



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1590 OF 2014

RAMADHAN LUVUSI HAMISI.....CLAIMANT

- VERSUS -

MOHAMMED ELTAFF.....1ST RESPONDENT

AL-MOMIN FOUNDATION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st May, 2019)

JUDGMENT

The claimant filed the statement of claim on 19.09.2014 through Kinyua Njagi & Company Advocates. The claimant claimed against the respondent for:

- a. One month in lieu of notice Kshs. 25, 000.00.
- b. 124 off duty days not taken for 31 months Kshs. 103, 329.00.
- c. 30 public holidays worked or not taken Kshs.25, 000.00.
- d. Underpayment of salary for 31 months at Kshs. 5, 000.00 per month.
- f. 15 days worked and not paid for may 2014 Kshs. 12, 500.00.
- f. Service pay for 2 years Kshs. 25, 000.00.
- g. Total Kshs. 345, 829.00.

The claimant prayed for judgment against the respondent for:

- a. Kshs345, 829.00.
- b. A declaration that the termination of employment by the respondent was unjust, unfair and unlawful.
- c. Cost of the suit.
- d. Interest on (a) and (c) above at court rates.
- e. Any other or further relief that the Honourable Court may deem fit to grant.

The respondents filed the statement of defence and counterclaim on 17.11.2014 through Tariq Khan & Associates Advocates. The respondent counterclaimed that upon termination on 15.05.2014 the claimant refused or neglected to vacate the housing accommodation provided by the respondent with a consequence that the respondent counterclaimed the resultant rent for May to November 2014 Kshs. 175, 000.00 at Kshs. 25, 000.00 per month; service charge May to November at Kshs. 2, 500.00 per month Kshs. 17, 500.00; electricity Kshs. 10,

000.00 and making a sum of Kshs. 202, 500.00. The respondent prayed for judgment against the claimant for:

- a. Kshs. 202, 500.00 as counterclaimed.
- b. Costs of the suit and the counterclaim.
- c. Interest on (a) and (b) above at Court rates.

There is no dispute that the 1st respondent in his capacity as the chairman of the 2nd respondent appointed the claimant as a caretaker and general worker effective October 2011. The claimant's duties entailed visiting the respondent's 8 centres spread across Kenya. The parties were in disagreement whether the claimant had been promoted as supervisor or overall administrator in charge of the respondent's 8 centres. The claimant's evidence was that the monthly salary agreed between the claimant and the 1st respondent was Kshs. 25, 000.00 while the 1st respondent's position was that it was Kshs. 20, 000.00. The claimant testified that he was actually paid Kshs. 20, 000.00 per month and the Court returns that in absence of a grievance in that regard prior to the termination, the agreed monthly salary was Kshs. 20, 000.00. The Court finds that the parties were in a contract of service. The claimant was inconsistent that he was promoted to supervisor and then again to administrator. That contradictory evidence cannot be trusted. The Court finds that the claimant was employed as a caretaker and general worker at Kshs. 20, 000.00 per month with duties undertaken at all the respondent's centres.

The Court has considered the pleadings, the evidence and the submissions on record. The Court makes findings on the matters in issue and dispute as follows:

1. The claimant did not establish the basis of the alleged underpayment. The Court has found that he was paid the Kshs. 20, 000.00 as was agreed. The prayer on underpayment will fail.
2. For the period 01.10.2011 to June 2013 the claimant's NSSF deductions and remittance was not done. He is awarded **Kshs. 20, 000.00** at half month salary for the 2 years served without NSSF contributions being made and as reasonable service pay or gratuity under section 35 of the Employment Act, 2007.
3. The claimant testified that he worked on 30 public holidays but he was not paid. His monthly salary was **Kshs. 20, 000.00** per month and he is awarded accordingly.
4. The claimant worked for 15 days in May 2014 but he was not paid and he is awarded **Kshs. 10, 000.00** accordingly.
5. The respondent terminated the claimant's employment by the letter dated 15.05.2014. The letter did not state the reason for termination and did not give a notice or pay in lieu of notice. The Court returns that the termination was unfair for want of a fair reason as per section 43 of the Act and for want of due process of a notice under section 35 or 41 of the Act as may have been appropriate. The claimant is awarded **Kshs. 20, 000.00** in lieu of the termination notice. While making that finding the Court returns that if indeed the claimant refused to go to Kisumu Centre as assigned or engaged in misconduct as was alleged, then the proper procedure was to invoke section 41 of the Act on notice and hearing but which was never done.
6. The claimant testified that he was housed by the respondent and upon termination he was required to vacate immediately. In the circumstances he obtained a temporary court order to remain in the house and once the order was vacated, he immediately vacated the house. Further the claimant testified that he was not responsible for accounting duties and as a caretaker and general worker, the Court returns that the respondent failed to show the claimant's role and liability in the failure to remit NSSF and NHIF on time leading to a penalty of Kshs. 39, 600.00 as the counterclaim in that regard will fail. The Court has considered the evidence and further that there was no tenancy agreement between the parties and the counterclaim will therefore collapse as unjustified.

In conclusion judgment is hereby entered for the claimant against the respondents for:

- a. The 2nd respondent to pay the claimant a sum of **Kshs.70, 000.00** by 01.07. 2019 failing interest at court rates be payable thereon from the date of filing the suit till full payment.
- b. The declaration that the termination of the claimant's employment by the 2nd respondent was unfair.
- c. The counterclaim is dismissed.
- d. The 2nd respondent to pay the claimant's costs of the suit and counterclaim.

Signed, dated and delivered in court at **Nairobi** this **Friday 31st May, 2019.**

BYRAM ONGAYA

JUDGE