



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.156 OF 2017

CAROLINE NYAKERARIO.....CLAIMANT

VERSUS

SEO & SON LIMITED.....RESPONDENT

JUDGEMENT

The suit herein is consolidated with similar suits arising from the same cause of action and against the respondent with the claimant's case being the test suit. The consolidation is with the following;

**Cause No. 149 of 2017 – Samuel Wambugu Gitonga**

**Cause No. 150 of 2017 – John Nguyo Kahiga**

**Cause No. 151 of 2017 – David Kisero Otieno**

**Cause No. 152 of 2017 – Dominik Ncunge Karimi**

**Cause No. 153 of 2017 – Elizabeth Wangari**

**Cause No. 154 of 2017 – Wycliffe Ochieng Ogolla**

**Cause No. 155 of 2017 – Jacob Kennedy Odongo**

**Cause No. 157 of 2017 – Wagura Muthoni Gladys**

**Cause No. 158 of 2017 – Belinda Atieno**

**Cause No. 159 of 2017 – Benson Nyamao Okaro**

**Cause No. 162 of 2017 – Christopher O Okwaro**

**Cause No. 163 of 2017 – Emily Imali Onyango**

**Cause No. 164 of 2017 – Ibrahim Ramadhan Jabia**

On 11th April, 2017 the claimants filed the Memorandum of Claims under different causes/files. The respondent was served with summons and notice to attend court on 23rd August, 2017 but failed to appear or attend to the notices issued. The claimant filed the requisite returns through the affidavit of Oyango Henry Obonyo.

The claimants attended court for hearing directions and a hearing date allocated. The respondent as served with Hearing Notice and returns filed through the Affidavit of Sabaya Sheila and there was no attendance.

The claimant was employed by the respondent together with the other claimants under the consolidated suit.

In March, 2015 the claimant was employed as a general labourer by the respondent who was undertaking a road project in Nakuru town. The claimant was allocated with duties to clear bushes along the footpaths, digging holes for the footpath capstones and raking of bitumen. The agreed wage was Ksh.400.00 per day and which was paid in arrears weekly or in a fortnight or in a month.

For 17 months the claimants remained in the continuous employment of the respondent until 25th July, 2016 when there was abrupt stoppage of work. The initial contract for casual work automatically converted and became regulated under the law and the due benefits were not paid.

The claimant is seeking for the payment of annual leave days earned, work during public holidays and rest days. The due house allowance was not paid and the abrupt stoppage of work resulted in unfair termination of employment as there was no notice, no reasons were given, there was no hearing and the summary action taken by the respondent is not justified. For the period at work with the respondent, there was underpayment.

The claimant is seeking the payment of the following dues;

- a) Notice pay Ksh.12,591.80;
- b) Annual leave Ksh.12,591.80;
- c) Pro-rata leave for 5 months Ksh.5,246.58;
- d) Underpayment ksh.37,260.60;
- e) House allowance Ksh.42,812.12;
- f) 10 public holidays Ksh.9,686.00;
- g) Service pay ksh.7,264.50;
- h) Compensation Ksh.151,101.60; and
- i) Costs.

The claimant testified that she together with the other claimants under the consolidated files were working for the respondent in a construction of foot bridges in Nakuru as general workers from March, 2007 and paid Ksh.400.00 per day while working for 7 days in a week. Such wages would be paid after every week and in most cases there were delays in payment which would be weekly twice a month.

On 25th July, 2016 the respondent called for a parade and the foreman stated that there was no work. There was no prior notice, reasons given or a hearing allowed for the claimants to know what had caused the sudden action leading to stoppage of work. No terminal dues were paid save for pay for days worked.

The claimant filed written submissions.

Upon filing suit, the respondent was served and failed to attend. Such leaves the court with the claimant's pleadings, evidence and submissions. Without the attendance of the respondent or the filing of any work records, the court is only left with the word of the claimant.

The claims made shall be assessed based on the leadings, evidence and the applicable law.

Section 8, 9 and 10 of the Employment Act, 2007 creates a legal duty upon the employer to issue the

employee with a written contract of employment within two months of employment where such employment commences orally and the employee is retained continuously undertaking the same duties. Where the employer fails in this duty, by operation of section 37 of the Act, the employee employed on causal/oral terms becomes protected and enjoys the terms under the law.

The Court of Appeal in the case of **Nanyuki Water & Sewage Company Limited versus Benson Mwiti Ntiritu & 4 others [2018] eKLR** held as follows;

*... Section 37 of the Employment Act, 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.*

In this case, the non-attendance by the respondent to give any defence and without any work record, the word of the claimants as the employee on the grounds that they were continuously employed by the respondent and paid weekly or biweekly is taken as the truth.

Under the provisions of section 37 of the Employment Act, 2007 the claimant thus enjoyed rights to notice before termination of employment, reasons for termination of employment and hearing to ensure the reason(s) for termination were explained under the provisions of sections 35, 41 and 43 of the Act. Where the mandatory provisions of the law are not followed by the employer, the resulting termination of employment is unlawful and unfair pursuant to the provisions of section 45 of the Act.

Notice pay is due under the provisions of section 35 of the Employment Act, 2007 at one month pay.

For the one (1) year and 5 months the claimant was in employment, annual leave was due or payment in lieu thereof under the provisions of section 28 of the Act. for the full year the claimant is entitled to 21 days wage and for the 5 months leave prorated at 8 days all being 29 days of leave at Ksh.14,036.00

Protected employees' wages are regulated under the Wage Orders for the payment of a minimum wage. As general labourer in the construction sector the daily wage in the year 2015/2016 Ksh.484.30. the Claimant was underpaid with Ksh.84.30 per day. For the 17 months of work and the claim for Ksh.37,260.60 is justified.

House allowance for Nakuru under the wage orders read together with section 31 of the Employment Act, 2007 provides for Ksh.1,000.00 per month. For the 17 months the claimant has Ksh.17,000.00 in house allowance.

The claim for 10 public holidays is not chronologised as to which days arose and therefore forming the basis for work. The court computation of the public holidays arising for the period of employment is different and for this purpose the claim is lost.

Service pay for the 17 months of work is not to be prorated. It only arises for the complete year served. The claimant is awarded Ksh.7,260.00 in service pay on the basis there is no evidence of the respondent paying the statutory dues in terms of section 35 of the Employment Act, 2007.

Upon the payment of the dues above, such shall be appropriate compensation to the claimant. No separate award shall accrue save for costs.

**Accordingly, this being the test suit under the consolidated files set out above, judgement is hereby entered for the claimant against the respondent in the following terms;**

**(a) Notice pay Ksh.12,591.80;**

**(b) Annual leave Ksh.14,036.00;**

**(c) Underpayment ksh.37,260.60;**

**(d) House allowance Ksh.17,000.00**

**(e) Service pay ksh.7,260.0;**

**(f) Costs.**

**Delivered at Nakuru this 14th day of February, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:.....