Section 18(2) of the Employment Act, the Respondent did not pay the Claimant's salary from the month of April 2022, thus subjecting the Claimant to serious



financial hardships relating to his upkeep and that of his family, as well as payment of rental accommodation.

- e. That despite intervention by the County Labour Officer vide a letter dated 10/5/2022 and subsequent phone calls to the Respondent's director through his mobile phone number (stated in the memorandum of claim), the Respondent declined to respond to the said letter and to pay the Claimant's withheld salary, which continued to accumulate in arrears each month.
 - f. That the Claimant continued to serve the Respondent diligently for 17 years without compensation for 4 extra worked hours daily, and without taking annual leave pursuant to section 28(1) of the Employment Act.
 - g. That the Respondent never provided the Claimant with an itemized pay statement in contravention of Section 21(1) of the Employment Act, thus denying the Claimant an opportunity to confirm what constituted his gross pay and any statutory deductions therefrom, if any.
 - h. That the Claimant was neither enlisted with the NSSF, nor did the Respondent make any contributions to the fund for the Claimant's retirement. That the Respondent did not operate any provident fund for its employees; and did not pay the Claimant any gratuity for the years worked.
3. The Claimant sought the following reliefs against the Respondent:-
- a. A declaration that the Respondent subjected the Claimant to unreasonable working conditions and unfair labour practices.
 - b. An order that the Respondent should hence forth pay the Claimant his salary monthly as it falls due without unreasonable delay until the Claimant is terminated.
 - c. Payment of withheld and overdue salary of the months of April and May 2022 amounting to kshs. 30,000; and any other salary arrears accumulated as at the date of termination of the suit.
 - d. Payment of overtime for the extra 4 hours worked daily from Monday to Saturday for 17 years so far worked, at one and a half times the daily rate of pay, amounting to kshs. 2,015, 520.
 - e. Payment of overtime for 12 hours worked on every Sunday for 17 years at double the daily rate of pay amounting to kshs. 1,336, 608.
 - f. Payment of overtime worked on 10 designated public holidays every year for 17 years at double the daily rate of pay amounting to kshs 257,040.
 - g. Compensation for 12 hours worked for each of the statutory 52 rest days per year for 17 years at double the daily rate of pay amounting to kshs. 1, 336, 608.
 - h. Payment for 357 leave days not allowed to be taken for 17 years amounting to kshs. 205, 962.
 - i. Payment of service pay for the 17 years worked at the rate of 15 days' salary for each completed year of service amounting to kshs. 127,500.
 - j. Payment of general damages for infringement and denial of the Claimant's constitutional rights to reasonable working conditions and fair labour practices.
 - k. Costs of the suit.



- l. Any other order, remedy and reliefs that the Court may deem just and fit to grant.
4. Documents filed alongside the Claimant’s memorandum of claim included the Claimant’s written witness statement and some 11 documents listed on three lists of documents dated 6/6/2022, 4/10/2022 and 1/2/2023 respectively. The said documents included the Claimant’s M-pesa statements on payment of his salary during the period of employment.
5. The Respondent filed response to the Claimant’s claim on 26/9/2022, denying the claim.
6. At the trial, the Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that he received his last salary from the Respondent in March 2022, and that he resigned on 7/3/2023, long after filing of the suit herein. That during the period of employment, he worked daily from 6.00pm to 6.00am as a night guard, and was not paid overtime. That he did not take annual leave during the period of employment and was not enlisted to either the NSSF or any provident fund.
7. The Claimant further testified that he was employed in May 2005 with a starting salary of 7,000, and that he was earning kshs. 15,000 at the time of resignation. That his salary was being paid either by M-pesa or in cash. That the Respondent’s Manager, Abdirahman Abdi, as well as “the boss” (Mr. Abdi) made the M-pesa payments. I have noted from the Claimant’s M-pesa statements produced in evidence that M-pesa payments were being made to the Claimant by Abdi Abdi and Abdirahman Abdi.
8. The Respondent did not attend Court when the suit came up for hearing on 5/2/2024, though served, and its case was closed by the Court without any evidence being adduced on behalf of the Respondent. The Claimant’s evidence was, therefore, neither controverted nor rebutted.
9. It was stated as follows in the case of TRUST BANK LIMITED -VS- PARAMOUNT UNIVERSAL BANK LIMITED & 2 OTHERS, NAIROBI [MILIMANI] HCCC NO. 1243 OF 2021:-

“It is trite that where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact. In so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”
10. Further, it was stated as follows in Chrispine Otieno Caleb -vs- Attorney General [2014] eKLR:-

“Although the defendant has denied liability in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged, but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
11. There being no rebuttal of the Claimant’s evidence regarding his employment by the Respondent and his monthly earnings at the time of filing of the suit herein and his subsequent resignation on 7/3/2023, the single issue for determination, in my view, is whether the Claimant is entitled to the reliefs sought.
12. From the Claimant’s pleadings and evidence on record, the Claimant’s salary at the time of filing the suit herein and at the time of his subsequent resignation on 7/3/2023 was kshs. 15,000. The Claimant testified that he last received his salary from the Respondent in March 2022. He resigned on 7/3/2023. He therefore worked for eleven (11) months without a salary.



13. On the claim for salary arrears, I award the Claimant kshs. 165,000 being unpaid salary for eleven (11) months (kshs. 15,000x11). Further, I allow the claim for kshs. 205,962 being payment for 357 untaken leave days.
14. The claims based on alleged overtime worked by the Claimant during the 17 years of employment, though in the nature of a continuing injury as contemplated in Section 89 (formerly Section 90) of the Employment Act, are declined. The claims were not particularised in the Claimant's statement of claim and were not proved. In particular, the Claimant did not plead, and did not particularize the specific minimum Wage Orders on which calculation of the said claims was based. Claims for unpaid overtime are in the nature of special damages, and must be specifically pleaded and strictly proved. For the same reasons, the claims based on work allegedly done on rest days and on public holidays are declined.
15. I allow the claim for kshs. 127,500 being service pay for the 17 completed years of service. The Claimant pleaded and testified that he was not a member of, or a contributor to either NSSF or any provident fund. In the absence of any evidence by the Respondent demonstrating that payment of service gratuity was not part of the Claimant's contractual dues, I hold that the Claimant is entitled to payment of service gratuity as claimed by him.
16. The suit herein being a simple employment claim based on the Employment Act, and the said Act being one of the statutes that give effect to the Constitutional provisions on fair labour practices, I decline to award general damages as sought by the Claimant.
17. Ultimately, and having considered written submissions filed on behalf of the Claimant, I enter judgment for the Claimant against the Respondent as follows:-
 - a. Salary arrearskshs. 165,000
 - b. Unpaid leave days.....kshs. 205,962
 - c. Service pay.....kshs. 127,500

Total kshs. 498,462
18. The Claimant is awarded costs of the suit and interest on the awarded sum. Interest shall be calculated at Court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST July 2024.

AGNES KITIKU NZEI

***JUDGE**

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

