



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1367 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

AMOS MUNYAO MUTUA.....CLAIMANT

VERSUS

FRIENDS DINER COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Amos Munyao Mutua instituted this suit vide a Memorandum of Claim dated 8th July 2016 against the Respondent, Friends Diner Company Limited for unpaid dues. The Claimant avers that he was at all material times an employee of the Respondent vide written contracts and diligently discharged his duties as a Chef. That on or about 23rd March 2016, he gave a Notice of Resignation effective 1st April 2016 due to personal issues and requested the Respondent to pay up his unpaid dues. That the Respondent accepted his resignation and promised to pay him the said dues and that the Respondent also requested that he puts down his claim in writing to compare notes, which he did.

The Claimant further avers that whenever he reminded the Respondent of his unpaid dues, the Respondent would insist it needed time to reconcile the Claimant's accounts. That the said unpaid dues include service pay, overtime dues, payment in lieu of leave days not taken, salary for the month of March, NSSF contribution and house allowance. The Claimant prays that judgement be entered in his favour for:-

- a) *Payment in lieu of leave days not taken..... Kshs.82,530*
- b) *Overtime..... Kshs.110,040*
- c) *Service Pay..... Kshs.137,500*
- d) *Salary for March 2016..... Kshs.27,500*
- e) *A certificate of service*
- f) *Costs of this claim.*
- g) *Interest on (a), (b), (c), (d) and (f) from the date of filing the suit until payment in full.*
- h) *Any other relief the court deems fit to grant.*

The Claimant also filed his Witness Statement wherein he states that he was employed on 11th October 2005. He further states that the Respondent gave him severance pay for the first two years but failed to pay the same from 2007 to 2016. That the Respondent also failed to remit payments to NSSF despite the same being deducted from his income. He states that he used to work daily including Saturday and Sunday with a promise of overtime pay but he was not paid overtime between December 2011 and May 2013. That he only took 15 days' leave in 2010 and never took any leave for the years 2012 to 2015 and that the leave days he took during this time were carried forward from 2008 and 2009. He also states that the Respondent never paid him house allowance and that it is only fair and just that the Respondent pays up his unpaid dues and gives him his well-deserved Certificate of Service.

The Claim is undefended and proceeded by way of written submissions.

The Claimant submits that from the evidence on record, it is not in contention that he was an employee of the Respondent and that he annexed payslips for February 2016 as well as a statement of account from the NSSF for the period 1st January 1997 to 29th February 2006. That since there has been no evidence to the contrary it is safe to conclude that he was the employee of the Respondent is evidenced by the monthly payments and statutory deductions.

He submits that **section 28 of the Employment Act** provides that an employee is entitled to 21 days' paid leave after every 12 months of consecutive service. That he has demonstrated in the annexure **AMM-5 on page 5-9** that his leave days were carried over from previous years and he therefore claims 84 days for the four years plus an additional 6 days from previous years, totaling 90 days. That he ought to be compensated for the leave days not taken. He relies on the case of **Joaqim Mbithi Mulinge v Transoceanic Projects & Development [K] Limited [2017] eKLR** where the court in allowing a prayer for compensation for leave days not taken, stated that leave days not taken are not forfeited.

As for the claim for Overtime, the Claimant submits that he would work more than eight hours a day, seven days a week and that he claims 1416 hours converted into 157 working days. That he was requested to work overtime on the understanding that he would be compensated. He cites the case of **Bernard Khaemba Malaba v Board of Trustees Mount Kenya University [2018] eKLR** where the court allowed a prayer for overtime where the company involved had an overtime policy.

It is submitted by the Claimant that keeping in mind that service pay is not payable where an employee is a member of NSSF as under **Section 35 of the Employment Act**, he is guided by **Section 5 of the Employment Act** on discrimination of employees to claim for service pay. That he has in fact already been paid part of his service pay and is therefore entitled to the same from 2007 to 2016 when he resigned. That the same equals to half a month's salary for 10 years. The Claimant also submits that after he handed in his resignation letter, the Respondent took advantage of his resignation and declined to pay him salary for March 2016 which he now claims. The Claimant further prays to be issued with a Certificate of Service as required by law and for costs since cost follow the event.

Analysis and Determination

The first issue for determination is whether the Claimant was an employee of the Respondent. The second issue for determination is whether the Claimant is entitled to the claim of unpaid dues.

In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR**, this Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue. Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent.

The documents submitted by the Claimant in the present case include copies of his payslip, notice of resignation letter dated 23rd March 2016, NSSF Statement of Account dated 30th March 2016 and correspondence indicating the leave days the Claimant took between 2013 and 2016. I find that the Claimant has discharged his burden and proved that he was employed by the Respondent through a copy of his Payslip and NSSF Statement of Account, which evidence payment of salary and statutory deductions periodically by the Respondent.

Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The Claim for unpaid dues as pleaded remains uncontroverted since the Respondent failed to enter appearance or file a response to the Claim despite being served with the summons together with the Memorandum of Claim herein.

The Claimant is entitled to the claim for earned leave days as he produced documentation indicating the leave days the Claimant took between 2013 and 2016. He however did not tender any evidence to prove that he worked overtime and is therefore not entitled to overtime. He is also not entitled to service pay as under **section 35 of the Employment Act** he was a member of NSSF as evidenced in the copy of his payslip filed in court. The gaps in the NSSF statement produced by the Claimant are for reconciliation through the machinery provided for under the NSSF to be handled by NSSF Act upon complaint by the Claimant.

In conclusion judgment is entered for the claimant against the Respondent as follows: -

- a) Payment in lieu of leave days not taken.....Kshs.82,530.00
- b) Salary for March 2016.....Kshs.27,500.00

Total Award is..... Kshs.110,030.00

- c) A certificate of service

The Claimant is entitled to a Certificate of Service in line with **Section 51 of the Employment Act**.

The claimant is awarded costs of the claim. Interest shall accrue at court rates from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE