

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 181 OF 2018

KENNETH OTIENO ONYANGO.....CLAIMANT

VERSUS

MANA SUPPLIERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and averred in his statement of claim that he was retained as a Sprays Operator by the Respondent on contractual basis between 23rd October 2017 and 23rd January 2018 and the contract was renewed for a further term of 3 months running from 24th January 2018 up to 24th April 2018. The Claimant averred that on 9th April 2018 he reported to work as usual and was verbally terminated and no reasons given to him. He averred that the manner in which the Respondent terminated his contract of employment was unprocedural, unlawful and contrary to Section 45 of the Employment Act. The Claimant averred that he was grossly underpaid from the time of his employment until his termination, not paid for overtime worked and further that the Respondent failed to remit the NSSF and NHIF dues deducted from the Claimant. He sought compensation for unlawful termination for 12 months – Kshs. 163,596/-, underpayment for 6 months – Kshs. 32,262/-, house allowance – Kshs. 12,269.70, NHIF not remitted at 200x4 – Kshs. 800/-, NSSF for March – Kshs. 527/-, unpaid leave – Kshs. 2,306.50, payment in lieu of notice – Kshs. 13,633/- and costs of the suit. In support of his claim the Claimant attached 2 piece rate contracts duly executed for the 3 month contract period. The contract provided for consolidated wages among other contractual terms such as overtime rate and provision of medical services. He also attached the printout of his NSSF provisional member statement of account as well as his NHIF individual statement. He attached the Taifa Sacco Society Limited statements for October 2018 to April 2018 showing payment of wages every fortnight. He attached the demand letter and the certificate of posting.

2. The Respondent in its defence averred that the Claimant was employed as a piece rate worker on a contract valid for 3 months from 23rd October 2018 to 23rd January 2018 which was renewed for another 3 months from 24th January 2018 to 24th April 2018 and paid a consolidated wage on casual rate of Kshs. 313.75 per day. The Respondent averred that the Claimant was temporally stopped from duty on 8th April 2018 due to reduction of labour upon which the Claimant was to be recalled back and the issue was explained to the Claimant personally by the manager. The Respondent averred that when it tried recalling the Claimant he was untraceable neither did he visit the Respondent or telephoned the officer despite several messages sent to him to see the manager. The Respondent averred that the NHIF and NSSF contributions for the Claimant were remitted up to the month of March 2018. The Respondent averred that the Claimant was not targeted nor forced out of employment at all. The Respondent averred that the Claimant was not entitled to 12 months compensation as he was employed for 3 months. The Respondent averred the Claimant was not entitled to payment of one month's salary in lieu of notice as he failed, refused and/or neglected to report back to the Respondent. The Respondent averred that the Claimant was paid all the dues he was entitled to and the Respondent thus sought the dismissal of the claim with costs. The Respondent attached a copy of the last piece rate contract between the Respondent and the Claimant dated 24th January 2018, an email on leave of absence dated 8th May 2018 indicating the Claimant had been notified to leave and return upon being called as the spray work had reduced, a schedule of NSSF payments and NHIF statement showing payment of dues for the relevant months. The Respondent attached a leave application form duly approved showing the Claimant took 9 days leave in February 2018.

3. The parties opted to have the matter determined in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016 on the basis of the pleadings and documents filed. The parties were therefore to file final submissions and this was done. The Claimant submitted that he worked diligently for the Respondent until he was verbally terminated on 9th April 2018 and no reasons given. He contended that the termination of his employment was contrary to Section 45 of the Employment Act. He submitted that despite the Respondent asserting that it sought to recall him back to work no evidence to back the allegation was filed. In light of the foregoing, the Claimant submitted that the issues for determination were whether the Claimant was unprocedurally and unfairly terminated, and whether the Claimant is entitled to the reliefs sought. He submitted that the Respondent was not forthright with the court as the termination was verbal 15 days prior to the end of the contract. The Claimant averred that if indeed it was true there was a reduction in the work the Respondent ought to have waited for the 15 days to end the contract. The Claimant submitted that the termination was contrary to Article 41(1) and (2) of the Constitution as well as Section 45 and 46 of the Employment Act. He relied on the case of **Wilson Alivisa Mulwanda & 3 Others v Ellams Products Limited [2015] eKLR** and the case of **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR**. He submitted that having proved the termination was unlawful the Respondent was liable to compensate him and relying on the case of **Wilson Alivisa Mulwanda (supra)** he submitted that he was entitled to 12 months compensation. He submitted that he was grossly underpaid and denied a sum of Kshs. 5,377/- every month. He submitted that he was denied house allowance which he was entitled to at the rate of 15% as required under Section 31(1) and (2) of the Employment Act. The Claimant submitted that the employer is under an obligation to remit contributions deducted from the employee to the National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF). The Claimant submitted that despite deductions made the Respondent never remitted the dues. He submitted that he worked continuously and was not granted leave days or paid in monetary form. He finally submitted that he was not given a notice or paid in lieu thereof. He thus sought the sums claimed in his memorandum of claim.

4. The Respondent submitted that the Claimant was engaged on piece rate contract and paid wages every fortnight. The Respondent submitted that there was evidence the Claimant was paid his consolidated wages on casual rate of 313.75 per day in terms of the contract.

The Respondent submitted that the statutory deductions in respect to the Claimant were made as per the statements annexed. The Respondent submitted that the Claimant's services were not terminated as alleged and that the Claimant was temporarily stopped and was to be recalled and it was the Respondent's position that the manager tried recalling the Claimant on behalf of the Respondent but the Claimant has never been traced and neither did he visit the Respondent's premises or telephoned the manager despite several messages sent to him to see the manager. The Respondent submitted that the Claimant was given leave in terms of his contract of employment as exhibited in the evidence filed. The Respondent submitted that the Claimant was not entitled to the payment of one month's salary in lieu of notice, overtime or house allowance as his salary was consolidated and the overtime claim unsupported. The Respondent submitted that if there was a finding on notice it would only be for 2 weeks as per the contract. The Respondent submitted that the Claimant is not entitled to compensation as sought.

5. The Claimant was terminated orally on 9th April 2018 a period of 2 weeks prior to the end of his contract. This was not seriously controverted by the Respondent as no evidence was adduced that the Claimant was notified in writing of the reduction in labour or that he would be recalled in future. Despite the Respondent's manager asserting that she tried notifying the Claimant to return or the allegations made that there were several messages sent to him, no iota of the evidence to back this up was availed. It would have been prudent to attach any communication prior to termination instead of the email that was sent in July 2018 long after the suit had been filed and which was suspicious in content and timing. Granted that the Claimant had a contract for 3 months and the Respondent failed to give any notice prior to termination the Claimant would be entitled to payment of one month's notice. The contract did not provide the rate payable per day but having regard to the Regulation of Wages (Order) 2017 applicable for Mweiga, Nyeri County, the sum that was to be paid to a general worker was Kshs. 349.50. It seems he was underpaid by a fraction of Kshs. 35.75 per day. The Claimant failed to prove the statutory deductions were not made. His own NSSF statement shows the dues remitted reflected in his account and the Respondent attached a statement from NHIF proving the payments were dutifully made and reflected on his account. The claims on the statutory dues just like the one for leave and overtime were unfounded and entirely without any merit. In the final analysis the Claimant is entitled to the following remedies:-

- i. One month's salary in lieu of notice – Kshs. 10,485/-
- ii. 3 month's salary as compensation – Kshs. 31,455/-
- iii. Underpayments Kshs. 6,435/-
- iv. Costs of the suit.
- v. Interest at court rates on the sums in i), ii), iii) above from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 26th day of November 2019

Nzioki wa Makau

JUDGE