



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1560 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

NICHOLAS MWANGANGI WAMBUA.....CLAIMANT

VERSUS

SAMAX LIMITED.....RESPONDENT

JUDGMENT

1. Nicholas Mwangangi Wambua instituted the suit vide a Statement of Claim dated 4th August 2016 suing Samax Limited for unfair dismissal from employment and refusal to pay outstanding terminal benefits.

2. He avers that he was orally employed by the Respondent as a Loading and Receiving Officer from beginning of June 2010 and was paid a weekly salary of Kshs. 1,500/- which translated to a monthly salary of Kshs. 6,000/- until the end of July 2013. That he worked continuously for the period the said amounts were paid and his salary was paid mostly in cash or via Mpesa through the telephone number belonging to a manager of the Respondent one Rita Wanjala. That for July 2013 he was paid Kshs. 3,500/- after deduction of Kshs. 2,500/- cash advance and that salary payments for the months of June and July 2013 were by Mpesa. He further avers that from beginning of August 2013 to end of March 2015, he was paid a monthly salary of Kshs. 7,500/- while from beginning of April 2015 to end of July 2015 he was paid a monthly salary of Kshs. 12,000/-.

3. He contends that he was nevertheless underpaid by the Respondent considering the Regulation of Wages Order in force during the specified periods and avers that the Respondent also failed to provide him with housing allowance at 15% of his basic salary. That he also has a record showing he worked overtime for days totalling more than 17 days at which he was released from work at different times ranging from 6pm, 7pm and 8pm. Further, that he never went for his annual leave nor paid in lieu of and was shocked to find out the Respondent had not registered him for NHIF and NSSF despite promising to do so. This he said he found out after his employment was terminated.

4. The Claimant further avers that on 3rd August 2015, the Respondent's Director summoned him to his office and together with two other employees, verbally terminated their services for asking for their lawful overtime pay and transport allowances. That he received terminal dues of Kshs. 48,000/- but was aggrieved and went to the labour office where he was told his claim would only stand if he had payslips. That he later approached Kituo Cha Sheria who sent two demand letters to the Respondent but it did not respond.

5. He now seeks before this Court: one month's pay in lieu of notice; underpayment; overtime; unpaid house allowance; service pay; annual leave; and compensation for the unfair dismissal. It is the Claimant's averment that he has been financially crippled and emotionally destabilised as a result of the unfair dismissal and further prays that this Court issues the following orders:-

i) A declaration that the termination of the Claimant's employment and/or dismissal was unfair.

ii) A declaration that the Respondents fundamentally breached its obligations under the Constitution of Kenya and the Employment Act, 2007.

iii) An order directing and/or compelling the Respondents to pay the Claimant the calculated sum being Kshs. 416,568 as particularised in paragraphs 20 & 21 of the statement of claim with interest at court rates from the date of filing this suit.

iv) The Claimant seeks determination of his overtime at court rates.

v) An order directing and/or compelling the Respondent to issue a Certificate of Service to the Claimant in accordance with Section 51 of the Employment Act, 2007.

vi) *An order that costs of this suit be awarded to the Claimant with interest thereon at court rates from the date of filing of the claim.*

vii) *Any other relief as the Court would deem just and expedient to grant.*

6. In response, the Respondent filed a Memorandum of Defence dated 15th September 2016 denying the Claimant's claims in the cause and averring that termination of the Claimant's employment was in accordance with the law.

7. It further avers that the Claimant's employment was not permanent but temporary and on a need basis when there was a lot of work and that he and two others were duly informed they would no longer be called for jobs due to harsh economic times and he accepted the Kshs. 48,000/- that was paid to him. It prays that the Claimant's claim be dismissed with costs to the Respondent

8. The Claimant then filed a Reply to Defence dated 4th November 2016 denying ever being informed that business had gone down and averring that in any case the Respondent is continuing with its businesses as usual. He prays for the Defence to be struck out and judgment be entered in his favour as prayed in the Claim.

Claimant's Submissions

9. The Claimant submits that the Respondent did not discharge its obligations under **Section 10(7) of the Employment Act** by providing records to disprove the Claimant's allegations on the terms of his contract of employment. That the Respondent did not provide an attendance register to prove the Claimant did not work continuously as alleged and that the casual salary voucher provided by the Respondent only confirmed receipt of the final dues and cannot be used to determine whether or not he was a casual employee. To this end he relies on the case of **Ruth Nyasuguta Areimba v Conference Caterers Limited [2021] eKLR** where the Court held that employers have custody of employment records and if they do not provide the same then it is deemed that they choose to withhold from the court evidence that would be unfavourable to them.

10. It is submitted by the Claimant that he further provided a sample of the MPESA statements showing receipt of salary payments and he invites the Court to consider that the payments were made consistently and infer that he was a permanent employee. He also urges the Court to consider the document tabulating dues dated 10/08/2015 provided by the Respondent in respect of the Claimant which is ideally what a permanent employee would be entitled to. He further submits that it was not feasible that he worked for the Respondent for over five years on temporal terms and that even if he was casual employee, his employment had converted to permanent terms as provided under **Section 37 (1) (a) of the Employment Act**.

11. On his claim for house allowance, the Claimant submits that **Section 31 of the Employment Act** provides that an employer shall provide reasonable housing accommodation for an employee or a reasonable rent in lieu of. That his last salary being Kshs. 12,000/- is not disputed and is in fact supported by the Respondent's tabulation of final dues. That since the Respondent never demonstrated that it paid salary as a consolidated sum or provided a written contract, he is entitled to payment in lieu of housing for the 62 months he worked for the Respondent. He relies on the case of **Joshua Lihanda v Outdoor Occasions Limited [2014] eKLR** where the court stated that the employer has the burden of proving payment of house allowance and further obligated to provide the written contract of service as under Section 9 of the Employment Act.

12. As regards service pay, he submits that where an employer fails to remit NSSF statutory deductions then **Section 35 (5) and (6) of the Employment Act** applies and courts have further held that the employee in such cases is entitled to service pay (see **Joab Ashitiba Hashon v Samaritan Medical Services [2017] eKLR**). It is the Claimant's further submission that as the Respondent failed to produce records of him going on leave or having paid him overtime, it ends therefore that he did not go on leave and that he is entitled to overtime as prayed. That this is pursuant to **Sections 10 and 74 of the Employment Act** which require employers to keep records of annual leave entitlement, days taken and days due as specified in **Section 28, of the said Employment Act**.

13. On under payment the Claimant avers that the Respondent did not also provide records to prove that the Claimant was not underpaid as averred in the Claim. The Claimant asserts that he has attached several Regulations of Wages Order for a general labour in force, in support of the claims for underpayments.

14. The Claimant further submits the salary voucher dated 10/08/2015 did not discharge the Respondent of liability and that his evidence that he was forced to sign the said voucher was not rebutted. He cites the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** where the Court found that a discharge voucher per se cannot absolve an employer from statutory obligation and cannot preclude the Court from enquiring into the issue of whether it was freely and willingly executed.

15. The Claimant submits that he has approached this court to carry out an assessment of whether the Kshs. 48,000/- he received amount to his final dues as judicial authority under **Article 159 of the Constitution of Kenya** lies with the courts. That he finds fortification in the holding in **Bernard Juma Oyieyo v Karia Supermarket Limited [2018] eKLR** where the court held;-

26. In this case, however, the court is of the view that the settlement agreement was not mutually negotiated and it did not contain all the claimant's entitlements. As stated by the claimant in his testimony, he went for his dues on 27.4.2013 and found the Accountant who gave him a form indicating his dues as Kshs. 48,403 and required him to sign or else he would not be paid anything. Because of the family needs, he signed for the money but he was not satisfied and that is why he brought this suit.

27. In addition to the foregoing, the agreement according to RW1, contained errors on the items paid and that in

my view is a reason that weakens the respondent's contention that the settlement agreement dated 27.4.2013 discharged her from

any further claims by the claimant. Consequently, I return that the claimant is not estopped from claiming the reliefs herein in addition to the sum paid to him on 27.4.2013. The foregoing view is fortified by **Peter Mwangi Maina Vs Equitor Bottlers Limited [2016] eKLR** where the court held that the parties never discussed the settlement agreement mutually and the employee promised not to sue for unfair termination.

