



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 84 OF 2018

ELIJAH MATHIAS AKHASIMA.....CLAIMANT

VERSUS

POWER HYDRAULICS KISUMU LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide a Memorandum of Claim dated 29th March, 2018 and filed in court on even date. The Claimant later filed an Notice of Motion application seeking to amend his statement of claim.
2. The Claimant filed an amended statement of claim dated 21st December, 2020 and filed before court on 21st December, 2020. The Claimant seeks payment of Kshs. 1,862.95 as salary under payment, Kshs. 15,115.74 being Service pay, leave allowance of 63 days, and a House Allowance of Kshs. 1,572,038.2/-.
3. The Respondent filed a reply to the Memorandum of claim dated 4th May, 2018 and filed on 10th May, 2018 and later on 3rd May, 2021, filed a reply to the amended Memorandum of claim.
4. The Claimant testified in support of his case during the hearing and the Respondent presented one Mr. Maurice O. Onyango, a Director of the Respondent to testify on her behalf.
5. Parties sought time to file submissions and each party was allowed 14 days to do so. No submissions have been filed as at the time of writing this judgment, which is beyond the time allowed. The Submissions have thus not been considered in the writing of this judgment.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent in the year 1989 where he served until the year 2016, when he tendered his resignation.
7. It is the Claimant's case that he first served at the Respondent's Nairobi offices and later in June, 1991, he was transferred to their Kisumu office where he served as a machine operator until his resignation in 2016.
8. The Claimant states that the Respondent effected name changes from Powerpack Hydraulics Ltd, Powerpack Hydraulics Kisumu Ltd and later Power Hydraulics. It is his case that the job never changed with these changes of names and neither did the management of the Company.
9. The Claimant avers that he resigned from the service of the Respondent due to victimization. He states that he wrote a letter to the Respondent giving particulars of the victimization and which informed his decision to resign.
10. The Claimant's case is that when he left the service of the Respondent, he was not issued with a Certificate of Service, payment for his pending leave and his NSSF contributions.
11. The Claimant's prayer to this court is for the award of the prayers in his amended statement of claim.

The Respondent's Case

12. The Respondent case is that the Claimant worked for Powerpack Hydraulics Kisumu Limited, while his Company is Power Hydraulics

Limited. The Respondent's witness states that he was never a Director of the Respondent but only served together with the Claimant as employees of the company.

13. It is the Respondent's case that he incorporated Power Hydraulic Kisumu Limited on 3rd February, 2014. He further states that he co-owns the company with his wife.

14. The Respondent's witness (RW1) admitted moving the Claimant to the new company he incorporated in 2014 and that he continued to pay him the salary he was earning in the older company. He further told the court that he was ready to pay the Claimant the part of the claim arising between the years 2014 and 2016, as the company he worked for between this period belonged to him.

15. RW1 states that the Claimant's salary as at resignation was Kshs. 14,555.90. He further states that this amount is inclusive of house allowance. On cross examination, the witness told the court that he does not have an itemized pay slip indicating the salary and allowances he paid the Claimant.

16. The witness further stated on cross-examination that he concedes the claim for leave, as the Claimant did not take his leave days for two (2) years.

17. RW1 states that he adhered to employer's obligation in running his business. He states that he kept records relating to his employees but did not file them in court in support of his case.

18. The witness denies harassing and/or victimizing the Claimant. He states that he has known him and worked with him for over 20 years and that they have never had issues working together.

Determination

19. I have considered the pleadings in the matter and the oral testimony given by the witnesses for both parties. The issues for determination in the matter are:

i. whether the Claimant was an employee of the Respondent

ii. whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was an employee of the Respondent

20. RW1's testimony is that the Claimant was only his co-worker between the year 1989 when he was first employed and 2013. It is his case that he registered his company; Power Hydraulic Kisumu Limited in January, 2014. He however admitted that his newly registered company, continued employing the Claimant with similar terms of service as those pertaining when he served in Powerpack Hydraulics Kisumu Limited.

