



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1314 2014

JAMES MURIITHI NJIRU **CLAIMANT**

v

OMEGA RISK MANAGEMENT LIMITED **RESPONDENT**

JUDGMENT

1. This Cause was heard on 11 December 2018 and 7 March 2019.
2. James Muriithi Njiru (Claimant) and Franklin Mugendi, the Managing Director of Omega Risk Management Ltd (Respondent) testified.
3. The Claimant filed his submissions on 4 April 2019 while the Respondent filed its submissions on 30 April 2019.
4. The Court has considered the pleadings, evidence and submissions.
5. The parties *List of Agreed Issues* raised some 9 questions for the Court's determination.
6. The *Agreed Issues* were casually drafted (the dispute was approached as one of variation of contract while according to the Court it rotates on whether there was breach of contract).
7. In the view of the Court, only 3 broad Issues arise, and these are
 - (i) Whether the Claimant was an employee of the Respondent
 - (ii) Whether the Respondent was in breach of contract and
 - (iii) Appropriate remedies/orders.

Whether Claimant was an employee of the Respondent

8. Although denying that the Claimant was its employee, there are more than enough records to show there was an employment relationship.
9. These include a letter of appointment dated 3 March 2011, contract dated 4 May 2011, letters informing Claimant of adjustment of salaries and a letter accepting Claimant's resignation.
10. The Claimant was definitely an employee of the Respondent.

Breach of contract

Salary for May 2014

11. Under the Employment Act, 2007, an employee is entitled as of right to earned/accrued salary.
12. The Claimant gave notice of resignation and offered to pay the equivalent of 1 month salary in lieu of notice. The Respondent accepted the notice and the Claimant's last date of work was 5 May 2014.

13. The Respondent admitted that the Claimant was entitled to Kshs 26,078/- being salary up to effective date of separation and nothing turns o this head of claim.

14. The Court will allow the head of claim on the basis of the admission and the law.

Leave

15. Annual Leave is at a minimum a statutory right, and a contract can only improve on the length and types of leave. The contract provided that the Claimant was entitled to 21 days annual leave.

16. The Claimant contended that by the time he resigned, he had 9.5 accrued leave days, which he computed as equivalent to Kshs 57,120/-.

17. The Respondent had however computed the Claimant as having 4.5 accrued leave days equivalent to Kshs 23,470/-.

18. In support of its contention, the Respondent produced the Claimant's leave schedule from January 2012.

19. According to the schedule, the Claimant took 20 leave days in 2012 and had a carry forward of 15.75 including from 2011.

20. In 2013, the Claimant took 15 leave days, leaving a balance of 21.75.

21. Because the Claimant left in May 2014, the Respondent computed the *pro rata* leave days for 2014 as 7 days.

22. The Claimant in this regard had about 28 accumulated leave days out of which he Claimant took 19 days leaving a balance of 9.5 days as of 30 April 2014.

23. Out of the 9.5 leave days, the Respondent purported to deduct 5.25 days allegedly because the Claimant was not entitled to leave during probationary period.

24. The Respondent however did not provide any justification why leave did not accrue during probation period.

25. In the view of the Court, and the Court so finds, leave starts to accrue from effective date of employment whether there is a probation period or not, and therefore the Claimant had 9.5 accrued leave days.

26. Commuted and using the daily rate of Kshs 5,215/70 as computed by the Respondent, the Claimant would be entitled to Kshs 49,549/15/-.

Fuel allowance

27. The contract provided for fuel allowance of between Kshs 25,000/- to Kshs 45,000/- per month depending on the region an employee was covering.

28. It is common that the Claimant was entitled to Kshs 25,000/- because he was based in Nairobi.

29. The Claimant's case was that from January to June 2013 he was not paid the full fuel allowance entitlement.

30. The contract was silent as to whether the fuel allowance was net of tax.

31. In light of the lack of clarity on the tax component, and in consideration that such an allowance was a facilitative benefit as well as being a fringe benefit for purposes of tax law, the Court can only reach a conclusion that it is the Kshs 25,000/- which was to be subjected to tax.

32. Any practice of the Respondent as far as top up was concerned would therefore be more of a gratuitous payment rather than a breach of contract.

Vehicle maintenance allowance

33. The contract provided for a monthly vehicle maintenance allowance of Kshs 20,000/-. This was also a facilitative as well as a fringe benefit.

34. The Respondent's Director however admitted in the witness statement that the Claimant was underpaid by Kshs 5,714/- per month for 32 months, and on the basis of the admission, the Court finds that the Claimant is owed Kshs 182,848/-.

Telephone allowance

35. Although the Claimant's contract provided for Kshs 5,000/- monthly telephone allowance, the evidence on record is that the Respondent paid the service provider directly for the actual usages up to June 2013.

36. From July 2013 to April 2014, the Claimant was paid the allowance through his pay slip (there was an increase of Kshs 1,000/- as from November 2013 to cater for a modem).

37. The allowance being facilitative and also subject to tax, the Court finds no breach of contract.

Overpayments

38. The Respondent overpaid the Claimant fuel and telephone allowances but it did not counterclaim the same, and the Court will leave it at that.

Conclusion and Orders

39. The Court finds and holds that save for the accrued leave, the Respondent correctly computed the Claimant's terminal dues.

40. The Court will find that the Respondent owes the Claimant and awards the Claimant

(a) Salary for May 2014 Kshs 26,078/33

(b) Accrued leave Kshs 49,549/15

(c) Vehicle maintenance Kshs 182,848/-

TOTAL Kshs 258,475/48

41. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 31st day of May 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Njiru instructed by Kimani & Muriithi Associates

For Respondent Ms. Githinji instructed by Kimanthi & Associates

Court Assistant Lindsey