



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 569 OF 2016

JAMES MURIITHI IRERI.....CLAIMANT

- VERSUS -

NJUCA CONSOLIDATED COMPANY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st May, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 29.07.2016 through Khaminwa & Khaminwa Advocates. On 29.07.2020 the claimant changed his advocates to M/S Gitahi Gathu & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Payment of salary due for 13 weeks from May to July (Kshs.10, 200.00 x 13 weeks) total Kshs.16, 500.00.
- b) House allowance for May to July (Kshs.5, 500.00 x 3) total Kshs.16, 500.00.
- c) Airtime allowance for May to July (Kshs. 3,000.00 x 3) Kshs. 9,000.00.
- d) NHIF for June to July (Kshs.900 x 2) Kshs.1, 800.00.
- e) Allowances accrued during night shift program from January 2016 to July 2016 (Kshs.1, 300.00 x 213 days) total Kshs. 276, 900.00.
- f) Payment to the claimant of all benefits accrued from May 2012 up to July 2016 in lieu of leave and public holidays as required by law.
- g) The respondent to issue the certificate of service to the claimant.
- h) Any other relief the Honourable Court may deem fit and just to grant to dispense justice.
- i) Costs and interest of the suit as from the date of filing the suit.

The claimant's suit is alleged as follows. The claimant was employed by the respondent as a foreman since May 2012 until the 04.05.2016 when he was issued with a letter of mandatory leave for one month. The leave was extended for one month as per the letter dated 09.06.2016. Thereafter, the claimant received no further communication and received no termination letter. The claimant states that his weekly pay was Kshs.10, 200.00, monthly house allowance of Kshs. 5, 500.00, monthly airtime allowance of Kshs.3, 000.00, monthly NSSF Kshs. 400 and NHIF Kshs.900.00. The payments were not made at all during the two months of mandatory leave. The claimant avers that he has never been terminated and he is entitled to contractual pay to date. Further, since September 2015 the claimant was engaged on night shift program and he was entitled to an allowance of Kshs. 1, 300.00 per night in relation to the CAS Consultant program. He was not given statutory one day off per week and worked during the public holidays. The claimant also claimed for a certificate of service per the Employment Act, 2007.

The respondent filed on 30.08.2016 the statement of reply to claim through M/S Muturi Gakuo & Kibara Advocates. The respondent prayed that the suit be dismissed with costs. The respondent's case was as follows:

- a) It employed the claimant as a casual labourer at weekly wages per work done and as when work was available until 04.05.2016 when he was placed on compulsory leave pending performance evaluation of duties allocated to the respondent as and when the said duties were available.

b) It was admitted that the leave granted on 04.05.2016 was extended on 09.06.2016 and leave was meant to evaluate the claimant's performance. The evaluation revealed that the claimant and other persons had fraudulently introduced ghost workers in the respondent's pay roll with the aim of benefiting from monies payable to such ghost workers. The claimant was charged, together with others, in criminal case No. 343/ 189/2016 CF-1117/2016 at Mombasa with respect to the said fraud. At the end of the extended leave, the claimant was bound to resume duty but willingly failed to do so. Upon lapsing of the period in the letter dated 09.06.2016, the claimant ceased to be the respondent's employee.

c) The respondent denied the claims and prayers made for the claimant. Further, the respondent denied that the claimant was entitled to air time allowance while on leave.

d) The respondent paid the claimant overtime allowance under the CAS Programme from August 2015 to January 2016 because his weekly pay rose from Kshs.10, 200.00 to Kshs. 15, 200.00 in view of the overtime under CAS Programme.

e) The notice to sue was not served.

The claimant testified to support his case. The respondent's witness (RW) was Gitongah Mwangi, the respondent's Head of Legal, Human Resource and Compliance. The Court has considered the pleadings, the evidence and the final submissions filed for the parties. The Court makes findings as follows:

1) The Court finds that the parties were in a contract of service. The claimant was employed as a foreman at a weekly pay of Kshs.10, 200.00. His last station of deployment was at Mariakani Weigh Bridge Site as per the letter of posting dated 14.07.2015. In absence of evidence by the respondent proving or disproving the term served, the Court returns that as urged for the claimant he worked for the respondent from May 2012 up to July 2016.

