



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 63 OF 2016

(Before Hon. Justice Mathews N. Nduma)

PAUL MBWABI.....CLAIMANT

VERSUS

SAMUEL MUHATI LIGUYANI.....RESPONDENT

JUDGMENT

1. Claimant filed suit claiming the following reliefs:

- a. Salary under payments for 5^{1/2} years worked in the sum of Kshs. 1,100,908.85.
- b. Payment in lieu of leave not taken for the period worked in the sum of Kshs. 99,558.85.
- c. Payment in lieu of one rest day per week for the period worked in the sum of Kshs. 257,903.60.
- d. Service pay for the period worked Kshs. 71,113.10.
- e. Interest and costs.

2. Claimant testified under oath and adopted a witness statement dated 21st April 2016 as his evidence in chief.

3. The claimant testified he was verbally employed by the respondent on 11th October 2010 as a night watchman.

4. The claimant secured the rental houses of the respondent and he lived in one of the houses. That the claimant was stationed at the gate every night. That he closed the gate by 9.00 pm in the night until 6 am in the morning. That he opened for the tenants and authorized visitors. During the day, the claimant worked as a caretaker of the plot. The claimant testified that he was promised to be paid at least the minimum wage for a watchman. The respondent refused to reduce the employment contract to writing. That the respondent did not even provide written lease agreements to his tenants.

5. That the claimant worked continuously until he fell ill and left voluntarily on 29th January 2016. That dirty sewage water that leaked in the respondent's plot, caused his illness. The claimant was tasked to clean the sewer water as part of the caretaker duties until repairs were done. That the leakage lasted for about a month and the claimant cleaned it with no gloves and gumboots.

6. That the respondent took him to hospital and paid initial hospital bills. The claimant was deducted salary for the days he did not work while sick. The claimant was not given a rest day weekly. The claimant was not a member of any pension scheme and was not paid service pay for the days worked.

7. The claimant was paid Kshs. 3,000 per month which was an under payment for a night watchman and caretaker. The claimant stayed in a changing room which was not proper housing. The claimant was not paid any terminal benefits. The claimant wrote a letter of demand through his advocates. The demand was not heeded to hence the suit. The claimant did not go on leave and was not paid in lieu of leave.

8. The claimant prays to be awarded accordingly.

9. CW2 was Silas Ashiundu Mbwas, a son of the claimant who testified that his father, CW1 worked for the respondent upon his retirement and return from Nairobi to the village.

10. CW2 testified that initially, CW1 went to the workplace every evening but later on, he was given accommodation at the respondent's plot. That CW1 worked during the night and day at the plot. CW2 testified that he did not like the way his father was overworked but he had no control over the matter. That the claimant slept in a very small room that had no windows and he was asked to clean sewer which eventually made him sick. That CW2 and his brother had to assist to foot hospital bills. That CW1 was now sickly and with no means to support himself. CW2 described his father as a hard worker and liked to be self-reliant but was now weak and sickly. That he be paid what is owed to him by the respondent.

11. The claimant produced a report from the Ministry of Labour following a conciliation process. The court has considered the report dated 1st March 2017. In particular the court has observed the findings by the County Labor Officer and the recommendations the officer made thereunder that indeed the claimant had worked for the respondent for about 5¹/₂ years and was not paid terminal benefits including arrear salary, accrued leave, rest days and public holidays and service gratuity. The officer recommended that the respondent do pay the said terminal benefits to the claimant.

Defence.

12. RW1, Samuel Muhati testified that he was a business man with rental houses at Musingu and the claimant was his uncle. That claimant was his tenant. That RW1 did not employ the claimant and the claimant did not get sick from working for him. That RW1 did not pay the claimant any salary but gave him food and clothing from time to time.

13. Under cross examination, RW1 stated that the claimant stayed at his plot for about 5¹/₂ years. That he stayed in one room. That claimant was sick when he came from Nairobi. That he was taken home by his family members in 2016. That the plot had about 13 rental houses and each room was paid for Kshs. 9,000 to Kshs. 10,000 a month. That RW1 did not employ anybody at the plot. That he gave no written letters to his tenants or to his employees at his Khayega home.

14. RW2 testified that he was Ben Muhinya and a Chief of Khesi Location in Kakamega. That he had tried to reconcile the claimant and the respondent but conciliation was not successful. That the claimant was weak and used a walking stick. He had a serious wound on the leg. RW2 stated that he was not aware of the relationship between the claimant and the respondent and had not visited the plot the cause of the dispute.

Determination

15. The issues for determination are:

- a. Whether the claimant worked for the respondent or not?
- b. Whether the respondent is entitled to the reliefs sought if (a) above is in the affirmative.

16. This case hinges on the credibility of the testimony by CW1 and CW2 *vis a vis* that by RW1. It cannot be doubted that the claimant lived in the residential rental plot, owned by the respondent for about five years(5) and four(4) months. CW1 and CW2 testified that the claimant worked as a watchman by night and caretaker by day. RW1 testified that he never employed anyone in his residential plot. At the same time, RW1 testified that he had 13 residential houses in that plot and collected between Kshs. 9,000 and 10,000 a month from each house.

17. It is inconceivable that RW1 left the tenants in the said plot to their own devices. The testimony by CW1 that he opened and closed the gate for the tenants and visitors and kept vigil at the gate the whole night is both sensible and credible. The testimony by RW1 does not ring true at all.

18. It does not make sense that the respondent would keep the claimant at his plot, not paying rent for five (5) and a half years. It is not plausible that nobody cleaned the compound during the day. The report by the labour officer corroborates the testimony by CW1 and CW2. That indeed the claimant worked for the respondent as per his testimony. When the claimant was no longer unable to work due to ill health he went back to his rural home. It is not that CW1 had no fixed abode. He stayed with the respondent to earn a living and was underpaid at the rate of Kshs. 3,000 per month contrary to the minimum wage applicable to night watchmen for the period he worked for the respondent. This is the finding of the court. The court further finds that the claimant was not granted at least one rest day per week for the entire period he worked. The claimant also worked during public holidays as he was the only employee of the respondent.

19. It is the court's finding that the claimant was not paid any terminal benefits upon leaving the employ of the respondent.

20. The claimant is entitled to payment of underpayments and in lieu of untaken rest days and leave days for a period of three years. The claims that accrued beyond the period of three years from the date of filing suit are time barred.

21. The claimant produced the General wage orders covering the period he worked which provide the minimum wage of a night watchman in the sum of Kshs. 12,221.10 per month in 2015. It was Kshs. 10,911.70 in the year 2013 and was Kshs. 9,571.65 in 2012. It was Kshs. 8,463 in 2011 and Kshs. 7,283 in 2010.

22. The claimant has prayed for payment of underpayments, in lieu of leave days, and in lieu of rest days for 5 years and 4 months. The court only awards the three items for a maximum period of three years. The claimant is to recalculate the claims in prayers C (i), (ii) and (iii) limited to the last three (3) years only, which the court has awarded.

23. With respect to service pay, this accrues as per the Regulation of security service terms and conditions of services, order 2012 from the date of termination. The court therefore awards the claimed the sum of Kshs. 71,113.10 being service pay for the period served.

24. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- a. Underpayments for the last 3 years of service, to be calculated.
- b. Payment in lieu of leave days for three (3) years in the sum of Kshs. $(12,221.30 \times 3) =$ Kshs. 36,663.30.
- c. Payment in lieu of one rest day per week for the last three (3) years to be calculated.
- d. Service pay in the sum of ksh. 71,113.10
- e. Interest at court rates from date of filing suit till payment in full.
- f. Costs of the suit.
- g. Computation by the claimant to be filed and served within 30 days. Respondent at liberty to file a response within 15 days of service. Computation to be confirmed by the court as awarded in the judgment.

Judgment Dated, Signed and delivered at Nairobi this 16th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 of the Civil 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.

Mathews N. Nduma

Judge

Appearances

Mr. Mbalusi for Claimant.

Mr. Shifwoka for Respondent.

Chrispo – Court Clerk