



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1631 OF 2016**

**DENNIS KIPKOECH LANGAT.....CLAIMANT**

**VERSUS**

**TEX TRADING LIMITED.....DEFENDANT**

**JUDGMENT**

1. The Claimant herein sued the Respondent seeking relief for the alleged unlawful and/or unfair termination of his employment. He averred that he was employed by the Respondent as a Truck Driver until 24<sup>th</sup> May 2016 when the Respondent terminated his services for no valid reason and without following due process and without giving him termination notice as required by law. The Claimant further averred that during his term of service, the Respondent did not pay him house allowance and gratuity/service pay and that he worked overtime without pay. The Claimant averred that the Respondent terminated his employment without giving him his lawful leave.

2. The Claimant averred that his gross salary was Kshs. 35,000/- per month and that the Respondent did not remit NHIF and NSSF payments from the year 2009 to 2012 and 2013 respectively. He averred that the Respondent tried to make him sign a resignation letter when it called him to go collect his Certificate of Service. He prays that an award be entered against the Respondent for:

- (a) A declaration that the Claimant's termination was unlawful and/or unfair.
- (b) An order for the Respondent to pay the Claimant Kshs. 1,016,335.50
- (c) Interest on (b) above at court rates.
- (d) Cost of this claim.

3. The Respondent filed its Response to the Claim wherein it averred that the claim is misconceived, incompetent, bad in law and an abuse of the process of the Court as it should have been reported to the labour office in the first instance for initial investigation and action as provided for under Section 47 of the Employment Act. Further, that the claim ought to also be dismissed with costs to the Respondent for offending Section 90 of the Employment Act. The Respondent denied that the Claimant was employed in 2009 averring that between 2009 and 2012 the Claimant had been hired at different times by the owners of two commercial vehicles which the Respondent had hired for transportation of its goods. It averred that offered the Claimant employment as a Driver on 1<sup>st</sup> April 2012 and that it suspended him for two months with full pay by a letter dated 24<sup>th</sup> May 2016 for gross misconduct. That the said suspension letter explained to the Claimant that the two months would be treated as part of his accumulated annual leave and he was to resume work thereafter on a fresh start. That however, the Claimant called on 25<sup>th</sup> May 2016 wanting to resign instead of being sent on leave as he had obtained employment elsewhere and that it advised him to put his resignation in writing and include his request for a certificate of service in the said letter. That it proceeded to prepare an 'Acceptance' when the Claimant went quiet for two weeks but the Claimant refused to sign the same and the matter was left hanging until it received a demand letter. The Respondent asserts that it therefore did not terminate his employment nor did it intend to terminate the same and that there was as such no unlawful or unfair termination.

4. The Respondent further averred that the Claimant's salary was inclusive of house allowance and the said claim therefore has no basis and that since the Claimant had served it for 4 years, his claim of 7 years leave due also has no basis. The Respondent averred that the Claimant had already taken one year's leave and the balance was expected to be taken during the paid suspension aforesaid. It averred that the claim for overtime has no basis as the Claimant worked within the requirements of the law and never worked on Sundays and public holidays. That the Claimant was not entitled to gratuity/service pay as this was not applicable to employees who benefitted from NSSF contributions and that since it has demonstrated that the Claimant was not in its employ between 2009 and 2012, the claims for the said periods should fail. It denies issuing a certificate of service to the Respondent and averred that the copy of the Certificate of Service produced by the Claimant is a forgery.

5. The matter was disposed of using Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. Parties filed written submissions in addition to the claim, affidavits and documents already filed. In his submissions, the Claimant submitted that the certificate of service issued to him by the Respondent is sufficient evidence and confirmation that he worked for the Respondent from February 2009. The Claimant submitted that the claim of forgery/fraud is unsubstantiated as the Respondent has not indicated what action it has taken against him if he indeed forged the said certificate. He submitted that the said document cannot be said to be a forgery by all standards since it bears all key features of the Respondent's letterhead format and rubber stamp and that further, Sections 107 to 109 of the Evidence Act provide that he who alleges must prove and that this Court should find that since the Respondent did not provide a document examiner's report or any other evidence to demonstrate that the certificate of service was a forgery, there is no evidence beyond reasonable doubt as held in **Daniel Gachanja Githaiga v Credit Reference Bureau Africa Ltd & 2 Others [2020] eKLR**. The Claimant submitted that he saw his alleged suspension letter for the first time in Court and questions why the same does not contain an acknowledgement of receipt by him in form of a signature, stamp etc. The Claimant submitted that the said letter is also not signed by the director purporting to have issued it and is thus meant to mislead the Court by painting the Claimant's conduct during employment negatively and he denies being paid the suspension pay of two months. He submitted that the Respondent has not proved that he asked to resign instead of going on suspension and that the Respondent did not act in accordance with justice and equity when it attempted to compel him to sign a resignation letter. The Claimant submitted that the Respondent has not discharged its duty of showing that termination was fair under Sections 43 and 45 of the Employment Act 2007 and that it has further not complied with the procedure under Section 41(2) of the Employment Act. He further submitted that Sections 20 and 21 of the Employment Act, 2007 make it the duty of the employer to ensure statutory deductions are effected and remitted as appropriate and that it was thus the duty of the Respondent to remit the Claimant's remittances for NHIF and NSSF for the period between 2009 and 2012 per the holding in **Joab Ashitiba Hashon v Samaritan Medical Services [2017] eKLR**. He submitted that the Respondent only made his NHIF and NSSF remittances for 2014-2016 and 2013-2016 respectively and that he is thus entitled to an award of the same. That since he only became a member of the NSSF from 2013 to 2016, he is entitled to gratuity for the period between 2009 and 2012 when he was not a member. He prayed for an award of 12 months' salary as compensation for unfair termination as under Section 49 of the Employment Act and submitted that his claim for house allowance is justified under Section 31 of the Employment Act. The Claimant submitted that since the Respondent has not produced the Claimant's copy of the contract of service which entails provisions that would otherwise fit the exception contemplated under Section 35(2) he is entitled to recover under this head. He submitted that he is further entitled to his leave dues as under Section 28(1) of the Act and he cited in support the case of **Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR** where it was held that the employer must ensure each employee has taken the annual leave when due or make payment in lieu thereof and that the same principle applies to public holidays where the Claimant was forced to work.