21. The Claimant told this court that he continued in the service of the Respondent until his resignation in the year 2016. There was no break in service so that even if the Company changed names in 2014, the Claimant was in their service until 2016. It is evident that the new company took over the management of its predecessor and is the only explanation as to why the Claimant did not notice the change of guard in the Company.

22. The new company therefor took over the staff of the old company without loss of benefits and for the same terms of service. RW1's attempt to switch company names, is in the opinion of this court, a veiled attempt to avoid liability. The Claimant has known and worked with and for him for many years. Further, RW1's request to correct his witness statement in regard of the actual name of the Respondent during the hearing of this matter, goes to confirm this position.

23. This court finds and holds that Power Hydraulics Kisumu Limited was the successor in title to the Respondent herein and hence liable to the Claimant as employer for purposes of this suit.

Whether the Claimant is entitled to the reliefs sought.

24. The Claimant seeks the following prayers under his amended statement of claim: salary under payment, Service pay, leave allowance of 63 days, and a House Allowance.

25. This suit was first lodged in March, 2018. The reliefs sought in the claim date back to the year he was employed. Per Section 90 of the Employment Act, 2007, the only valid part of the claim, are the prayers that fall within three years immediately before the filing of the suit. In this regard I will address each claim for the period March, 2015 to the Claimant's date of resignation as the suit was filed after about a year and five months had lapsed.

Salary Under Payment

26. The Regulation of Wages (General)(amendment) Order, 2015, applicable during the period of the Claimant's claim, provides the minimum wage for a machine operator as Kshs. 12,416.00. the Claimant's case is that his salary as at the time of his resignation was Kshs. 14,555.90.

27. It then follows that the Claimant's claim that he was under paid during this period is not true. The claim fails and is dismissed.

Service Pay

28. RW1's testimony is that his company had not registered for NSSF when the Claimant transited to it in 2014. No deductions in this respect were thus made towards the Claimant's pension.

29. The court finds and holds that the Claimant is entitled to payment of service pay. Service pay is calculated based on the employee's earnings and the period worked. The standard calculation is 15 days salary for every year worked.

30. For the avoidance of doubt, the award of service pay is in relation to the period the Claimant was in the Services of Power Hydraulic Kisumu limited, the successor of the Respondent and not beyond. In this regard, the award of service pay is for the years 2014 to 2016, being 15 days salary for each of the three years.

House Allowance

31. RW1 told the court that the Claimant's salary was consolidated salary inclusive of house allowance. No evidence was adduced to support this position.

32. The employer is under statutory obligation to keep and retain his employees' records. The Respondent did not deem it necessary to provide pay slips to show that the Claimant's salary included a house allowance and was thus consolidated.

33. The Court finds the claim merited and the Claimant is awarded house allowances for 18 months, being the period of the claim that falls within the requirement of Section 90, Employment Act, 2007.

34. House allowance is calculated at 15% of the employee's basic salary. For this reason, the Claimant's monthly house allowance amounts to Kshs. 2,183/-, the basic salary being Kshs. 14,555.90/-

Leave allowance

35. Section 28 of the Employment Act, 2007 provides for leave allowance thus:

“(1) An employee shall be entitled –

(a) after every twelve consecutive months of service with his employer to not less than twenty -one working days of leave with full pay”

36. RW1 admitted that the Claimant neither utilized his leave days nor was he compensated for them. He proceeded to concede the claim and the court finds the claim for Leave Allowance merited and is awarded for the years 2015 and 2016.

37. The Claimant's monthly basic salary was given as Kshs. 14,555.90. His daily wage will then translate to Kshs. 485.

38. In conclusion, Judgment is entered for the Claimant and against the Respondent, as follows:

- i. House Allowance at Kshs.39,294/=
- ii. Leave Allowance at Kshs. 19,236/= (485 X 42 days)
- iii. Service pay at Kshs. 21,825/- (485X45 days)
- iv. Costs of the suit and interests until payment in full.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Otieno h/b for Mr. Obware for the Claimant

N/A for the Respondent

Christine Omollo- C/A