



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO 224 OF 2015

SAMUEL BUNDI MOKORA CLAIMANT

VERSUS

MUSA CHEBIRIGE T/A FARMERS INN CLUB RESPONDENT

JUDGEMENT

On 30th July, 2015 the claimant filed the Memorandum of Claim and amended the same on 21st August, 2015. The respondent entered appearance on 26th October, 2015 but there was no defence filed.

Pleadings closed herein and on 24th July, 2019 the court allocated a hearing date for 10th December, 2019. On the due date parties attended and hearing confirmed after the call over of all matters but at the hour the respondent remained absent until the conclusion of the hearing.

The claim was heard on his case in the absence of the respondent.

The claim is that in January, 2000 the claimant as employed by the respondent as a watchman [Security Guard] earning a gross wage of Ksh.1,200 per month and would be at work for 12 years and 10 months until October, 2013 when his employment was terminated. There were no reasons given, no hearing or payment of terminal dues and such resulted in unfair termination of employment.

The claim is for underpayment of wages for the years 2000, 2001, 2002, and 2003 at ksh.182, 906.40;

2004 to 2013 all total underpayment being ksh.725, 827.90;

Notice pay Ksh.10, 911.70;

Annual leave for 12 years and 7 months Ksh.113, 074.59;

Overtime pay

Pay of work during public holidays;

Gratuity pay; and

Compensation pay.

The claimant testified in support of his claims.

In the absence of the respondent and without filing any defence, the court shall assess the claims made on the merits and the applicable law.

The claimant has not clearly pleaded as to the circumstances leading to termination of employment save that there was no notice issued or payment in lieu of notice. The witness statement is left bare in this regard.

Despite there being no defence filed, section 47(5) of the Employment Act, 2007 requires the employer to set out the unfair circumstances of termination of employment for the employer to give a justification of the same. The threshold to be met by the employer and the claimant herein is lacking.

There are claims with regard to the non-payment of terminal dues.

On the claim for underpayments, the claimant has set out dues owing from the year 2000 to the year 2013. As at the year 2000 to the year 2007 the applicable law with regard to employment was the Employment Act Cap 226, now repealed. Effective 2nd June, 2008 the applicable law was the Employment Act, 2007 with transitional provisions with regard to conversion of employment terms and conditions where the employer had not issued a written contract of employment.

The payment of due wages is regulated in law. On the applicable wage Orders what is due in underpayments shall be assessed by the County Labour Officer, Nakuru for the duration of January, 2000 to October, 2013 for the court to adopt as appropriate. Context is the claimant was a security guard with the respondent on this basis.

Notice pay shall apply the last due wage under the applicable wage orders.

The overtime claim and public holidays pay is premised on general statement that the claimant worked 12 hours for 6 days each week and spanning 12 years and 10 months. The court takes it that the claimant enjoyed a rest day each week. Without setting out how the work hours and public holidays were spread to award under such general terms would be to visit injustice on the other party even where they were absent at the hearing.

Annual leave is claimed for 12 years and 7 months. Section 28 of the Employment Act, 2007 read with the Court of Appeal in **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR** and on the basis that a respondent should be protected against unreasonable delays in submitting claims. The Court relied on the case of **Gathoni vs. Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981** that;

The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.

That claims for overtime pay and that of annual leave accrued at the end of each month and year respectively. This thus set out the parameters of section 28 and the provisions of section 90 of the Act with regards to claims for a continuing injury especially where annual leave must be taken or secured within 18 months of accrual. So save for the leave dues for the last two (2) years of service, the others not covered as continuing injury abate. 42 days annual leave dues based on basic wage.

Gratuity pay not due where there is no written contract allocating such benefit. Gratuity and service pay is different as one is agreed between the parties whereas the other is due under the provisions of the law. The claim is declined.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) Underpayments due from January, 2000 to October, 2013 for a security guard;**
- b) Notice pay for one month gross wage;**
- c) Annual leave for 2 years at 42 days based on basic pay;**
- d) The matter is hereby referred to the County Labour Officer, Nakuru for the tabulation of the dues above;**
- e) Report and mention on 6th February, 2010.**
- f) The claimant is awarded costs.**

Delivered at Nakuru this 17th day of December, 2019.

M. MBARU

JUDGE

In the presence of: