



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE. NO. 2282 OF 2014**

**DANIEL KIMAKETI NDIWA.....CLAIMANT**

**-VERSUS-**

**DEVKI STEEL MILLS.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent from June 2002 and worked until 6.6.2014 when he resigned from employment. Thereafter he brought this suit claiming terminal benefits totalling to Kshs.449,530.56 made up of overtime, service pay and accrued leave.

2. The respondent admitted that the claimant was her employee and their relationship was governed by the Collective Bargaining Agreement (CBA) between her and Kenya Engineering Workers Union. She averred that the claimant resigned from the employment by a letter served on 6.5.2014 and all his dues were computed and paid to him. She further averred that the claimant acknowledged payment of the said dues and executed a discharge agreement declaring that he had further claim against her. She therefore prayed for the suit to be dismissed with costs.

**Evidence**

3. The claimant testified as Cw1. He stated that he joined the respondent in June 2002 as a casual employee and was later appointed on permanent basis earning Kshs.13,284 per month. He worked until 6.6.2014 when he resigned after serving a termination notice on 5.5.2014.

4. He however contended that after the resignation, he went for his dues from the personnel officer Mr. Stephen Mutuku who told him to wait for computation. He further contended that when the dues were computed, he refused the same because the computed sum of Kshs.280,000 was less than his expected dues under the CBA and the particulars were not indicated. Later he found Kshs.28,015 deposited in his bank account by the respondent but without particulars. He therefore prayed for judgement in terms of the reliefs sought in his claim.

5. In cross examination, he relied on the certificate of service to prove that he worked for the respondent from June 2002 to June 2014. He admitted that under the CBA, he was supposed to serve a termination notice of 3 months. He maintained that he was not shown how the Kshs.28,015 was computed.

6. The respondent called her HR Assistant as a witness and he testified as Rw1. He stated that the claimant was employed by the respondent as a Plant Crane Attendant by the letter dated 1.4.2008 and his engagement was governed by a CBA signed between his trade union and the respondent. He further stated that the claimant resigned from the employment in May 2014 and all his dues were computed and paid to him less statutory deductions, Sacco loan and salary advances by the respondent. He contended that the net sum after the said deductions was Kshs.28,015.

7. In cross examination, Rw1 admitted that the certificate of service produced by the claimant was issued by the respondent's personnel officer. He further admitted that the respondent started issuing payslips to workers in 2015. He further admitted that the claimant was working from 7 a.m. to 7 p.m but he was paid the normal rate for the first 8 hours and then overtime at the rate of 1 ½. He also admitted that the payroll he produced as an exhibit had no date, month and year nor did it indicate leave payments. He however contended that the claimant's terminal dues were computed as per appendix 6 to the defence including leave days, severance pay and salary for the days worked. He contended that these dues were eventually paid to the claimant.

**Analysis and determination**

8. After consideration of the pleadings, evidence, and the submissions presented by both parties, the main issue arising for determination is whether the claimant is entitled to the reliefs sought in his claim.

9. The claimant contended that after the resignation his dues were computed at Kshs.280,000 but he refused to sign the same because it was less than his entitlement under the CBA. Thereafter, only Kshs.28,015 was deposited to his account without any particulars. The respondent has however contended that the said Kshs.28,015 was less of the statutory deductions, Sacco Loan and salary advances. She further averred that the claimant acknowledged the said computation as full and final settlement and discharged her from any further claims.

10. The claimant denied the signature on the discharge agreement. The respondent never produced the original copy of the discharge agreement and she never put any effort to prove that indeed the claimant signed the said discharge agreement. I therefore find that the claimant never discharged the respondent from further claim vide the said photocopy of discharge agreement which is full of alternations made by hand. I will therefore proceed to consider the claim sought.

#### **Overtime**

11. The claimant prayed for 15 hours per month for 12 years. He produced copies of letters written by the respondent to the claimant's union admitting that the claimant was working 195 hours per month instead of 180 hours provided under clause 14 of the CBA. On that basis, I find that the claimant is entitled to the claim of 15 hours overtime per month translating to 2160 hours of overtime for the 12 years. The salary was Kshs.13,284 per month equalling to Kshs.510 per day and Kshs.63.90 per hours. **Hence Kshs.63.90 x 1 ½ x 2160 hours = Kshs.207,036.** However, I award the claimant Kshs.143,467.20 as prayed because parties are bound by their own pleadings.

#### **Service Pay**

12. The claimant prayed for service pay at the rate of 27 days pay per year for 12 years. No basis was shown for claiming 27 days pay per year. Rw1 stated that the dues paid to the claimant after resignation was less NSSF deductions. Rw1 also produced a payroll showing NSSF deductions of Kshs.200 from all employees. The claimant never denied that he was a member of NSSF. I therefore find that he is disqualified from claiming service pay under section 35(6) of the Employment Act.

#### **Leave allowance**

13. The claimant prayed for leave allowance for 12 years at the rate of 21 days per year. He however did not specifically plead the number of the leave days due. All what he pleaded was that there were outstanding leave days but he never specified. I therefore decline to grant the claim for leave allowance for lack of particulars and evidence. I further dismiss the claim for being vague because, although pleaded as leave allowance, by computing it based on 21 days per year gives it another meaning. In this courts view, leave allowance is different from annual leave under section 28 of the Employment Act and clause 8 of the CBA. A claim for leave allowance is therefore akin to leave travelling allowance under clause 9 of the CBA.

14. In conclusion I enter judgment for the claimant in the sum of Kshs.143,467.20 plus costs and interest at courts rates from the date of filing the suit. The decreed sum will however be subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi**

**this 15th day of November , 2019**

**ONESMUS N. MAKAU**

**JUDGE**