



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**CAUSE NO.303 OF 2016**

**LEONARD BONYO OLENDE.....CLAIMANT**

**VERSUS**

**PHILIP RUTO LOPOKOYIT.....RESPONDENT**

**JUDGEMENT**

The claim is premised on the facts that the claimant was employed by the respondent in the year 2011 as a Gardener and a day time Watchman.

In the year 2001 the claimant was paid a wage of ksh.3, 000.00 per month which was increased to ksh.4, 000.00 in the year 2006 and in the year 2009 it was increased to ksh.5, 000.00 and which was paid until the respondent terminated employment in November, 2014.

The claim is also that for the 13 years the claimant worked for the respondent he was made to undertake various duties at the respondent's residence but was underpaid. No annual leave was allowed or paid in lieu, during public holidays the claimant remained at work; all weekends were spent at work without payment in compensation.

Upon termination of employment there was no payment of gratuity accrued by dint of 13 years continuous employment. The claims made are for the payment of the following dues;

- a) Compensation for unfair termination of employment;
- b) Notice pay ksh.10,116.00;
- c) Underpayments ksh.266,246.00;
- d) Public holidays ksh.59,165.00;
- e) Annual leave ksh.78,187.00; and
- f) Gratuity Ksh.75, 870.00.

The claimant testified that he was employed as a watchman at the respondent's residence. He was recommended for the job by the father-in-law from the year 2001 and he continued with duties of a watchman and gardener until the year 2014 when a security company was introduced and he was directed to leave his employment. The claimant was accommodated within his work premises.

The claimant also testified that that the respondent failed to pay his statutory dues and when he travelled abroad from the year 2006 to 2010 had the father-in-law supervise his employment. At the residence was the father-in-law, the mother a brother.

The claimant was allowed to have his wife within the premises and was running a charcoal business from the garage. The claimant had a boda boda business running and which he runs to date.

The claimant also testified that when the respondent introduced a firm of security guards he pleaded for time to move his property to his rural home in Nyando. Later the respondent made some payments through mpesa.

The defence is that the claimant was an employee under an oral contract but not from the year 2001 as he started working in the year 2003 to

2014. The claimant was hired on casual basis and only got recommended to work for the respondent in the year 2003 when he was hired a gardener.

The defence is also that the respondent left the country in the year 2006 when the claimant started engaging in his own private business of boda boda and had the wife running a charcoal kiosk in the vicinity and used the residence garage as a store for the business merchandise. Such activities were without the authority of the respondent.

The claimant was housed and accommodated by the respondent and was living with his wife and running private business. These were benefits to the claimant.

The claimant was paid his wages monthly and was revised from time to time to be in tandem with the wage guidelines. The respondent was away working in Nigeria and paid the claimant through Mpesa.

In the year 2013 the respondent noted some misconduct on the part of the claimant and which resulted in termination of employment in the year 2014. The claimant had been given several verbal warnings and failed to take heed. The misconduct related to the claimant engaging in boda boda business at the expense of his employment terms, illegally selling electricity to neighbours without the respondent's consent, leasing the property of the respondent without consent, and allowing the wife to keep the garage as storage for private business. The claimant was invited to a hearing but failed to give satisfactory defences.

Upon dismissing the claimant from his employment, the respondent continued to pay him for over 6 months noting he had school going children. The claims made are not justified and should be dismissed with costs.

The respondent testified that he dismissed the claimant from his employment in the year 2014 after giving him several warnings for engaging in private businesses from his residence and which was without his authority. The respondent also got material from his residence which confirmed the claimant was leasing part of the premises.

The claimant was a gardener and had been taken as part of the family and allocated 3 rooms for his use with water and electricity and all utilities were fully paid for. The claimant started at a wage of ksh.3, 000.00 which was increased over the years to Ksh.5, 000.00 and would get a Christmas gift in cash, wage advances. There was no requirement to work over public holidays or during annual leave. There was a private security firm offering security services and the claimant was not required to attend to security duties as he was the gardener.