16. It is the Claimant's submission that the burden of proof of the validity of reason for the termination of an employee lies with the employer as under **Section 43 of the Employment Act**. That if indeed business had gone down due to harsh economic environment the Respondent should have followed the due process for redundancy and subsequently paid him severance pay in that regard. That however the Respondent did not demonstrate that it called him for any meetings to explain such reasons as alleged and did not also prove that it communicated to him the reasons for the termination through a letter.

17. He submits that it is for this reason that his termination was for no valid reason and even if there was a valid reason, the Respondent did not follow due process for declaration of redundancy under **section 41(1) of the Employment Act**. Further, since the Respondent did not issue him with the requisite notice as under **Section 35(1) (c) of the Employment Act**, he is entitled to at least 28 days termination notice. The Claimant submits that in the circumstances, the Respondent violated the law and natural justice and he has proved his case on a balance of probabilities that he was a permanent employee and thus entitled to the reliefs sought.

Respondent's Submissions

18. The Respondent submits that the Claimant sought to rely on M-pesa statements that were clearly imprinted "*not transferrable and not to be used in court or by police*" and which disclaimer estops the Claimant from relying on the said M-pesa statements. Further, the Claimant did not obtain consent from Safaricom to rely on the said M-pesa statement and this Court ought to therefore disregard the same. It submits that the admissibility of electronic evidence was addressed in **Salma Yusuf Kassim -vs- African Safari Destinations Limited [2021] eKLR** whereby the Court proceeded to expunge electronic evidence for not having a certificate of the manner and means of its production and having offended the provisions of the law as regards production of electronic evidence as provided under **Section 106A and B of the Evidence Act**.

19. It is the Respondent's submission that it was after the deliberations it had with the Claimants and two other employees that it sought the assistance of the Labour Office to come up with the dues payable to the said employees. That the Claimant did not produce the diary he allegedly recorded overtime hours to substantiate his claim for overtime whereas the Respondent stated that the nature of the Claimant's job made it practically impossible to work overtime. The Respondent submits that the termination of the Claimant's was not unlawful as the Claimant received his full and final dues and signed a casual salary voucher confirming he had no further claim against the Respondent.

20. The Respondent further submits that the Claimant stated in his examination in chief that he signed the said voucher under duress which he had not mentioned in his witness statement. That the issue of economic duress was elaborated in **Esther Muthoni & Another -vs- Joseph Mwangi Kirari [2019] eKLR** making reference to a cited decision of the Privy Council in **Pao & Others vs Lau Yiu & Another [1979]3 ALL E.R. 65**, stating thus

"...In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it."(emphasis theirs).

21. That as pointed out in the authority, the Claimant had a legal remedy if indeed he was placed under duress and would not have signed the casual salary voucher and that he would also have pleaded the undue duress in his claim and sought to have the casual salary voucher settlement declared void. It is the Respondent's submission that the claim of coercion by the Claimant is thus an afterthought and no evidence has been adduced to support this claim. On the issue of duress, the Respondent relies on the reasoning of the Court in **Wenslaus Oduki Odinga -vs- Kenya National Hospital Board [2013] eKLR** that as the claimant had failed to provide any such details of duress or inducement, his claim that he was forced to sign the admission was rejected and which means the respondent had a substantive justification for terminating the claimant's employment. The Respondent also relies on the authorities of **James Karanja Mwangi -vs- Timafloor Limited [2017] eKLR** and **Francis Mwangi Kimuri -vs- Timafloor Limited [2018] eKLR**. It submits that therefore the casual salary voucher the Claimant signed was a binding contract between the Claimant and the Respondent and the Claimant has no claim whatsoever against the Respondent.

Determination

22. Issues for determination in the court's opinion are:-

- (1) Was the claimant a permanent or a casual employee of the respondent.
- (2) Were the mpesa statements adduced without a certificate under Section 106 A and B of Evidence Act admissible.
- (3) Was claimant termination lawful?
- (4) Is claimant entitled to the reliefs sought or not.

23. Issues No. 1 was the claimant a permanent or a casual employee of the respondent?

The claimant's evidence is that he was an employee of the Respondent from June 2010 and his employment was based on oral contract of

service.

