



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.255 OF 2016**

**BERNARD MBURI MARY.....CLAIMANT**

**VERSUS**

**NAKURU COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**HON. JOHN GATHIRWA CHEGE.....RESPONDENT**

**JUDGEMENT**

The claimant is a male adult. The 1<sup>st</sup> respondent is the entity established under the County Government Act. the 2<sup>nd</sup> respondent is the Ward Representative for Malewa West Ward, Nakuru County.

The claimant was an employee of the 1<sup>st</sup> respondent attached to the 2<sup>nd</sup> respondent under a contract dated 1<sup>st</sup> July, 2013 for a period of 5 years. under the contract the claimant was to earn ksh.30,000 per month which amount the 1<sup>st</sup> respondent failed to pay.

The claim is that the respondent breached the employment contract by withholding the due salary to the claimant. There was no explanation as to why the salary remained unpaid. Such resulted in unfair labour practices.

The claim is also that the claimant remains an employee of the respondent as his employment has never been terminated.

The claim is for a declaration that the salary due for the term of the contract is due. that the claimant was subjected to unfair labour practices. An order directing the respondent to remit outstanding dues to the NSSF and NHIF. The payment of salaries for 19 months that the claimant worked and not paid for and the underpaid amounts all being ksh.650,000. In the alternative the claimant is seeking the payment of general damages for unfair termination of employment.

The claimant testified that he was employed as ward manager by the respondent under a contract of Ksh.30,000 per month. He had a budget of ksh.60,000 for staff as he had two other employees, a clerk and a security guard.

In the months of July, August, and September and to November, 2013 the claimant was not paid his dues salary. On 18<sup>th</sup> December, 2013 the claimant was paid Ksh.115,664 which had been due for two months for November and December, 2013 with regard to all the employees in the office. He was next paid in January to August, 2014 and then in September, 2014 there was no pay until October, 2015 when ksh.10,000 was deposited in his account and for 4 months he was paid ksh.10,000 which was less the

contract amount. Total arrears being ksh.650,000 as due.

The claimant also testified that by letter dated 8<sup>th</sup> aril, 2015 he resigned from his employment with the respondents on the grounds of personal commitments and due to inadequate wages.

In December, 2013 he was paid ksh.115,600 wages for November and December, 2013.

The next payment was on 11<sup>th</sup> February, 2014 at ksh.115,664.

The next payment was on 14<sup>th</sup> April, 2014 at ksh.57,832 to cover march, 2014;

On 17<sup>th</sup> April, 2014 the claimant was paid ksh.57,832 .

There were prompt payments from December, 2013 to October, 2014 when problems started.

The defence is that the claimant had approached court with unclean hands and by making misrepresentations since his resigned from his employment with the respondents per his letter dated 8<sup>th</sup> April, 2015 and giving reasons that he had personal commitments and responsibility.

The claimant had been employed as a ward manager vide contract dated 1<sup>st</sup> July, 2013 for a period of 47 months. The due wage was ksh.15,000 and not ksh.30,000 as alleged.

The claims made are without justification and left voluntarily upon resignation. The non-remittance of NSSF and NHIF dues have not been addressed with the relevant statutory bodies and thus the claims made should be dismissed with costs.

Daniel Thuku Nduati testified that he is an accountant with the 1<sup>st</sup> respondent and the claimant was a ward manager for malewa West assisting the 2<sup>nd</sup> respondent in his duties. The claimant was issued with a written contract of service paid Ksh.15,000 monthly for the term of the contract at 47 months. The claimant resigned from his employment for personal reasons and was thus removed from the pay roll with effect from April, 2015.

Mr Nduati also testified that as the War manager, the claimant received an allocation to cater for all other employee and operations in his office. He did not complain of any poor terms and worked for 20 months and paid ksh.15,000 months and thus the claims made have no merit and should be dismissed.

Upon cross-examination, Mr Nduati testified that under the claimant's contract, paragraph c has been tampered with a whitewash to remove the sum of Ksh.30,000 to ksh.15,000. The tampering is not counter-signed to confirm the correction.

That the claimant attached his bank statements and some payments may have included arrears due.

The claimant was last paid ksh.9,200 on 11<sup>th</sup> February, 2016; On 7<sup>th</sup> November, 2016 the claimant was paid ksh.9,200; 9<sup>th</sup> December, 2015 the claimant was paid Ksh.9,200;

11<sup>th</sup> December, 2015 the claimant was paid ksh.9,200;September, 2014 to November, 2014 there was no salary paid;

November, 2014 until 8<sup>th</sup> April, 2015 there was no payment. This was the last day at work. The next payment was in December, 2015 as noted above at ksh.9,200.

The NHIF payment was last effected in December, 2015.

At the close of the hearing, both parties filed written submissions.

The claimant submitted that he was employed under a contract from 1<sup>st</sup> July, 2013 and worked until 31<sup>st</sup> March, 2016 contrary to what the respondent avers to be January, 2016. The NHIF contributions were last done in March, 2016.

The claimant also submitted that his monthly salary was ksh.30,000 unlike what the respondent has produced in a forged contract.

The claimant worked from 1<sup>st</sup> July, 2013 to march, 2016 and paid through his bank and the evidence is that he was not paid for several months all being 19 and the due wage is ksh.570.00.

The respondents submitted that there was a contract of service between the parties allowing for the payment of ksh.15,000 per month and not ksh.30,000 as claimed. The claimant would be paid through the bank to pay his fellow employee and pay for office operations a total of ksh.60,000 per month until he resigned from his employment vide letter dated 8<sup>th</sup> April, 2015 and the claim that he was entitled to payment at ksh.30,000 for 19 months has no factual or legal basis.

An employee who voluntarily resigns from his employment terminates his own employment as held in the case of **Cheruiyot Kipkemoi Joel versus Tirgaga Tea Factory Company Limited [2017] eKLR; Robert Indiazi versus Tembo Sacco limited [2018] eKLR; and Milton Isanya versus Aga Khan Hospital Kisumu [2017] eKLR.**

The contest herein is largely about the monthly pay due to the claimant.

The respondent has attached the contract of service issued to the claimant.

Paragraph C therefore address the wage due.

As confirmed by Mr nduati in his evidence, the due amounts are tampered with from ksh.30,000 to ksh.15, and 000.

Even a look with the naked eye of this document can tell that the hand that has written over the document in various parts is different from the one that has made a change to the figures due under paragraph C.

This tampering with the document and to purport to use it in court to sway justice is sheer criminal conduct. It does not speak well of the respondents and the advocates.

With the admission by Mr Nduati, the court takes it that the original record is that the claimant was earning ksh.30,000 per month. For expediency and for reasons that are criminal, the respondents made changes to the contract to create an impression that the claimant was not earning such an amount. The truth now out, the due monthly wage under the contract is hereby held to be ksh.30,000.

The other issue is the question of cessation of employment.

The claimant asserts that he was not paid his wages and there was no formal termination of his employment and should be considered an employee of the respondent to date. In his submissions he allocates the last employment date as march, 2016.

In defence, the respondent asserts that the claimant resigned from his employment effective 8<sup>th</sup> May, 2015 when he resigned. The respondent has attached the letter to the defence and is not challenged in any material way.

The claimant gave notice that;

*Ref: immediate notice of resignation*

*Its [it is] with profound respect that I wish to issue a short notice – in regard to vacate office. In confirmation to this I wish to state as follows –*

*(i) The decision to vacate office is voluntary based on personal commitment and responsibility*

*(ii) Inadequate wages.*

Effective 8<sup>th</sup> May, 2015 the claimant ceased employment with the respondent.

On the due wages based on the contract sum of ksh.30,000 per month, the bank statement filed, there are 12 months of unpaid wages being July to October, 2013;

September to December, 2014; and January to April, 2014 and 8 days wage up and until the date of resignation on 8<sup>th</sup> May, 2015.

For the 12 months what is due is ksh.360,000 and the 8<sup>th</sup> May, 2015 the claimant confirmed he was paid Ksh.9,200 on 11<sup>th</sup> December, 2015;

Ksh.9,200 on 21<sup>st</sup> December, 2015;

Ksh.9,200 on 7<sup>th</sup> January, 2016; and

Ksh.9,200 on 11<sup>th</sup> February, 2016.

All being ksh.36,800. This was paid after employment had ceased.

Resignation being a voluntary mode of termination of employment, the reasons given for such action taken into account, the claimant cannot claim that he was not aware that he ceased his employment with the respondent as per his notice and thus should be paid beyond such date of 8<sup>th</sup> May, 2015.

On the payments done after the last day at work, the claimant is owed Ksh.360,000 less ksh.36,800 all being Ksh.323,200.

The claimant has also claimed for general damages due to unfair labour practices, indignity of non-payment of his agreed wages and unjust treatment. The basis is that upon the respondent failing to pay the claimant his due wages he was placed in great hardship, his wife was ailing at the time and eventually died and this cause hi great anguish and damage.

The claimant however resigned from his employment and gave his reasons as being personal and poor wages. It was voluntary exit from work.

Where an employee is placed under intolerable work conditions and is forced to resigned from his employment due to the conduct of the employer, the remedy is to claim under constructive dismissal to have the court assess the circumstances leading to the involuntary action and award accordingly. However such matter must be pleaded and addressed in evidence.

In this case the claim for payment of general damages on the evidence and pleadings are found without any support and are not justified.

With regard to claim that the respondents should remit all the NSSF and NHIF dues contributions, this are matters that should be addressed in a different forum. Where there was no remittance of statutory dues during the employment period, recourse is under section 35 of the Employment Act, 2007 which has not been invoked in this case.

**Accordingly, judgement is hereby entered for the claimant against the respondents jointly and severally for the payment of the due salaries all being Kshs. 323,200 and 50% of due costs.**

Delivered at Nakuru this 6<sup>th</sup> day of February, 2020.

**M. MBARU**

**JUDGE**

In the presence of: .....