



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 572 OF 2015**

**GERALD MWANGI GICHOHI.....CLAIMANT**

**v**

**PAUL MOIPEI .....1<sup>st</sup> RESPONDENT**

**CALIFORNIA BAR & BUTCHERY.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Gerald Mwangi Gichohi (Claimant) instituted these proceedings against Paul Moipei and California Bar & Butchery (Respondents) on 13 April 2015 and he stated the Issue in Dispute as Unlawful termination of employment and failure by the Respondents to pay terminal dues and/or benefits.

2. The Claimant sought for the breaches a total of Kshs 2,996,400/-.

3. The Respondents filed a *Defence to Memorandum of Claim* on 19 May 2015, and the Cause was heard on 11 November 2019 and 11 December 2019.

4. The Claimant and the 1<sup>st</sup> Respondent testified.

5. The parties did not file submissions as directed.

6. The Court has considered the pleadings and evidence.

**Unfair termination of employment or mutual separation**

7. The Claimant was employed by the Respondents as a Manager in 2008.

8. According to the Claimant, he fell ill and was admitted at Kenyatta National Hospital from 18 August 2014 to 22 August 2014 and when he resumed work after discharge, he was informed that his services were no longer required, as a consequence of which he reported to Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers.

9. The Union wrote a demand to the Respondents on 10 December 2014 and meetings were held culminating in an agreement on 20 January 2015. As a result, the Respondents paid the agreed dues to the Claimant.

10. However, the Claimant maintained in Court that circumstances forced him to accept the agreement and payments set out therein, which he felt were insufficient.

11. The 1<sup>st</sup> Respondent admitted that he employed the Claimant as a Manager in 2008 and that he suffered a stroke and could no longer perform his contractual obligations as a result of which they discussed and agreed on mutual separation.

12. The Claimant did not disclose the nature of illness he suffered but at the same time did not dispute the Respondents assertions that it was a stroke.

13. The Union's letter to the Respondents talks of ill-health.

14. The Union and the Respondents met and a mutual agreement was reached upon which the Claimant was paid Kshs 72,000/-.

15. The Agreement indicates that the payment was in full and final settlement.
16. The Claimant contended before the Court that circumstances forced him to accept the Agreement.
17. The Claimant had the benefit of a Union representative when the negotiations were taking place. If he had any difficulties, he should have brought such to the attention of the Union representative.
18. The Union representative who negotiated and witnessed the Agreement was not called to testify. The failure was not explained.
19. From the obtaining circumstances, the Court finds that the Agreement was voluntary and it was in full and final settlement of any dues accruing to the Claimant from the employment relationship.
20. This, according to the Court was a case of mutual separation and not unfair termination of employment.

#### **Breach of contract/statute**

#### **Overtime**

21. The Claimant sought Kshs 1,728,000/- on account of overtime pay.
22. The Employment Act, 2007 leaves it to the parties to agree on working hours.
23. However, the *Regulation of Wages Orders* set out minimum working hours within specific industries.
24. The Claimant did not disclose during testimony any specific *Regulation of Wages Order* which applied in his case. This head of the claim was not proved.

#### **House allowance**

25. The Claimant did prove that the wage agreed did not include house allowance.

#### **Accrued leave days**

26. Section 28(4) of the Employment Act, 2007 circumscribes the number of leave days which can be carried forward.
27. The Claimant did not show that he carried forward leave with the approval of the Respondents, or that he applied for leave and was denied. He also did not explain whether the accrued leave was discussed during negotiations involving the Union. Relief is declined.

#### **National Social Security Fund contributions**

28. The Claimant did not produce any statements from the National Social Security Fund to demonstrate contributions amounting to Kshs 38,400/- were not remitted to the Fund.

#### **Conclusion and Orders**

29. The Court having found that this was a case of mutual separation, finds no merit in the Cause and orders it dismissed with no order on costs.

**Delivered, dated and signed in Nairobi on this 6<sup>th</sup> day of March 2020.**

#### **Radido Stephen**

#### **Judge**

#### **Appearances**

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|-----------------|---|
| For Claimant    | Mr. Gachomo instructed by Ngugi Mwaniki & Co. Advocates                             |
| For Respondent  | Ms. Ooga/Mr. Gituma instructed by Nyokabi Waiganjo, Omungala & Associates Advocates |
| Court Assistant | Judy Maina  |