Upon dismissing the claimant the respondent he was paid a gratuity of Ksh.15, 000.00 and ksh.17, 000.00 together with ksh.5, 000.00 for his expenses as he had a child in school. The respondent also continued to pay the due wage for months. The respondent too it the matter was amicably settled and the claims now made are without basis.

Both parties filed written submissions which shall be taken into account in the assessment of the mater.

The Employment Act has given great emphasis to a contract of service as with it parties have the freedom to agree on the terms and condition to regulate their relationship. As correctly submitted by the claimant, in the case of **Martin Ileri Ndwiga versus Olerai Management Company [2017] eKLR** the court held as follows;

*... there was no written contract of employment save for the oral arrangements between the parties. Section 8, 9 and 10 of the Employment Act, 2007 requires that every employee be issued with a contract of service stating the terms and conditions of such employment. Where such written contract is not possible to issue immediately, section 10(1) makes it mandatory that such a document should issue not later than two (2) months as follows;*

*(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment. [underline added].*

The failure to issue an employee with a written contract of service only serves to the disadvantage of the employer. The duty in law is vested upon the employer to issue a written contract of service to secure rights and duties at work. Without such written contract, where there is a conflict, and the employer has no work records as required under section 10(6) and (7) of the Employment Act, 2007 the word of the employee must be believed.

In this case, save for the extracts from the mpesa payments records, there is no other work record kept by the respondent.

The respondent opted to keep employment regulated under oral/verbal terms. The word of the claimant as the employee must be believed on the face of the respondent failing to abide the mandatory provisions of the law pursuant to section 9 and 10 of the Employment Act, 2007.

The year when the claimant started employment with the respondent was challenged. The claimant was not clear as to who the employer was in the year 2001 and with the respondent admitting in defence at paragraph 3 that employment started in the year 2003 to 2014, such averments not being challenged, this found credible and taken as admitted. The claimant was employed as a Gardener in the year, 2003 to 2014.

The claim that there was employment as a day time watchman is also challenged on the defence that the respondent had hired a private security firm while the claimant was the gardener. Indeed, where the claimant admits to have been the gardener and had to use the lawn mower, he cannot have been undertaking two jobs concurrently as a day time watchman.

The reason(s) leading to the summary dismissal of the claimant are hazy. On the one hand the claimant testified that he was invited by the respondent and told that he had been replaced in his duties by a security firm which took over security duties. On the other hand, the respondent testified that the claimant was not the security guard and he was dismissed following various misconduct of selling electricity to neighbours, using the premises for private businesses and for subleasing the premises.

Without any written warnings, or documented misconduct, it is the word of the claimant against that of the respondent. The respondent must suffer for not keeping work records. However, what is not in dispute is that before employment terminated, the claimant was called and notified of the change. Even where the claimant was not a security guard, upon changes made by the respondent, by his own evidence, the claimant was called and informed. He was obviously not happy.

The claimant also testified that following termination of employment he demanded the respondent to help him moving his family back home, he needed to move his personal belongings from his residence and was given Securicor Company to help transport his goods and upon assessment they charged ksh.55, 000.00 and it was agreed that a *jua kali* service be used and this was at a cost of ksh.32, 000.00 and which the respondent paid for.

To this end, employment terminated with the full knowledge of the claimant to the extent of getting assistance to move out his personal belongings. The court finds no unfair labour practice which requires the payment of compensation.

On the claim for underpayment, work during public holidays, not taking annual leave and the payment of gratuity, such shall be assessed with regard to the applicable law.

As noted above, the failure to keep work records only serves to the disadvantage of the employer. Even where defence is filed and is devoid of any work records, the court can only be guided by the work records kept by the employer as the best evidence is to be found in these work records.

