



**REPUBLIC OF KENYA**

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

**ELRC NO. 1081 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> February, 2019)**

**WILSON MWAURA NGIGI.....CLAIMANT**

**VERSUS**

**NATURE EXPEDITIONS AFRICA LTD.....RESPONDENT**

**JUDGMENT**

1. On 30<sup>th</sup> June 2014, the Claimant through the firm of Waiganjo Wachira and Company Advocates, filed his Memorandum of Claim dated 13<sup>th</sup> June 2014. The Claimant seeks the following prayers:-

**a. Unpaid dues totaling Kshs. 963,453.30.**

<b>i) Unpaid salary for the month of September 2012</b>	<b>Ksh. 18,000.00</b>
<b>ii) Unpaid leave from the year 1998 to 2012</b>	<b>Kshs. 98,133.30</b>
<b>iii) Unpaid holidays</b>	<b>Kshs. 30,000.00</b>
<b>iv) Unpaid Saturdays and Sundays</b>	<b>Kshs. 273,000.00</b>
<b>v) Unpaid house allowance</b>	<b>Kshs. 388,800.00</b>
<b>vi) Service pay at the rate of 18 days</b>	
<b>wages for every year worked</b>	<b>Kshs. 155,520.00</b>

**b. Punitive and aggravated damages.**

**c. Costs and incidental to this suit.**

2. It is the Claimant's case that on 7<sup>th</sup> September 1998 he was retained by the Respondent as a Mechanic Grade 111 at a salary of KShs. 3500.00 per month. He avers that he was an excellent employee whose performance exceeded expectation and acted within the scope of his employment.

3. The Claimant avers that on 3<sup>rd</sup> September 2012, he issued the Respondent with his letter of resignation issuing a 1 months' notice and finally resigning on 3<sup>rd</sup> October 2012.

4. The Claimant avers that he is entitled to the prayers sought. He also avers that he sustained aggravated damages in the form of mental distress, inconvenience and psychological injury as a result of having his dues withheld without any right whatsoever. He further avers that such action was outrageous, reckless, deliberate, actuated by malice and with intentional disregard of him.

5. During trial, the Claimant in this case, testified that his salary at the time of resignation was 18,000.00.

6. Upon cross-examination, the Claimant admitted to being paid 29,000.00 after his resignation, which included his September salary of

Kshs.18,000.00 and leave of Kshs.10,000.00. He admitted to not stating the said payment in his resignation letter.

7. He contended that the Respondent failed to attend two meetings before the labour officer but attended the third one, where he was absent. He further contended that he used to work on Saturdays from 7:30 am to 7:00 pm, being 6 hours overtime. He denied ever going on leave since the commencement of his employment. However, it was his testimony that he was given 4 days leave upon the demise of his father. It was also his testimony that he worked for 3 Sundays per month.

8. During re-examination, it was his testimony that he had no idea as to how the Kshs. 29,000.00 was arrived at. He also denied meeting the Respondent's conciliator.

9. On 29<sup>th</sup> August 2014, the Respondent filed its even dated Response through the firm of Kenyatta Odiwuor & Company Advocates. The Respondent avers that the Claimant's letter of employment dated 16<sup>th</sup> June 2000 was a forgery and did not emanate from it. It is the Respondent's case that the Claim herein is fatally defective as it is based on a forgery hence an abuse of the Court process thus should be struck out.

10. The Respondent avers that the Claimant was paid all his dues upon resignation, which payment he duly acknowledged by requesting the Respondent to deposit the dues in his bank account.

11. The Respondent avers that the Claimant resigned on his own volition hence the issue of mental distress, inconvenience and psychological injury are baseless in fact and in law.

12. The Respondent further avers that the Claimant never took his work seriously and was subject of various disciplinary proceeding including receipt of various warning letters.

13. It is the Respondent's case that the claim herein is not appropriate for an award of punitive damages due to the Claimant's conduct in the course of his employment.

14. It is the Respondent's case that the Claimant took his leave days before resigning, 3 months leave in 2005 and took a 4 month leave upon the demise of his father. Further, the Claimant's outstanding salary was deposited in his bank account.

15. The Respondent avers that the Claimant's prayer concerning unpaid holidays is vague for lack of particulars. The Respondent further avers that it is its policy to have none of its employees working on a public holiday.

16. It is the Respondent's case that Saturday was a working day where the Claimant worked from 8:30 am to 1:00 pm which pay was included in his salary. The Respondent contends that Sunday was not a working day. The Respondent further contends that the Claimant's salary was inclusive of allowance.

17. The Respondent avers that the Claimant is not entitled to service pay as he voluntarily resigned.

18. It is the Respondent's case that the Claimant abandoned the mediation process when he realized he could not prove his claim against the Respondent.

19. On 5<sup>th</sup> September 2014, the Claimant filed a reply to the Respondent's Response arguing that it consists of mere general denials and gave notice of its intention to make an application to have the same struck out before hearing.

20. The Respondent's case was scheduled for hearing on 3<sup>rd</sup> December 2018. However, the Respondent was not ready to proceed because its Counsel could not get hold of its witness thus sought an adjournment. The Court rejected this application and ordered its case closed.

### **Submissions by the parties**

21. The Claimant in his written submissions dated 4<sup>th</sup> December 2018 and filed on 6<sup>th</sup> December 2018, frames the issue for determination as whether he is entitled to the reliefs sought. He submits that he is entitled to his salary of September 2012 because the Respondent unlawfully denied him the same.

22. The Claimant also submits that he is entitled to the un-utilized leave days from 1988 (sic) to 2012 as provided for under section 28 of the Employment Act 2007. It is his further submissions that he is entitled to unpaid holidays, Saturdays and Sundays worked for the years 2008 to 2012.

23. It is the Claimant's submissions that he is entitled to unpaid house allowance calculated at 15% of his basic salary as the Respondent has failed to produce records proving its payment. The Claimant relies on the case of **Jane Njeri Wanyoike & 23 Others vs. Pan Africa Insurance Company Limited & 2 Others [2017] eKLR**. The Claimant also submits that he is entitled to service pay because even though his salary was being subjected to statutory deductions, he was not registered as member of NSSF or NHIF. He relies on the case of **Joab Ashitiba Hashon vs. Samaritan Medical Services [2017] eKLR**.

24. The Respondent in its written submissions dated 17<sup>th</sup> December 2018 and filed on even date, submits that the Claim is bad in law for want of particulars. The Respondent further submits that the Claimant's claim for unpaid leave cannot suffice because its records indicate that the Claimant took 7 months' leave in the course of his employment. The Respondent also admits that the Claimant's salary was inclusive

of house allowance.

25. It is the Respondent's submissions that the Claim is an afterthought and is time barred since it has been brought after 12 years and only upon the Claimant's resignation.

26. I have examined the evidence and submissions before me. The main prayer by the Claimant is for payment of his termination benefits as he resigned voluntarily which fact the Respondent admitted.

27. The Respondent indicated that the Claimant was relying on a forged employment letter. They did not however prove this nor did they produce their preferred employment contract with the Claimant.

28. The claimant indicated that his salary at resignation was 18,000/= per month and there is no evidence to the contrary. There is no indication that he was paid house allowance all the time he worked which is contrary to Section 31 of Employment Act which states as follows:-

**1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.**

**2) This section shall not apply to an employee whose contract of service:-**

**a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or**

**b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).**

29. The Claimant was not a member of NSSF and so he is entitled to payment of service charge as provided under Section 35(5) (6) of Employment Act which provided as follows:-

**5) "An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.**

**6) This section shall not apply where an employee is a member of:-**

**a) a registered pension or provident fund scheme under the Retirement Benefits Act;**

**b) a gratuity or service pay scheme established under a collective agreement;**

**c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and**

**d) the National Social Security Fund.**

30. The Claimant submitted that he worked on Saturdays and Sundays and during holidays but there is no proof of this. On leave pay, there is an indication that the claimant was paid some leave dues for the year 2013 amounting to 10,500/= (Respondent's Appendix 1) and also 10,500/= for the year 2012.

31. Since the Claimant resigned in 2012 the only leave he would have been entitled to would be for 3 years prior to resignation and since he was paid for 2012, he is only entitled to the leave for 2011 and 2010 =  $18,000 \times 2 = 36,000/=$ .

32. In terms of remedies, therefore I find for the Claimant and award him as follows:-

**1. Service pay for 15 days for each year worked =  $18,000 \times 0.5 \times 14 = 125,000/=$**

**2. Leave for year 2011 and 2010 =  $18,000 \times 2 = 36,000/=$**

**3. unpaid leave allowance for 3 years as the rest of the claim is time barred =  $15\% \times 18,000 \times 36 = 97,200/=$**

**TOTAL = 259,200 – less statutory deductions**

**4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of filing suit.**

**Dated and delivered in open Court this 14<sup>th</sup> day of February, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties