



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2169 OF 2016

BONIFACE AMENYA MORANGA....PETITIONER

VERSUS

WILSON KANYI KAREITHI.....RESPONDENT

JUDGMENT

1. The suit was filed on 16/10/2016 by the claimant seeking the reliefs set out in the Memorandum of Claim as follows:-

- (a) One month's salary in Lieu of NoticeKshs 10,000.00
 - (b) Accrued leave days for 5 years.....Kshs 42,000.00
 - (c) Severance pay for 5 years.....Kshs 25,000.00
 - (d) Unremitted NSSF dues for 60 monthsKshs 12,000.00
 - (e) Unremitted NHIF for 60 months.....Kshs 9,600.00
 - (f) Salary for the months of November
and December, 2015.....**Kshs 20,000.00**
 - (g) **Salary underpayment for 60 months.....Kshs 180,000.00**
 - (h) **Unpaid house allowance for 60 months.....Kshs 180,000.00**
 - (i) **9 public holidays per year at double rate.....Kshs 57,600.00**
 - (j) **Overtime during week days 8400 hours.....Kshs 840,000.00**
 - (k) **Overtime on Saturdays 2400 hours.....Kshs 240,000.00**
 - (l) **Overtime on SundaysKshs 240,000.00**
- Total.....Kshs 1,856,200.00

2. The claimant also sought compensation for unlawful dismissal.

3. C.W.1 the claimant testified that he was employed by the respondent as a caretaker of the premises known as **Plot L.R No. 72/2252** in new Southlands Langata from December, 2009 and worked upto 31st November, 2015. That he was paid Kshs.10,000 per month.

4. That he worked from Monday to Saturday from 5am to 9 pm. and on Sundays from 8 a.m. to 6 p.m. During public holidays, he worked from 5 a.m. to 5 p.m.

5. That the claimant worked diligently until 31st December, 2015 at around 12 noon when the respondent verbally dismissed him from employment.

6. The claimant testified that the reason for the dismissal was that he demanded two months outstanding salary for the period October to December, 2015.

7. That the dismissal was unlawful and unfair and the claimant seeks compensation in terms of Section 49 of the Employment Act, 2007. That for five (5) years he was never granted leave nor paid in lieu thereof. That he was underpaid since he ought to have been paid a gross salary of kshs.12,000 per month as a caretaker. That he was not paid house allowance. That the claimant prays for the reliefs set out in the Statement of Claim including overtime during normal working days and for work done during public holidays as set out in the claim.

8. The respondent filed a statement of defence dated 18/11/2016 in which the respondent denied being the employer of the claimant.

9. The respondent admits that the claimant was employed at L.R. No. 72/2257 New Southlands Langata but disputes that he was a caretaker. He states that the claimant was a cleaner from December, 2009. The Respondent averred that the claimant worked up to October, 2015, when he absconded.

10. The respondent did not attend the hearing of the suit and so did not adduce any evidence to contradict the testimony by the claimant. The suit is thus undefended to that extent.

11. The Court believes the testimony by the claimant which is consistent with the particulars of claim.

12. The claimant has discharged the onus placed on him in terms of Sections 27 and 28 of the Evidence Act, Cap. 80 Laws of Kenya by establishing that he worked for the respondent and was owed by the respondent payments set out under paragraph 11 of the Statement of Claim.

13. The claimant also discharged the onus placed on him under Section 47(5) of the Employment Act, in demonstrating that his employment was terminated without justification.

14. The Court finds that the respondent violated Section 36, 41, 43 and 45 of the Employment Act and that the termination was not for a valid reason and the respondent did not follow a fair procedure in terminating the employment of the claimant.

15. Accordingly, the Court awards the claimant terminal benefits set out in the Statement of Claim and herein before in this judgment except the following claims that have not been sufficiently proved:-

(i) Severance pay for 5 years – Kshs 25,000

(ii) Underpayment for 60 months – Kshs 180,000

(iii) Unpaid house allowance - Kshs 180,000.

16. The rest of the claims are also limited to maximum – period of three (3) years. Any claim beyond this period is time barred.

17. The final award is thus as follows:-

(a) Kshs 10,000 in lieu of notice.

(b) Kshs 30,000 in lieu of 3 years untaken leave.

(c) Kshs, 12,000 unremitted National Social Security Fund (NSSF).

(d) Kshs 9,600 unremitted National Hospital Insurance Fund (NHIF).

(e) Kshs 20,000 being unpaid salary for November, and December, 2015.

(f) Unpaid 9 public holidays per year for 3 years – 34,560

(g) Overtime during the week for 3 years – Kshs 504,000

(f) Overtime during Saturdays for 3 years – Kshs 144,000

(h) Overtime during Sundays for 3 years – Kshs 144,000

Total terminal benefits – Kshs 908,160.

Compensation

18. The claimant had served the respondent for a period of 5 years. The claimant did not contribute to the termination. The claimant was not paid any terminal benefits nor compensation upon termination. The claimant lost good prospects of career progression without justification. The claimant suffered loss and damage.

19. The Court has considered the case of ***Brian Kimani Ngichiri –vs- Serville Investments Limited [2021] eKLR- ELRC Cause No. 484 of 2017***, in which it awarded the claimant the equivalent of four (4) months' salary in compensation for unlawful dismissal. The Court awards the claimant the equivalent of six months' salary in compensation in the sum of Kshs 60,000.

20. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-

(a) Compensation – Kshs 60,000

(b) Terminal benefits – Kshs908,160.

Total award - Kshs 968,160.

(c) Interest at Court rates from date of judgment till payment in full.

(d) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27TH DAY OF JANUARY, 2022

MATHEWS N. NDUMA

JUDGE

Appearances

Okemwa for claimant

Ekale – Court Assistant