6. The Respondent submitted that the certificate of service produced by the Claimant is a nullity because it was issued contrary to provisions of Section 51 of the Employment Act whose Subsection (2) and (3) are very clear. The Respondent averred that the Claimant did not have the said certificate in July 2016 but later had one dated 25<sup>th</sup> May 2016 in August 2016 while filing the case. On the issue of NSSF and NHIF remittances, the Respondent placed reliance on the case of **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR** where the Court stated that: *"Even if no remittances had been made by the Respondent, the Claimant would still not be entitled to refund of the same as both NSSF and NHIF have statutory and administrative structures to collect the same from defaulting employers, backed up by power to prosecute and charge penalties for late payments."* The Respondent submitted that it did not terminate the employment of the Claimant and that the procedure to be followed in termination of employment matters does not apply and consequently, the claims for compensation for unfair termination and notice pay fail. On the issue of house allowance, the Respondent relied on the case of **Charity Wambui Muriuki v Total Security Surveillance Limited [2017] eKLR** where the Court stated that a consolidated salary includes basic pay and allowances payable to an employee and housing allowance is usually one of them. The Respondent further submitted that the Claimant in the instant case was earning pay that was above the minimum wage and his salary included house allowance and that in the absence of any written contract, the Basic Minimum Wages Orders are applicable - Legal Notice No. 197 of 2013 - The Regulation of Wages (General) (Amendment) Order 2013; Basic Wages for Heavy Commercial Driver and The Regulation of Wages (General) (Amendment) Order 2015; Basic Wages for Heavy Commercial Driver).

7. The Respondent submitted that the Claimant's claim for seven years' leave plus dues for public holidays is not justifiable because the Claimant worked for the Respondent for only three years and never worked on public holidays. The Respondent submitted that the Claimant is further not entitled to gratuity/service pay because he was a member of NSSF for the period of employment under the Respondent as provided for in Section 35(6) of Employment Act. The Respondent prays that this Court finds that the Claimant's Memorandum of Claim dated 11<sup>th</sup> August 2016 lacks merit and to dismiss the same with costs.

8. The Claimant's suit was filed within time as contemplated under Section 90 of the Employment Act insofar as his claim for unfair termination goes. He was an employee until May 2016 and the suit was filed in August 2016. He is alleged to have been dismissed from employment yet in his claim he attached an annexure being Appendix 5 which is an unsigned letter from the Respondent accepting his resignation. If he indeed was dismissed as he alleged, it does not follow that the Respondent would be accepting his oral resignation made over the phone. He was notified of there being no liabilities owed though the company would issue him a token of appreciation to be channelled through his NIC account. From all accounts he was not dismissed. He therefore cannot recover for unlawful termination of employment. The claim for overtime was not supported by any documentation nor was the claim for unpaid public holidays. The only claim that seems to have traction is the claim for house allowance. He asserts that he was not paid any house allowance for the entire duration of his employment and he unfortunately acquiesced the claim that were not made within 12 months of the non-payment. The only valid claim would be for the period covering July 2015 to June 2016 when the employment came to an end. He earned Kshs. 35,000/- and in accordance with Section 31 of the Employment Act, his house allowance would be 15% of this sum translating to Kshs. 5,250/- a month making a total of Kshs. 63,000/- owed for the period within the limitation of such claims. He failed to prove that he was entitled to payment of service gratuity as he did not avail any documentation to support his alleged employment by the Respondent in 2009. The Respondent categorically denied employing him prior to 2012 and he did not rebut that averment save for his feeble attempts in submissions. He thus is only entitled to the following:-

- i. House allowance unpaid for 1 year – Kshs. 63,000/-
- ii. Costs of the suit capped at Kshs. 25,000/-
- iii. Interest at Court rates on the sum in (i) above from the date of this judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021**

**Nzioki wa Makau**

**JUDGE**