



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 116 OF 2016

MAURICE OTIENO WASERA.....CLAIMANT

v

NAMO ITALIANO LTD.....RESPONDENT

JUDGMENT

1. On or around 1 January 2010, Namu Italiano (K) Ltd (the Respondent) offered employment to Maurice Otieno Wasera (the Claimant) as a mechanic.
2. On or around 19 December 2015, the Claimant separated from the Respondent and on 10 May 2016, he lodged the instant Cause in Court alleging breach of contract.
3. The Respondent filed a Response and Counterclaim on 28 July 2017, and the Cause was heard on 19 September 2018 when the Claimant testified.
4. The Respondent closed its case on 10 March 2020 without leading any evidence, and pursuant to Court orders, the Claimant filed his submissions on 27 January 2021, while the Respondent filed its submissions on 31 March 2021.
5. The Court has considered the pleadings, evidence on record and submissions.

Breach of contract

Leave days

6. Under section 28 of the Employment Act, 2007, each employee is eligible to at least 21-days annual leave on full salary.
7. The Claimant testified that he did not go on leave during the course of employment and prayed to be awarded Kshs 54,600/- on account of the leave.
8. The Claimant did not disclose whether he applied for annual leave and was denied or whether he carried forward the 6 years annual leave with the permission of the Respondent.
9. The Respondent did not lead any evidence or produce leave records as demanded by section 10(3) of the Employment Act, 2007.
10. The Court, in the circumstances and in consideration of section 28(4) of the Act, will allow this head of the claim but restricted to the last 18 months of the contract and award the equivalent of one and half months' salary.
11. The Claimant's salary was Kshs 13,000/- and the Court allows the claim in the sum of Kshs 19,500/-.

Service gratuity

12. The Claimant's contract did not provide for payment of service gratuity. If by service gratuity the Claimant meant *service pay* as contemplated by section 35(5) & (6) of the Employment Act, 2007, he is not eligible for the same as there is evidence that he was a contributor to the National Social Security Fund.

Underpayment of salaries

13. The Claimant's letter of appointment dated 1 January 2010 indicated that he was a mechanic.

14. In November 2004, the Claimant attained a National Grade Test Certificate Grade III as a Motor Vehicle Mechanic. In August 2013, the Claimant attained a certificate as a Motor Vehicle Mechanic Grade I.

15. The Claimant thus asserted that from May 2013 to April 2015, he was entitled to a basic salary of Kshs 25,381/- instead of the Kshs 13,000/- he was earning and that from May 2015 to separation, he was entitled to a salary of Kshs 28,427/- while the Respondent continued to pay him Kshs 13,000/-.

16. While attempting to show that the Claimant was not underpaid, the Respondent suggested to him under cross-examination that he never presented his trade certificates.

17. The Claimant contended that he wrote letters to the Respondent on the underpayments and also submitted copies of the certificates to the Secretary.

18. The Respondent did not call the Secretary or in any other way produce evidence to controvert the oral testimony by the Claimant on presenting the certificates to it.

19. The Court will therefore allow this head of the claim but with the rider that the prescribed minimum wage for Artisan Grade I was Kshs 22,070/- from 2013 to April 2015 and Kshs 24,719/- from May 2015.

Unfair termination of employment

20. The Claimant did not plead a case of unfair termination of employment.

21. During his examination-in-chief, he did not reveal the name or details of the Respondent's staff who informed him of the termination of employment.

22. The Court, therefore, finds that the Claimant did not discharge the burden imposed on employees alleging an unfair termination of employment by section 47(5) of the Employment Act, 2007.

Counterclaim

23. The Respondent counterclaimed for Kshs 13,000/- on the ground that the Claimant did not give notice of resignation.

24. The Claimant appeared to admit as much in his appendix J, and the Court will allow the Counterclaim.

Conclusion and Orders

25. The Court finds and declares that the Respondent was in breach of contract in respect of leave and underpayment of salaries.

26. The Claimant is awarded:

(i) Accrued leave Kshs 19,500/-

(ii) Underpayments Kshs 284,272/-

Subtotal Kshs 303,772/-

(iii) Less Notice Kshs 13,000/-

TOTAL **Kshs 290,772/-**

27. Interest on decretal sum from date of judgment.

28. Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 30TH DAY OF JUNE 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Nyanga & Co. Advocates

For Respondent Aoko Ondieki & Co. Advocates

Court Assistant Chrispo Aura