



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.264 OF 2015

JAMES MACHARIA WAIRIMU.....CLAIMANT

VERSUS

CATHOLIC DIOCESE OF NAKURU.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in August, 2005 as a conductor and Grounds man and issued with letter dated 1st March, 2013. The claimant was earning Ksh.150.00 per day when he commenced employment and which was increased to ksh.200.00 per day when he was confirmed in May, 2008.

At the time employment terminated on 31st December, 2013 the claimant was earning Ksh.5, 000.00 per month together with Ksh.900.00 house allowance.

The claim is that there was underpayment. Work hours were 5am to 7.30pm without compensation for the overtime work. There were no off days, annual leave or a payment in lieu thereof.

The claim is also that employment was terminated without notice or hearing contrary to the law and due process. A Certificate of Service was issued dated 17th February, 2014.

The claimant reported a dispute with the labour officer where the respondent paid ksh.20, 000.00 without a breakdown or explanation.

The claimant is seeking the following dues;

- a. Notice pay Ksh.32,000.00;
- b. Underpayments from September, 2005 to 31st December, 2013 Kshs. 164,423.00;
- c. Overtime pay ksh.596,746.00;
- d. Off days Ksh.67,975.00;
- e. Public holidays ksh.73,258.00;
- f. Leave for 6 years and 4 months ksh.44,820.00;
- f. Gratuity for 8 years ksh.41,511.00;
- h. Compensation.

The claimant testified that in August, 2005 he was employed by the respondent as a Conductor to pick students and then do gardening and then drop them home in the evening using the school bus. His day would start at 5am until 7pm. He was paid ksh.150.00 per day which increased to ksh.200.00 from April, 2008. This increased to Ksh.5, 000.00 per month.

The claimant also testified that he was sent on compulsory leave and then made to hand over his duties in December, 2013. On 2nd January,

2014 he was issued with a contract renewal but did not accept it. For the duration of employment he only took annual leave twice. He was not paid for the other years. During public holidays he would be at work for 3 hours.

The claimant also testified that the letter of apology filed by the respondent was only issued to him after taking compulsory leave. He did not sign it and he had no case of misconduct. gratuity is payable to him as the respondent did not pay NSSF dues.

The claimant also testified that he was employed in the year 2005 without any written terms. He was then issued with letter of appointment. Such related to being a conductor. By letter dated 25th September, 2013 he was sent on compulsory leave. It followed a quarrel he had with Fr Mbogo and was sent to the Human Resource Manager where a disagreement arose.

The claimant also testified that he had a 3 years contract with the respondent ending 31st December, 2013. He did not know he had to apply for a renewal. On 2nd January, 2014 he got letter that his contract would not be renewed and was required to handover for his terminal dues to be paid.

He reported a dispute to the labour officer and the respondent paid him ksh.23, 686.00 which was not in full settlement of his owing dues.

Defence

In response, the defence is that in May, 2008 the claimant was employed by the respondent and issued with contract of employment as a grounds man/conductor. His wages were increased over time with work hours defined from 8am to 5pm. The claimant took his annual leave and was not required to work during off days or public holidays.

The claimant was notified that his contract was coming to an end and should prepare a handover for the payment of his final dues. such dues have since been paid in full.

The claimant was sent on compulsory leave for 30 days from 1st to 31st October, 2013 following allegations of negligence.

Upon the end of contract the claimant made a report to the labour officer and both parties attended conciliation and he was paid Ksh.23,686.00 in settlement and a certificate of service was issued to him.

The claims made for underpayments, overtime, leave and untaken off days are time barred. The claim should be dismissed.

In evidence, Jimnah Kimani Mwangi the human resource manager testified that the claimant was a grounds man/Conductor with the respondent from May, 2008 and had defined work hours and never worked during public holidays. He took his annual leave and his last contract was for 3 years ending 31st December, 2013. He was notified of the end of the contract and final dues paid.

Following allegations of negligence, the claimant as net on compulsory leave for 30 days starting 1st October, 2013.

At the close of the hearing, both parties filed written submissions.

The issues which emerge for determination;

Whether there is a case of unfair termination of employment.

Whether the claimant was underpaid;

Whether the claimant has been paid his full terminal dues;

Whether the remedies sought are justified.

The Certificate of Service issued to the claimant by the respondent and dated 17th February, 2014 following a report to the Labour officer is not in dispute. Such Certificate is a requirement under the provisions of section 51 of the Employment Act, 2007 to confirm the duration and period of employment.

