



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 209 OF 2017

STEPHEN KAHINDI KAZUNGU..... CLAIMANT

VERSUS

DOC WIDE BUSINESS CENTRE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 20.03.2017 through Kitonga Kiiva Advocate, Kituo Cha Sheria. The claimant states that he was engaged by the respondent as a Port Clerk on April 2014 at Kshs. 16, 190.00 per month. He worked from 06.00am to 1800 Hours every day including on Saturdays. He was not accorded annual leave throughout service. He worked as expected until December 2015 when he resigned after giving a month's notice of his intention to resign in writing as required by law. The claimant claims and prays for terminal dues including:

- a) Salary arrears for November and December 2015 Kshs. 32, 380.00.
- b) Leave days earned but not taken Kshs. 32, 380.00.
- c) Overtime for 2 years 8 months working at 12 hours a day Kshs. 385, 920.00.
- d) Off days 128 days at Kshs. 540 Kshs. 69, 120.00.
- e) Gratuity or service pay for 2 years 8 months of service Kshs.22, 666.00.
- f) Total Kshs. 542, 466.00.
- g) Certificate of service.
- h) Costs of the claim and interest at court rates.
- i) Any other relief the Honourable Court deems fit to grant.

The respondent filed on 10.04.2017 the respondent's statement of response through Munyao, Muthama & Kashindi Advocates. The respondent admitted employing the claimant as a Port Clerk effective April 2014 until he resigned in December 2016. The respondent admitted that at resignation the claimant earned Kshs. 16, 190.00 per month. It was denied that the claimant worked on Saturdays or overtime and he was given off days. Further he took and utilised his annual leave days. NSSF was remitted for the period of 2 years and 8 months served. Thus the respondent prayed that the suit be dismissed with costs.

The suit was heard on 29.04.2021 and by consent of parties it was ordered that partial consent judgement be entered for the prayer for salary for November and December 2016 for **Kshs. 32, 380.00** and the rest of the claims were to go for full trial. The claimant testified to support his case. The respondent did not call a witness. The only issue for determination is whether the claimant is entitled to the residual prayers after the partial consent. The Court has considered the final submissions and order as follows:

- a) There is no dispute that the parties were in a contract of service.
- b) The claimant was a member of NSSF and as submitted for the respondent he is not entitled to gratuity or service pay per section 35 (1) (c) and (5).

c) The Court finds that the suit was filed on 20.03.2017 and resignation was December 2015 and the claim for accumulated leave days, overtime and off days were all continuing injuries which were time barred by the 12 months' limitation period prescribed in section 90 of the Employment Act, 2007. There was no evidence of a dispute or grievance about those claims throughout the service. The claims were clearly an afterthought and as submitted for the respondent, the claimant failed to establish them on a balance of probability.

d) The claimant is entitled to a certificate of service per section 51 of the Act.

e) The respondent says it admitted per partial consent and each party should bear own costs. The consent was at pre-trial after denial in the response. The Court has considered all the circumstances and finds that the respondent will pay partial costs of the suit fixed at **Kshs. 20, 000.00** only.

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

a) Delivery of the certificate of service in 7 days from the date of this judgment.

b) The payment of **Kshs.52, 380.00** by 01.08.2019 failing interest to run thereon at Court rates from the date of this judgment till full payment.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 18th June, 2021.

BYRAM ONGAYA

JUDGE