The Claimant has expounded how his salary was being paid through mpesa line of one Rita Wanjala. The Respondent Richard Wanjala who admits was the proprietor of the Respondent company also informed the court Rita Wanjala was his wife.

24. The Respondent on the other hand testified that the claimant was employed as a temporary employee based on the needs of the Respondent.

25. Section 37 of Employment Act provides that where a casual employee works for a period of a number of continuous working days which amount in aggregate to the equivalent of not less than one month the contract of service of the casual employee shall be deemed to the one where wages are paid monthly and Section 35 (1) (c) of Employment Act will apply.

26. Section 35 (1) (c) of Employment Act provide that where a contract to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing.

27. The discharge voucher prepared by the Respondent and dated 10th August, 2015 clearly provides that Claimant worked for 5 years. He was purported to be paid one salary in lieu of notice at Kshs.12000/= and service pay for 5 years together with leave pay for ½ month. The Respondent therefore clearly demonstrated the Claimant was not a casual labourer who is paid his dues on daily basis for less than 30 days. He was his employee for all practical purposes.

28. In the case of **Esther Njeri Maina Vs Kenyatta University Limited Petition No.133 of 2018** the court held that casual employment cannot be indefinite the Respondents having served the appellants for the length of time served. The court went further to observe that the Respondent served the appellant for months on end which cumulatively comes to over many years. The court proceeded to declare the employment relationship not casual or temporary but permanent and pensionable under Section 37 (1) of the Employment Act 2007.

29. Similarly in the instant case, I am persuaded the employment relationship between the Respondent and the claimant was permanent and not casual. Even if it started as casual it converted to permanent under Section 37 (1) of the Employment Act.

30. Issue No. 2

Were mpesa statement produced by the claimant admissible not having an attachment of electronic certificate as provided in the Evidence Act Sections 106A and B.

31. Let me point out at the onset that much as I appreciate some of the mpesa statements are endorsed that they should not be used in court or by police however the Labour and Employment Rules and Employment and Labour Relations Court Rules are independent of Evidence Act.

In particular Section 20 of the Employment and Labour Relations Court Act provide that the court shall act without undue regard to technicalities.

32. Some of those statements are endorsed words "*not to be used in court or by police*" but some are not.

In any case the Claimant produced the statement to prove he was receiving monthly salary from one Rita the wife of the proprietor of the Respondent Company.

33. The court is of the view that the Respondent should also have raised the issue of inadmissibility of those documents before the close of the pleadings. The same was only raised during submissions.

34. In any event the Claimant's produced those mpesa statements to prove he used to get monthly payment from the Respondent through Rita Wanjala. No evidence has been raised to rebut the fact that Claimant used to be paid that amount. In fact the Respondent as good as demonstrated that the Claimant used to be an employee of the Respondent for five years.

35. Even if the court does not refer to the mpesa statements there is still solid evidence that the Claimant was employed on permanent basis by the Respondent.

36. The third issue is whether the Claimants termination was valid?

The Respondent says he terminated the Claimants employment because their business had gone down. He claims he informed the Claimant and two other employees that he would not be calling them for jobs due to harsh economic environment. He says that they then paid them their terminal dues.

37. The Claimant in his reply to the Respondent's response denies he was told that the Respondent was going through hard economic environment.

38. The court would like to point out that if the respondent was terminating the Claimant because of redundancy it was mandatory he complies to Section 40 of the Employment Act.

39. Section 40 of the Employment Act makes it mandatory inter alia that in order to declare an employee who is a member of a trade union,

redundant the employer notifies the union to which the employee is a member and the labour officer in-charge of the area and informs them the reason for redundancy. He also informs them the extent of the intended redundancy not less than a month prior to the date of the intended termination on account of redundancy.

40. If employee is not a member of trade union he should be notified personally in writing and the labour office should also be informed.

41. There is clear violation of Section 40 of the Employment Act by the Respondent and therefore the court finds the claimant was unlawfully terminated as no valid reason was given for his termination and secondly the procedure followed to terminate him was flawed.

42. The respondent failed to give the Claimant a written contract as provided in Section 9 of the Employment Act.

Section 9 of the Employment Act provides inter alia that a contract of service for a period of number of working days which amount aggregate equivalent of three months or more shall be in writing.