The respondent testified that the claimant was paid a wage of ksh.3, 000.00 from the year 2003 and this was increased over time to ksh.5, 000.00. Great effort is made to extract from the mpesa transactions but the record is not credible as the statements due should have sufficed. Where the respondent required obliterating some parts from such statement(s), the legitimacy of the same would have been apparent instead of the tedious duty to extract the favourable parts from the statement.

The filed extracts are however useful to the extent of setting out when the claimant was paid and how much.

For the period before the year 2010, the applicable Regulation of Wages (General) (Amendment) Orders applicable from the year 2003 to the year 2009 shall apply on the basis that the claimant was only paid a wage of ksh.3, 000.00 per month in the year 2003 to 2005; from 2006 to 2009 he was paid Ksh.4, 000.00 per month and from the year 2010 to 2014 he was paid ksh.5, 000.00 per month. These tabulations are put into account in the absence of any work records.

The minimum wage due;

In the year 2003 is Ksh.3, 603.00 per month the underpayment was ksh.603.00 all being ksh.7, 236.00;

2004 wage due ksh.3, 999.00 per month and underpayment due is ksh.11,988.00;

2005 wage due ksh.4, 279.00 the underpayment is Kshs.15, 348.00;

2006 wage due ksh.4, 792.00 the underpayment is ksh.9, 504.00;

2007 wage due ksh.4, 792.00 the underpayment is ksh.9, 504.00;

2008 wage due Ksh.4, 792.00 the underpayment is ksh.9, 504.00;

2009 wage due Ksh.5, 488.00 the underpayment is Ksh.17, 856.00;

2010 wage due Ksh.6, 221.00 the underpayment is Ksh.14, 652.00;

2011 wage due ksh.6, 999.00 the underpayment is ksh.23, 988.00;

2012 wage due ksh.7, 915.00 the underpayment Ksh.34, 980.00;

2013 wage due Ksh.9, 024.00 the underpayment is ksh.48, 289.00.

5 months in the year 2014 the underpayment is ksh.20, 120.00

Total underpayment ksh.212,969.00

On the claim for work during public holidays, with the claimant being offered accommodation by the respondent, the respondent being abroad, the taking of such public holiday was thus regulated. The option to keep in the offered accommodation and failure to take the due

public holiday cannot be at the expense of the employer. The claim in this regard is declined.

The taking of annual leave is regulated under section 28 of the Employment Act, 2007. Such leave should not be accumulated beyond the provisions of section 28(4) on the rationale that rest cannot be postponed. The claimant is entitled to leave due for 18 months all being 30 days' pay in lieu of taking annual leave. On the last due wage, leave pay is tabulated at ksh.9, 024.00.

On the claim for gratuity, the same is without legal support; being anchored in any private treaty or in an employment contract is not due as held in **Coastal Bottlers Ltd versus George Karanja [2014] eKLR**. where the intention of the claimant was to claim service pay on the basis that there were no statutory dues paid, this is not pleaded. Claim for gratuity is declined.

From the defence and the evidence called, upon the termination of employment in May/June 2014 the claimant continued to receive a salary for 6 months. On the payment of Ksh.5, 000.00 a month such amounts to ksh.30, 000.00.

The claimant was also paid a gratuity of Ksh.15, 000.00 and 17,500.00 which he stated to be costs for transporting his goods home. There was no requirement for such provisions for either a gratuity pay of provision for transport for baggage. The amount of ksh.32, 500.00 thus paid is admitted.

Total received from the respondent is ksh.62, 500.00. Such dues shall be put into account in the computation of the dues owing.

There is no claim for costs.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of the due underpayments at ksh.212, 969.00 and annual leave pay ksh.9, 024.00 to be paid less ksh.62, 500.00. The payments due to the claimant shall be subject to the provisions of section 49(2) of the Employment Act, 2007. No orders to costs.**

**Delivered at Nakuru this 7th day of March, 2019**

**M. MBARU JUDGE**

In the presence of:

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