The claimant was employed by the respondent from May, 2008 to 31st December, 2013 as a *Grounds man*. Mr Mwangi the human resource manager qualified the position held as that of *Grounds man/Conductor*.

For the duration of employment, the claimant was under a fixed term contract ending 31st December, 2013. Such fixed term contract carry with it rights. With the end of employment, the claim was filed on 18th September, 2015.

The legal rights under the fixed term contract ended all other legal obligations between the parties and which were not addressed within the provisions of section 90 of the Employment Act.

The claims not lodged with the court up and going back to the 18th September, 2012 are time barred. See **Attorney General & another versus Andrew Maina Githinji & another, Nyeri Civil Appeal No.21 of 2015**. Time computation under the provisions of section 90 of the

Employment Act, 2007 starts running from the date employment terminated. In this case the operational date is 31st December, 2013 when the contract ended by efflux ion of time and was not renewed. Any claims due should have been filed within 3 years.

The above put into account, the claims within time relates to the last contract of employment for 3 years and ending 31st December, 2013. The claims outside this contract and before 1st January, 2012 are time barred.

On this basis, the contract of employment having ended on its term, such is legitimate and lawful under the provisions of section 10(3) of the Employment Act, 2007. The claimant was notified that his contract would not be renewed. He had not applied for its renewal in the first instance. The claim for unfair termination of employment is not justified.

The Certificate of Service confirms the claimant was employed as a grounds man cum Conductor. The Regulation of Wages (General) (Amendment) Order, 2013 did not regulate the position(s) held by the claimant save that under the Regulations a general worker such as the claimant was and without any skill made provision for a general wage of Kshs.9,024.15 per month.

The respondent has not attached any work records with regard to the claimant as to how much he earned per month. The claimant testified that he earned Ksh.5, 000.00 per month at the time his employment terminated. The contract applicable to the claimant and ending 31st December, 2013 which may have outlined his wage and benefits is not attached.

The court must believe the claimant that he earned ksh.5, 000.00 as his wage and Ksh.900.00 in house allowance. There was therefore an underpayment of Ksh.3, 124.15 per month for the duration of the contract of 3 years and is owed ksh.112, 469.40 in underpayments. For the duration subject to contract period, the claimant has claimed for underpayment due as follows;

1st May, 2010 to 30th April, 2011 for 12 months at ksh.25, 786.20;

1st May, 2012 to 30th April, 2013 being 12 months at ksh.38, 439.60; and

1st may, 2013 to 31st December, 2013 being 8 months all at ksh.35, 822.00

Total due being ksh.100, 047.60.

For the reasons above, underpayments awarded at ksh.112, 469.40.

The claimant under paragraph 9 of the Memorandum of Claim asserts that he took annual leave twice for the years 2012. Annexure 4 to the Claim is approval for leave for the year 2011 and annexure 5 is annual leave approval for the year 2012.

In defence the respondent has attached approval for leave in October, 2013 and though stated to be compulsory leave, such leave was taken for 30 days. The claimant confirmed taking such leave in his evidence.

The evidence by the defence that the work hours were 8am to 5pm is not challenged in any material way. The outlined overtime work hours claimed are without justification.

Similarly, the claimant being a conductor cum grounds man to claim not taking off days and working over public holidays is without justification. Such claims

The claimant shall be issued with an appropriate Certificate of Service covering the period of his last contract with the respondent and issued in accordance with section 51 of the Employment Act, 2007.

The claim for gratuity for 8 years is on the grounds that the claimant's NSSF dues were not paid by the respondent.

The respondent has not attached any payment statement outlining the wages paid to the claimant. There is no evidence of statutory dues paid for him by the employer. For the period of this contract to 3 years the claimant is entitled to service pay under the provisions of section 35(5) of the Employment Act, 2007 and on the due wage of ksh.9,024.15 such is assessed at ksh.13,536.00.

The claimant has since received a payment of ksh.23, 686.00 in terminal dues.

Accordingly, judgement is hereby entered for the claimant against the respondent for underpayments assessed at ksh.112, 469.40; service pay ksh.13, 536.00; these dues shall be paid less ksh.23, 686.00 received by the claimant. Each party shall pay own costs.

Delivered in open court at Nakuru this 11th July, 2019.

M. MBARU

JUDGE

In the presence of:

Court Assistants: &

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