Section 9 (2) provides the employer who is a party to a written contract shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented by the employee in accordance to sub-section 3.

43. Section 10 of Employment Act provides that in such a contract all particulars of employment should be stated.

44. In the absence of such a contract there is no proof that the Claimant was not underpaid and was provided with housing or housing allowance.

45. The court therefore is of the view that since the Respondent did not provide written records to show that he paid the Claimant for the house allowance and overtime. It is taken the same were not paid.

In the case of **JOSHUA LIHANDA VS OUTDOOR OCCASIONS LIMITED (2014) eKLR** the court placed the burden of proving housing allowance was paid on the employer.

46. In that case the court held that “the Respondent had the obligation to provide Claimant a written contract under Section 9(2) which requires employer to state particulars of contract which read together with Section 31 (2) of the Employment Act would include provision of consolidated Claimant’s wages or salary with rent. It cannot be for Claimant to demonstrate that what was paid to him was not consolidated wages or salary. The law places the obligation of proof of the consolidation provision on the employer.

47. The court therefore is convinced the reliefs sought by the Claimant are deserved.

48. But before I deal with the specific reliefs I would like to deal with an issue raised by the parties in relation to the discharge voucher signed by the Claimant during his exit from the Respondent’s employment.

49. The Claimant signed the discharge voucher and was then paid Kshs.48,000/=. When testifying in court he averred he signed the same under duress and he says he was desperate for money.

After he received the payment, he went to the labour office and then Kituo Cha Sheria for assistance.

50. It is the Respondents averment that the Claimant signed the voucher voluntarily and he cannot recant it at this point. He relies on the case of **JAMES KARANJA MWANGI VS TIMAFLORE LIMITED (2017) eKLR** where Claimant signed and acknowledged the payment of final dues with a disclaimer that he had no further claims against the Respondent. The court held that “the parties engaged in a valid contract to terminate the contract of employment and the claimant claims and prayers are not justified.

The court also held that an agreement entered between the parties is binding in the case of **FRANCIS MWANGI KIMORI VS TIMAFLORE LIMITED (2018) eKLR**.

51. The Claimant on the other hand relies on **THOMAS DE LA RUE K LIMITED VS DAVID OPONDO OMUTELEMA (2013) eKLR** where it was held that a discharge voucher per se cannot absolve an employer from statutory obligations and cannot preclude court from inquiring into the issue whether the discharge voucher was freely and willingly executed.

The court however observed that the issue of discharge voucher should be dealt with on its own particular circumstances to establish if it was signed voluntarily.

In the case of **BERNARD JUMA OYIEGO VS KARIA SUPERMARKET LIMITED (2018) eKLR** the court found settlement agreement was not mutually negotiated and did not contain all the Claimant’s entitlements.

52. Similarly in this case the claimant in his evidence in chief says he was asked to sign a letter before getting his money.

He says he was desperate for money and so he signed the letter and then received the money and proceeded to take his family upcountry as he could not provide for them in Nairobi.

53. It is clear there was no agreement on the dues to the Claimant from the Respondent and that the Claimant signed the discharge voucher

out of desperation and apprehension that he would not receive any pay unless he signed the discharge voucher.

The court is therefore of the view that the Claimant is not precluded from claiming the reliefs herein in addition to the amount paid to him being Kshs.48,000/=.

Reliefs Awarded:-

Having found that the Claimant was unlawfully terminated the court awards the following:-

54. 1. one month salary in lieu of notice Kshs.12,000/=
 2. underpayment of salary as in paragraphs
 - 5, 8 & 20 his memorandum of claim.....Kshs.115,864/=
 3. overtime pay for 17 days.....Kshs.6,800/=
 4. unpaid house allowance.....Kshs.111,600/=
 5. Service pay.....Kshs.30,960/=
 6. Annual leave.....Kshs.43344/=
 7. Compensation for 4 months' equivalent salary.....Kshs.48,000/=
- Total awarded Kshs.368,568/= less Kshs.48,000/=
- already paid.....Kshs.320,568/=

Less any statutory deductions.

Costs to the claimant and interest at court rates.

Claimants to be given certificate of service immediately.

Delivered, dated and signed in Nairobi this 4th day of November, 2021.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE