



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 771 OF 2017

JETRO ASUTSA MURANJE.....CLAIMANT

VERSUS

NOBLE GASES INTERNATIONAL LTD1st RESPONDENT

SAGOO & NYOTTA LIMITED.....2nd RESPONDENT

JASPAL SINGH NYOTTA.....3rd RESPONDENT

TARSEM SINGH NYOTTA.....4th RESPONDENT

JUDGMENT

1. Jetro Asutsa Muranje (Claimant) instituted legal proceedings against the Respondents on 25 April 2017 and he stated the Issue in Dispute as

Payment of remuneration wrongfully withheld and wrongful, biased, discriminative, vindictive, unfair and unlawful termination of the Claimant's employment.

2. The Claimant sought a total of Kshs 5,458,845/- for the alleged breaches/violations.

3. On 23 October 2017, the Court granted leave to the Respondents to file and serve *Responses* to the Memorandum of Claim within 14 days, and in default, the Cause was to proceed as an undefended Cause.

4. The *Responses* were not filed.

5. On 24 April 2019, the firm of Nyabena Alfred & Co. Advocates applied to be allowed to cease acting for the Respondents for lack of instructions, but the application was marked as withdrawn on 18 June 2019.

6. The application was marked as withdrawn because the firm of *Kamau Chege & Kagunyi Advocates* had filed a *Notice of Appointment of Advocates* on 17 June 2019.

7. On 21 November 2019, the Claimant served a hearing notice upon the firm of *Kamau Chege & Kagunyi Advocates*. The notice was acknowledged.

8. When the Cause was called out for hearing on 19 December 2019, the Respondents and their advocate on record were absent, and because the Court was satisfied with the service of a hearing notice, and further considering that there was no *Response* on record, allowed the hearing to proceed.

9. The Claimant testified and he filed his submissions on 14 February 2020 (should have been filed by 31 January 2020).

10. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

11. The Claimant testified that he was employed by the 2nd to 4th Respondent as a driver on 28 April 2004 and that from 15 July 2009 he started to work for the 1st Respondent as well (depending on instructions from the 3rd and 4th Respondents).

12. On the separation, the Claimant stated that on 29 July 2016, the 3rd Respondent insulted him and also accused him of theft and that being infuriated, he reported to the Police.

13. According to the Claimant, the Respondents were not amused with the report to the Police, and on 8 August 2016, the 3rd Respondent instructed him to hand over the vehicle keys.

14. According to the Claimant, the decision to surrender the vehicle keys effectively frustrated the contract and that amounted to a termination of employment without requisite notice of termination of employment.

15. The Claimant was paid by the month and according to section 35(1)(c) of the Employment Act, 2007, was entitled to *written notice of termination of employment*.

16. The Claimant's testimony that no written notice was given remaining unrebutted, the Court finds that the Claimant established that there was unfair termination of employment.

17. The Respondents were therefore under a burden to show that they afforded the Claimant a hearing as contemplated by section 41 of the Employment Act, 2007.

18. Further, it was upon the Respondents to prove the reasons for terminating the Claimant's contract, and that the reasons were valid and fair, in terms of sections 43 and 45 of the Act.

19. The Respondents snubbed the opportunity to discharge the burden by failing to file a *Response* and/or attend the hearing.

20. The only logical conclusion the Court can draw is that the termination of the Claimant's employment was unfair.

Compensation and pay in lieu of notice

21. The Respondents did not give notice, and the Court holds that the Claimant is entitled to 1-month pay in lieu of notice (basic salary in June 2016 was Kshs 15,120/-).

22. The Claimant served the Respondents for about 12 years, and in consideration of the length of service, the Court is of the view that compensation equivalent to 12 months gross salary would be fair (gross salary was Kshs 18,000/-).

Underpayments

23. The Claimant did not lead any evidence to show that he was underpaid, either below the prescribed minimum wages or contractually agreed on wage.

24. In the submissions, he referred to the Regulation of Wages (General)(Amendment) Order of 2017 to claim Kshs 438,675/- underpayments.

25. Apart from stating that he was a driver, the Claimant did not disclose the type of vehicle he used to drive. It is only in the submissions that the Claimant contended that he used to drive a medium-sized vehicle.

26. Further, the Wage Order relied on by the Claimant was only applicable from 1 May 2017 and not throughout the period he was in employment.

27. This head of the claim was not proved to the required standard.

Over time, public holidays and rest days

28. The Employment Act, 2007 has left it to the employer and employee to agree on working hours, save for a rest day every 7 days.

29. The Claimant alleged that he worked 13 hours a day and that he also worked during public holidays from 2004 to 2016. He claimed Kshs 2,724,731/- for the overtime.

30. The Claimant submitted that he should have been working 8 hours per day, but did not disclose any particular provision providing for the same.

31. The Court is aware that different Regulation of Wages Orders prescribes sector-specific working hours, and without evidence as to which particular one applied in the sector the Respondents operated in, the Court finds that the Claimant did not prove this head of the claim to the required standard.

Severance pay

32. The Claimant's position was not declared *redundant* and, therefore, he is not eligible for severance pay.

33. In the submissions, the Claimant prayed for *service pay*, but since he was a contributor to the National Social Security Fund, he is ineligible for *service pay* because of section 35(5) & (6) of the Employment Act, 2007.

NSSF contributions not remitted

34. The Claimant produced copies of *Provisional Member Statements of Account from the National Social Security Fund* indicating that deductions were not remitted to the Fund during some months.

35. Since the Act under which the National Social Security Fund has elaborate provisions on dealing with such unremitted contributions which include levying of penalties, the Claimant should make a formal complaint to the Fund to follow up on the contributions.

Accrued leave

36. The Claimant sought Kshs 70,383/- on account of leave days not taken.

37. According to a schedule produced by the Claimant, the accrued leave run from 2004 up to 2016 when he separated with the Respondents.

38. However, the Claimant did not disclose whether he applied for leave and was denied, or whether he accumulated the leave with the permission of the Respondents.

39. Section 28(4) of the Employment Act, 2007 circumscribes the number of leave days which can be carried forward, and without disclosure as to whether the leave was accrued with permission of the Respondents, the Court declines to grant this head of the claim.

Unpaid salary for July 2016 and 8 days in August 2016

40. The Claimant was entitled as of right to earned wages, and the Court will allow the head of the claim as prayed in the sum of Kshs 28,637/-.

Certificate of Service

41. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

42. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(i) Pay in lieu of notice	Kshs 15,120/-
(ii) Compensation	Kshs 216,000/-
(iii) Unpaid salaries	Kshs 28,637/-
TOTAL	Kshs 259,757/-

43. Respondent to issue a certificate of service to the Claimant within 21 days.

44. The Claimant to have costs on a half-scale.

Delivered, dated and signed in Nairobi on this 13th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kirui instructed by Watako Kirui & Co. Advocates

For Respondents Kamau Chege & Kagunyi Advocates

Court Assistant Judy Maina