

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2287 OF 2016

RICHARD MUNYAO KATUKU.....CLAIMANT

-VERSUS-

CHRISTOPHER MUTHOKA MUTUA

T/A ISEKA GRANT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 10.11.2016 through Rakoro & Company Advocates. The claimant prayed for judgment against the respondent for:

a) A decterest of the claim.

laration that the termination or dismissal of the claimant by the respondent was unfair and unlawful.

b) The respondent to pay the claimant a sum of Kshs.329, 869.73 comprising Kshs.15, 248.00 a month pay in lieu of notice; Kshs.106, 737.36 7 months due salary; Kshs.8, 894.77 seven months prorated leave; Kshs.16, 011.13 off dues and public holidays; and compensation of Kshs.182, 979.28.

c) **Costs and in**The claimant's case is that he worked for the respondent from 01.05.2015 to November 2015 as a conductor or turn boy. The last monthly pay was Kshs.15, 248.19 with a travel allowance of Kshs.400.00 per day. The claimant pleads that he was stopped from working for the respondent in November or around November 2015 without any reason and at a time when he was owed salaries as claimed.

The memorandum of response was filed on 15.12.2016 through Njuguna Ng'ang'a & Associates Advocates. The respondent's case is that he employed the claimant at Kshs.700.00 per day and there was no agreement on lunch and travel allowance as alleged for the claimant. Further the respondent's case is that the claimant was terminated from employment by way of redundancy when he falsely alleged that he had injured his chest while on duty. Upon involving the clergy, the respondent paid the claimant Kshs. 13,500.00 after negotiation and in furtherance of brotherhood in the church. The respondent prayed that the suit be dismissed with costs.

To answer the **1st issue** for determination there is no dispute that parties were in a contract of service. The tenure and terms of payment are in dispute. The respondent pleaded that the claimant worked from July 2015 to August 2015 at Kshs.700.00 daily wage. The claimant testified that they agreed upon Kshs.1000.00 daily wage but he was actually paid Kshs.400.00 per day. The respondent did not attend at the hearing despite service for such attendance.

The Court has considered the claimant's evidence. He pleaded that he was paid Kshs.15, 248.19 per month and in his evidence he testified that he was paid a daily wage of Kshs. 400.00 out of the agreed Kshs. 1000.00 per day. The claimant's evidence was inconsistent with his pleadings and the Court finds that he cannot be trusted. On the material on record the Court finds that the claimant has failed to establish the terms and conditions of pay and in particular, the rate of pay.

To answer the **2nd issue** for determination, the claimant was not clear on the date of termination. He alleged that he was terminated in November 2015. The injuries as claimed must have been continuing and suit was filed on 10.11.2016 and the Court is unable to determine if the claims may have been time barred per section 90 of the Employment Act, 2007. Nevertheless, the Court finds that the liquidated claims needed to be strictly pleaded and proved and it is found that the claimant has failed to satisfy that requirement; the precise date of termination having not been established at all. In the circumstances the Court returns that the claimant has failed to establish the fact of the alleged termination.

To answer the **3rd issue** for determination, the Court returns that the terms of the contract being at large and the fact of termination having not been established, the suit is liable to dismissal as none of the prayers have been established as justifiable. As the respondent failed to attend the hearing there will be no orders on costs of the suit.

In conclusion the suit is hereby dismissed with no orders on costs.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 9th April, 2020**.

BYRAM ONGAYA

JUDGE