



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 140 OF 2018

WILSON KOMBE YERI.....CLAIMANT

- VERSUS -

STANFORD OMONDI T/A STANROSE MODEL SCHOOL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the statement of claim on 16.03.2018 through Madzayo Mrima & Jadi Advocates. His case is that he was employed by the respondent from 22.10.2014 to 22.11.2015 as the School Bus Driver. He worked for an aggregate period of three months. From November 2014 to June 2015 he worked 5 days weekly and was paid Kshs.7, 000.00 on monthly basis and from July 2015 to November 2015 his monthly pay was Kshs.8, 000.00. Further he states that December 2014, April 2015 and August 2015 were school holidays and he was not paid his due salary for those months. He was not given an appointment letter or pay slip. Further he states that on his own volition he tendered notice and resigned on 22.11.2015 and his terminal dues were never paid. He states that he worked within Mombasa City and he claims underpayment and house allowance per the General Wage Order as amended in 2013 and 2015. The claimed underpayment and house allowance for November 2014 to November 2015 is in the sum of Kshs.136, 115.54 as particularised in the statement of claim at paragraph 10 thereof. He also claims NSSF was not remitted and the respondent be ordered to NSSF Kshs. 4, 800.00 and service pay for one year Kshs.11, 593.00.

The claimant prays for judgment against the respondent for:

- a) Service pay Kshs. 11, 593.00.
- b) Underpayment Kshs. 136, 115.54.
- c) NSSF Kshs. 4, 800.00.
- d) Costs of the suit plus interest.
- e) Any other relief that the Honourable Court may deem fit to grant.

The respondent filed on 11.05.2018 the response to the statement of claim and through Isaac Onyango & Company Advocates. The respondent's case is that the claimant was indeed a qualified driver but hired on part-time basis as need arose. Further, on instances he was hired he worked from 0530 Hrs to 0730 Hrs and again at 1530Hrs to 1830Hrs to pick and drop the pupils by the respondent's School Bus. In-between the hours, the claimant was in self-employment as a motorbike-rider known as *boda boda*. Thus, the respondent denied that the claimant was entitled as claimed and prayed for. The respondent prayed that the statement of claim be dismissed with costs.

By order on 19.05.2021 the respondent's counsel ceased to act in the matter. Despite service the respondent failed to attend the hearing. The claimant testified to support his case.

The Court has considered all the material on record including the claimant's final submissions. The Court makes the following findings.

First, the evidence and pleadings are that the respondent employed the claimant as a driver. The dispute is whether the employment was on full time or part-time basis. Section 10(7) of the Employment Act, 2007 places on the respondent the burden of proving the particulars of the terms and conditions of the contract of service. In the instant case, the respondent failed to call a witness and failed to discharge that burden.

However, the Court has considered the claimant's evidence. The claimant testified thus, "**I am a Driver. I drove school children in the morning and at close of the day. The vehicle was not frequent at the garage. I have not said in my witness statement that I was assigned other roles...I never operated boda boda. The School is a day school. It closed for vacations. There were mid-terms and holidays. I did not drive children during these breaks...**" The Court finds that the claimant has confirmed that he only worked in the morning and evening. In his earlier evidence he had testified that during the day he assisted in the kitchen and washing lavatories but which matters he never pleaded and he is bound accordingly, that, he was employed only as a driver. He also confirmed by that evidence that during mid-term and school holidays he did not work. The evidence confirms the respondent's pleading that the claimant was a part-timer with freedom to otherwise gainfully engage himself between morning and evening assignments to drive the pupils. The Court finds that the claimant was a part-timer engaged on piece work in the evening and morning and upon need outside school vacation and mid-terms.

Second, the claimant resigned voluntarily on 22.11.2015. The underpayments and house allowance claimed being a continuous injury purportedly ceased in November 2015. Similarly, the unremitted NHIF ceased in the same November 2015. The statement of claim was filed on 16.03.2018. The Court finds that for such continuing injury the time of limitation was 12 months from the date of cessation of the continuing injury and the cause of action was time barred when the suit was filed on 16.03.2018. The claimant testified that he was a member of NSSF and the Court finds that he was not entitled to service pay in view of that alternative provision. The Court further considers that it was open for the claimant to pursue any failures of the respondent about NSSF and NHIF in accordance of the relevant statutory provisions.

The respondent failed to attend the hearing and will not be awarded costs. Each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 16th July, 2021.

BYRAM ONGAYA, JUDGE