2) The Court finds that the evidence is that the claimant was placed on mandatory leave from work as per the letter dated 04.05.2016. The leave was for 30 days from 05.05.2016 to 06.06.2016. The letter stated that the leave period did not constitute disciplinary action and did not assume that the claimant was on the wrong but was to allow for performance evaluation in the position held by the claimant. The letter dated 09.06.2016 conveyed to the claimant that the respondent's management had decided to extend the leave by one more month from 09.06.2016 to 09.07.2016. The letter concluded, "**However, should there be need to call you back before the month is over you shall be notified.**" The Court therefore finds that the claimant was expected to resume duty automatically (without a recall) after the extended leave lapsed on 09.07.2016. Further, the Court finds that if prior to 09.07.2016, the respondent required the claimant at work, then the respondent had the duty or obligation to recall him.

3) The Court finds that by evidence of RW, the claimant was not one of the accused persons in the criminal case as alleged for the respondent.

4) The evidence is that after the extended leave lapsed on 09.07.2016, the claimant did not report back for duty. The Court finds that whereas the claimant may be entitled to consider himself terminated after 09.07.2016, the termination cannot have been unfair because the claimant's failure to report back was at his own instance. Accordingly, the Court returns that in the instant case the issue of unfair termination as urged for the claimant does not even begin to emerge. In any event the claimant did not allege unfair termination and pray for a relief in that regard. It is submitted for the claimant that it was inadvertent that unfair termination and compensation were not pleaded. However, as submitted for the respondent, the Court returns that it is trite law that a party is bound by own pleadings and in any event, the Court has already found that the termination in the circumstances was not unfair because the claimant voluntarily failed to resume duty at the end of the extended compulsory leave.

5) On the reliefs prayed for the claimant the Court makes findings as follows:

a) The claimant prays for payment of salary due for 13 weeks from May to July (Kshs.10, 200.00 x 13 weeks) total Kshs.16, 500.00. The evidence is that the claimant was on leave at the respondent's instance and leave was devoid of disciplinary action. The Court finds that the claimant is entitled as prayed for and awards the claimant **Kshs.132, 600.00**.

b) House allowance for May to July (Kshs.5, 500.00 x 3) total Kshs.16, 500.00. The respondent has merely denied that it paid monthly house allowance but not offered evidence in that regard. It is not the respondent's case that the weekly pay was consolidated including house allowance. The Court finds that the respondent has failed to offer evidence per section 10(7) of the Employment Act, 2007 proving or disproving the alleged house allowance. In the circumstances, the claimant is awarded the house allowance as claimed and as established on a balance of probability at Kshs. 5, 500.00 per month but for only two months of May and June when he was on leave making **Kshs. 11, 000.00**.

c) The claimant is awarded airtime allowance (on a balance of probability) for May and June (Kshs. 3,000.00 x 2) **Kshs. 6,000.00**.

d) In awarding the allowances, the Court has considered the respondent's submission that the claimant ought to have proved the same and returns that under section 10(7) of the Employment Act, 2007, the burden to prove or disprove such terms of service was vested upon the respondent and the respondent failed to discharge that burden.

e) The evidence is that NHIF for June was remitted and the prayer in that regard is declined especially that after 09.07.2016 the claimant ceased to be the respondent's employee and no justification has been given for July 2016 NHIF.

f) The claimant prays for allowances accrued during night shift program from January 2016 to July 2016 (Kshs.1, 300.00 x 213 days) total Kshs. 276, 900.00. The respondent has explained that the overtime was paid when the weekly pay was raised from Kshs.10, 200.00 to Kshs. 15, 200.00 over the period in issue. There is no reason to doubt the respondent's explanation and the Court

declines the prayer as unjustified.

g) The claimant prays for payment of all benefits accrued from May 2012 up to July 2016 in lieu of leave and public holidays as required by law. The Court finds that the prayer is in the nature of special damages whose particulars have not been specifically computed and proved. The prayer is declined.

h) The Court finds that the respondent should issue the certificate of service to the claimant as per section 51 of the Employment Act, 2007.

i) The claimant has succeeded in his claim substantially and is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) Payment of **Kshs.149, 600.00** by 01.08.2021 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.

2) The respondent to deliver the certificate of service in 30 days for the term of service as foreman from May 2012 up to July 2016.

3) The respondent to pay claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 21ST MAY, 2021.

BYRAM ONGAYA

JUDGE