



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

CAUSE NO. 854 OF 2016

ANTHONY MURIITHI NJERU

CLAIMANT

V

NW REALITE LIMITED

RESPONDENT

JUDGMENT

1. Anthony Muriithi Njeru (Claimant) sued N.W. Realite Ltd (Respondent) on 13 May 2016 and he stated the Issues in Dispute as

- i. Underpayment of salary
- ii. Refusal to pay terminal dues
- iii. Refusal to pay accrued salary and leave.

2. The Respondent filed a *Response to Claim* on 17 June 2016, denying the averments by the Claimant.

3. The Claimant joined issue with the Response by filing a *Reply to Statement of Response* on 2 August 2016 and the Cause was heard on 22 January 2019 and 13 March 2019.

4. The Claimant and the Respondent's Human Resources Manager testified (witness statements were adopted as part of evidence).

5. The Claimant filed his submissions on 25 April 2019 while the Respondent had filed its submissions earlier on 23 April 2019.

6. The Court has considered the pleadings, evidence and submissions.

Underpayments

7. The Claimant was employed as an Accountant on 1 September 2010 and served in the same position until he resigned on 15 May 2013.

8. Although asserting that he was a Senior Accountant, the Claimant did not present any record or document varying his designation or promoting him to the said position.

9. The remuneration of accountants is not one of those subject to the Labour Institutions Act and the *Regulation of Wages Orders* made thereunder, and therefore remuneration below the prescribed/gazetted rates does not arise.

10. If the Claimant was paid below the contractually agreed rates, he did not prove the same.

House allowance

11. In the submissions, the Claimant urged that the salary he was earning did not include house allowance.

12. The job appointment contract issued to the Claimant provided for gross salary per month.

13. Gross income has been defined in Black's Law Dictionary as *total income from all sources before deduction*.

14. In the view of the Court, and without any other evidential foundation the Claimant was earning a consolidated salary and he was aware of the same, and therefore underpayments is more of an afterthought, otherwise it would have been raised during the tenure of the employment contract.

May 2013 salary

15. The Claimant sought Kshs 60,000/- being salary up to 31 May 2013. His testimony that he was not paid the salary was not interrogated or rebutted by production of pay records.

16. The Respondent contended that it offset the salary because of the Claimant's failure to give a 2 month notice of termination of employment.

17. Although the Respondent did not formally counterclaim for breach of contract, it is the view of the Court that it would be unconscionable for the Claimant to benefit from his own breach of contract (failing to give requisite notice).

18. The Court will find that the Claimant was entitled to the May 2013 salary but decline to award the same.

Gratuity

19. On account of gratuity, the Claimant sought Kshs 60,000/-.

20. Gratuity is either anchored in contract or the law.

21. The Claimant's contract did not provide for gratuity. If the Respondent's *Employee Handbook and Operations Manual* provided for gratuity, they were not filed or produced in Court.

22. If the head of claim for gratuity was anchored on a written law, the same was not disclosed in Court.

23. If the Respondent had a practice/custom of paying gratuity, the practice was not established. This head of claim was not proved.

Mileage allowance

24. On account of mileage allowance, the Claimant pleaded Kshs 25,000/-.

25. Although not provided for in the contract, the Claimant's testimony that he was entitled to monthly fuel allowance of Kshs 20,000/- was not challenged, and the Court will allow the same for the month of May 2013.

Airtime

26. The Claimant also testified without the testimony being rebutted that he was entitled to monthly airtime allowance of Kshs 5,000/- and that he was not paid for May 2013.

27. The Court will allow the head of claim.

Leave

28. The Claimant testified that he did not go on leave for 2 years, and in respect thereof sought Kshs 108,500/-.

29. The Respondent produced the Claimant's leave records, and the records show that as of 10 March 2013 the Claimant had taken 9 leave days.

30. Since the Claimant left in the course of the year (May 2013), he would have been entitled to *pro rata* leave for the 5 months computed in terms of the formula set out in section 28(1)(b) of the Employment Act, 2007, equivalent to 8.75 days.

31. The Court finds that the Claimant had utilised all the *pro-rated* leave entitlement days by date of separation.

Certificate of Service

32. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

33. The Court finds and holds that the only entitlements due to the Claimant, and which he is awarded are

- (a) Mileage allowance Kshs 20,000/-

(b) Airtime Kshs 5,000/-

TOTAL **Kshs 25,000/-**

34. Certificate to service to be issued within 15 days.

35. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 14th day of June 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Njiru instructed by Mumia & Njiru Advocates

For Respondent Mr. Kigen instructed by Kamotho, Maiyo & Mbatia Advocates

Court Assistant Lindsey