



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

CAUSE NUMBER 836 OF 2017

BETWEEN

JOSEPH MUTUA MTINDACLAIMANT

VERSUS

NINE ONE ONE KENYA LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odindiko & Company Advocates for the Claimant

No appearance for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 2nd November 2017. He avers he was employed by the Respondent as a Security Supervisor, in the year 2003. He worked until the year 2017, when the Respondent, without notice and justifiable cause, terminated Claimant’s contract. His last salary was Kshs. 15,000. He prays the Court to find termination unfair and unlawful, and grant him the following orders:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. Annual leave of 12 years at Kshs. 145,385.
- c. Service pay over the same period at Kshs. 103,860.
- d. Gratuity at 18 days salary for every year of service at Kshs. 124,632.
- e. Equivalent of 12 months’ salary in compensation for unfair termination at Kshs. 180,000.

Total...Kshs. 568,877

- f. Costs.
- g. Interest.
- h. Any other suitable relief.

2. There is an Affidavit of Service sworn by an authorized Court-Process Server, indicating the Respondent was served with the Notice Summons and Statement of Claim. The Respondent did not enter Appearance and file Statement of Response. The Claim was set down for formal proof. The Claimant gave evidence on 18th February 2019.

3. The Claimant, in his oral evidence, adopted his Witness Statement filed on 2nd August 2017 and Documents which include among others, Letter of Appointment, Certificate of Service and N.S.S.F Provisional Member Statement of Account.

4. He told the Court he was initially employed at Mombasa. He was transferred to Nairobi in 2015 as a Supervisor. He was further transferred to Kajiado days after the transfer to Nairobi. After 6 months in Kajiado, he was instructed to return to Nairobi. He was not paid transfer allowance to enable him move from Kajiado. He sought for assistance from Human Resource Manager to no avail. He was unable to continue serving.

5. In his Submissions the Claimant clarifies that his Claim is on constructive dismissal. He relies on the **Kenya Court of Appeal decision, NAI Civil Appeal No. 20 of 2012, Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga** in arguing that he was constructively dismissed by the Respondent, through abrupt, persistent and unaided transfers.

6. On annual leave, the Claimant argues that no records have been availed by the Respondent, to discount his prayer. Citing **E&LRC decisions Bukachi v Ready Consultancy 2012 [e-KLR]** and **Francis Maina Kamau v Lee Construction [2014] e-KLR**, the Claimant submits that unless the Employer produces annual leave records contradicting the Employees, the Court should endorse the position held by the Employee.

7. On service pay, the Claimant submits that the Respondent has not produced evidence showing that the Claimant was subscribed to the N.S.S.F. He merits service pay.

8. He deserves notice pay under Section 36 of the Employment Act 2007. He similarly submits that he is entitled to compensation for unfair termination.

The Court Finds:

9. The Claimant was employed by the Respondent in the year 2013, as a Security Guard. He later became a Controller and Guard Supervisor. He left employment after being transferred from Mombasa, to Nairobi, Kajiado, then Nairobi, without facilitation. He asked for financial assistance from Human Resource Manager on the last transfer. It was not forthcoming, and the Claimant left employment in 2015.

10. The Court agrees with him, that he was constructively dismissed. The Respondent made it impossible for the Claimant to continue working. Believing the Respondent to be no longer interested in observing the fundamental terms and conditions of service, the Claimant left. The decision of the Court of Appeal cited by the Claimant in his Submissions, applies to his situation on all fours.

11. In the absence of evidence from the Respondent, the Court is satisfied that termination was unfair. The Claimant is granted **notice pay at Kshs. 15,000 and compensation for unfair termination equivalent of 12 months' salary at Kshs. 180,000.**

12. The same applies for annual leave pay. The Claimant has supported his prayer with decisions made by the E&LRC on the item. There is no annual leave record supplied to the Court by the Respondent, to contradict the prayer. Oral evidence given by the Claimant is uncontested. The prayer is well-founded on fact, case law as well as statute. **He is allowed Kshs. 145,385 as annual leave pay in arrears.**

13. He prays for service pay as well as gratuity. He was subscribed to the N.S.S.F as shown in his own documents, specifically the N.S.S.F Provisional Member Statement of Account. Although he has not expressly submitted on Regulation of Wages [Protective Services] Order 1998, his prayer for gratuity is merited under clause 17 of this Order. After 5 years of service, an Employee is entitled to 18 days' salary for every complete year of service. This provision is separate from the service pay regime under Section 35 of the Employment Act. The Wage Order does not make the Employee ineligible for gratuity, on the basis of subscription to the N.S.S.F or other Social Security Plans. Whereas the Claimant is disentitled to service pay by virtue of his subscription to the N.S.S.F, the Court is satisfied that he merits gratuity under Regulation of Wages [Protective Services] Order. **He is granted the prayer for gratuity at Kshs. 124,632.**

14. **Costs to the Claimant.**

15. **Interest allowed at 14% per annum from the date of Judgment until payment is made in full.**

IN SUM, IT IS ORDERED: -

a. It is declared that the Claimant was constructively dismissed.

b. The Respondent shall pay to the Claimant notice at Kshs. 15,000; equivalent of 12 months' salary at Kshs. 180,000; annual leave at Kshs 145,385; and gratuity at Kshs. 124,632 – total Kshs. 465,017.

c. Costs to the Claimant.

d. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 14th day of June 2019.

James Rika

Judge