



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 17 OF 2017

IRUNGU GITHAE.....CLAIMANT

VERSUS

MUTHEKA FARMERS CO-OPERATIVE

SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent for a debt of Kshs. 89,749/-. The Claimant avers that he was employed by the Respondent 20th July 2015 as a night watchman on a monthly salary of Kshs. 4,827/-. He averred that he worked for the Respondent until 18th July 2016 when he resigned. The Claimant avers that at the time of his resignation, the Respondent was and still is indebted to him in the sum of Kshs. 89,748/- being underpayment for 12 months amounting to Kshs. 78,036/-, house allowance underpayment for 12 months Kshs. 11,712/-. He sought a certificate of service as well as costs in addition to the sum of Kshs. 89,748/-. The Respondent filed a response and denied having underpaid the Claimant and puts him to strict proof thereof.

2. At the hearing, only the Claimant testified as the Respondent did not call any witness. The Claimant testified that he resigned from the Respondent after getting employment somewhere else. He stated that the Respondent never used to pay him in accordance with the law and that as a consequence there were unpaid dues. He testified that he was seeking for the correct dues from the Respondent. On cross-examination he confirmed that his contract was for a term of 3 years and that he sought for wage increase verbally from the manager of the factory. He confirmed that he did not request for house allowance in writing. He stated that he issued notice to the Respondent but agreed that he never produced the notice in court. He stated that he is the one who gave the letter that he used to resign.

3. The Claimant submitted that the minimum wage in Nyeri as at 1st May 2015 was Kshs. 11,330.10 and he thus contended that he was underpaid by Kshs. 6,503.10 and therefore seeks Kshs. 78,037.20 being underpayment for the 12 months that he worked with the Respondent. He also submitted that the Respondent did not pay him house allowance pegged at 15% of his basic salary.

4. The Respondent submitted that the Claimant signed the letter of employment voluntarily and he never raised any issue before signing the contract. It submitted that the Claimant had all the time to reject the offer in the event he felt that the terms and conditions did not match his intention and or aspirations, however he did not, he went ahead to attest to the offer thus sealing the contract. The Respondent further asserted that the Claimant affirmed that he neither gave any notice to his employer upon resignation nor did he give any notice in writing notifying the Respondent of his low wage. On the issue of certificate of service, the Respondent indicated that it could only issue a certificate if it is the one which terminated the employment. It referred to Section 51(1) of the Employment Act. The Respondent submitted that it is the only party that has a ground for a remedy as the Claimant was in breach of the same agreement that he is seeking to benefit from. The Respondent contended that it had contracted the Claimant for a period of 3 years and that he had only worked for one year and he voluntarily left his employment and thus was not entitled to any benefits for the alleged breach of contract. The Respondent submitted that the Claimant attested to a valid contract of employment well aware of the contents of offer and the consideration. The Respondent relied on the case of **Moses Kimanzi Katii v H. Young (E.A) Limited [2018] eKLR** and **Antony Ndung'u Gakuo v Hughes Eho (Kenya Branch) [2018] eKLR**.

5. The dispute relates to an issue of underpayment of wages. From the pleadings and evidence led, the rates paid to the Claimant were below the minimum wage for a night watchman in Nyeri. The rate contained in the Wages Order is not disputed. The Respondent's defence was that the Claimant acceded to the payment and that he signed a contract and accepted the inferior pay. It relied on the cases of **Moses Kimanzi Katii v H. Young (E.A) Limited (supra)** and **Antony Ndung'u Gakuo v**

Hughes Eho (Kenya Branch) (*supra*) and argued that the claim for unpaid dues does not hold any water. It is argued that the Claimant should have raised the issue during the six month's probation period or when the offer of appointment was made. Section 48 of the Labour Institutions Act 2007 provides that the minimum rates of remuneration established in a Wages Order constitute a term of employment of any employee to whom the Wages Order applies. If the contract of employment provides for payments lower than the minimum rates as in this case, the minimum rates under the Wages Order substitute the inferior terms. Under the law, any employer paying below the minimum wage commits an offence. The Claimant proved that the Respondent owes a sum of Kshs. 6,503.10 per month exclusive of house allowance. It did not matter that he resigned from employment as relief or remedies in this court are not only where there is dismissal. Regarding the claim for house allowance, Section 31(1) of the Employment Act makes provision on the payment of house allowance where the employer does not provide reasonable accommodation. The sum is 15% of basic pay as per Section 31 of the Employment Act and the Claimant is entitled to it. The Respondent's argument that it could only issue a certificate if it is the one which terminated the employment of the employee is incorrect. Section 51 in the material part provides:-

51. (1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

.....

(4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

6. From the plain reading of Section 51(1) and (4) of the Employment Act, it is clear that the section does not specifically state the party who is supposed to terminate employment for the issuance of the certificate to be effected. Upon either party terminating the contract, the same is due. The Claimant herein is therefore entitled to the certificate of service as prayed. In fact, the Respondent is committing an offence for which they are liable to a fine of one hundred thousand shillings or imprisonment for a term not exceeding six months or to both such fine and imprisonment. In the case of **Moses Kimanzi Katii v H. Young (E.A) Limited** (*supra*), the claim was for relief for unlawful dismissal and the claimant in that case failed as he had resigned and therefore was not dismissed. In this case the claim is for underpayment of wages and non-payment of house allowance. These claims remained live and were not extinguished on resignation.

7. In the final analysis I enter judgment for the Claimant against the Respondent for

- i. Kshs. 78,036/- being underpayment of wages;
- ii. Kshs. 11,712/- being unpaid house allowance;
- iii. A certificate of Service strictly in accordance with Section 51;
- iv. Costs of the suit
- v. Interest at court rates on i) and ii) above from date of filing suit till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar