



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1114 OF 2013

JAMES AYOO NGWALLA.....CLAIMANT

VS

GILLYS SECURITY & INVESTIGATION SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 16th July 2013 and filed in court on 17th July 2013, the Claimant has sued the Respondent for salary and benefits arrears. The Respondent filed a Response and Counterclaim on 16th August 2013 to which the Claimant responded on 11th November 2013.

2. At the trial, the Claimant testified on his own behalf and the Respondent called Josephat Makwaro Matianyi and Dorothy Aketch Nyangaga. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent in the position of General Manager on a one year renewable contract from 8th November 2010. His monthly emoluments were as follows:

- a. Gross salary.....Kshs. 60,000
- b. Fuel allowance.....12,000
- c. Airtime allowance..... 3,000
- d. Responsibility allowance..... 33,000

4. The Claimant was also entitled to 21 days in annual leave.

5. On 6th April 2012, the Claimant resigned from the Respondent’s employment.

6. The Claimant states that during the entire period of his employment, he was only paid his gross salary. He received an advance of Kshs. 40,000 in the month of March 2012 but was not paid any salary until he resigned on 6th April 2012.

7. The Claimant further states that National Social Security Fund (NSSF) deductions were made from his salary but only Kshs. 800 for December 2010 and December 2011 was remitted. He adds that various

amounts tagged as *advance* and *fuel* were deducted from his salary as follows:

| | |
|-----------------------|--------------|
| a. November 2010..... | Kshs. 15,000 |
| b. December 2010..... | 15,000 |
| c. January 2011..... | 13,600 |
| d. March 2011..... | 5,150 |
| e. April 2011..... | 5,000 |
| f. November 2011..... | 8,000 |
| g. December 2011..... | 5,000 |
| h. January 2012..... | 12,000 |
| i. February 2012..... | 5,000 |

8. The Claimant's claim is as follows:

| | |
|--|--------------|
| a. Salary for the month of March 2012 and 6 days in April 2012 | |
| Less Kshs. 40,000 advance..... | Kshs. 35,000 |
| b. Fuel allowance for 17 months (12,000x17)..... | 204,000 |
| c. Responsibility allowance for 17 months (33,000x17)..... | 561,000 |
| d. Airtime allowance for 17 months (3,000x17)..... | 51,000 |
| e. Unremitted NSSF payments (400x15)..... | 6,000 |
| f. 15 days leave pay..... | 34,615 |
| g. Unexplained deductions..... | 83,750 |
| h. Certificate of service | |
| i. Costs plus interest | |

The Respondent's Case

9. In its Response and Counterclaim dated 15th August 2013 and filed in court on 16th August 2013, the Respondent admits having employed the Claimant on a one year renewable contract. After the end of the one year contract on 7th November 2011, the Claimant continued working for the Respondent until 19th March 2012 when he proceeded on his annual leave which was to end on 10th April 2012.

10. The Respondent avers that the Claimant failed to report back to work on 10th April 2012 prompting the Respondent to write to him on 12th April 2012. The Respondent denies receiving an email dated 6th April 2012 from the Claimant communicating his resignation but admits receiving the Claimant's resignation letter dated 6th April 2012 on 8th May 2012.

11. The Respondent denies owing the Claimant any money and states that it is the Claimant who breached

the terms and conditions of his contract by failing to give a one month's termination notice. The Respondent further states that for the period the Claimant worked, he was paid all his dues in accordance with the employment contract.

12. With respect to airtime allowance, the Respondent states that the Claimant was entitled to Kshs. 3,000 per month. However, the Claimant used to receive a daily airtime allowance of Kshs. 250 from the Respondent's Office Assistant.

13. The Respondent pleads that although the contract indicated that the Claimant was to be paid Kshs. 33,000 per month as responsibility allowance and Kshs. 12,000 as fuel allowance, he used to receive Kshs. 42,392 per month in respect of the two allowances.

14. The Respondent denies any shortfall in NSSF remittances on the Claimant's account.

15. While admitting that the Claimant was entitled to 21 days' annual leave, the Respondent states that the Claimant proceeded on 16 days' leave from 19th March 2012 and was expected to resume duty on 10th April 2012. He however absconded duty until 8th May 2012, when he issued a letter dated 6th April 2012, indicating that he did not wish to renew his contract. The Respondent therefore holds that the Claimant did not have any accrued leave days.

16. On the claim for salary deductions, the Respondent states that the Claimant received advance payments on several occasions which were recovered from his salary at the end of the month.

17. By way of counterclaim, the Respondent claims the following from the Claimant:

- a. One month's salary in lieu of notice.....Kshs. 60,000
- b. Excess airtime allowance paid.....76,500
- c. Costs plus interest

Findings and Determination

18. There are two (2) issues for determination in this case:

- a. Whether the Claimant has proved his claims against the Respondent;
- b. Whether the Respondent has made out a proper counterclaim against the Claimant.

The Claimant's Claims

19. The Claimant claims salary for the month of March 2012 and 6 days in April 2012. According to the evidence on record, the Claimant was on annual leave between 19th March 2012 and 10th April 2012. In the meantime, he resigned from the Respondent's employment from 6th April 2012.

20. It is therefore evident that the Claimant was an employee of the Respondent up to the date of resignation and the Court found no reason why he was not paid his salary for the month of March 2012 and for 6 days in April 2012. I therefore allow this claim net of Kshs. 40,000 admitted by the Claimant as an advance.

21. The Claimant's letter of appointment provided for the following monthly allowances:

- a. Fuel allowance.....Kshs. 12,000
- b. Responsibility allowance.....33,000

c. Airtime allowance.....3,000

22. The Claimant states that he was not paid any of these allowances and therefore claims them in arrears. According to the Claimant's pay slips which were produced by both parties, the Claimant was not paid any allowance through the payroll. With regard to fuel allowance, the Respondent produced several cash payment vouchers in the Claimant's name with the narration 'mileage claim.'

23. The Court did not however find any link between these vouchers and the monthly fuel allowance due to the Claimant on a monthly basis. First, the amounts did not tally and second, the narration was consistently different. In his testimony before the Court, the Respondent's 1st witness, Josephat Makwaro Matianyi attempted the argument that the amounts reflected in these vouchers covered both fuel and responsibility allowances.

24. The Court was unconvinced. If indeed, the Respondent had elected to pay the Claimant's allowances by voucher, this ought to have been clearly exhibited. In the absence of any such evidence, the Court arrived at the conclusion that the Respondent did not pay the Claimant fuel and responsibility allowances as agreed in the employment contract. These claims therefore succeed and are allowed.

25. On the claim for airtime allowance, the Respondent states that although the Claimant was entitled to a monthly allowance of Kshs. 3,000 he was credited with airtime worth Kshs. 250 on a daily basis, making a total monthly figure of Kshs. 7,500. The Respondent's 2nd witness, Dorothy Aketch Nyangaga, who is said to have made the daily airtime credits, did not however produce any evidence to support this averment. The Court therefore finds that the Respondent failed to pay the Claimant monthly airtime allowance as agreed in the employment contract. This claim therefore also succeeds and is allowed.

26. The Respondent concedes owing the Claimant 10 days' leave pay. This is evidenced by leave request form dated 12th March 2012, which the Claimant did not contest. I therefore allow 10 days' leave pay.

27. The Claimant further claims refund of salary deductions he terms as unexplained. The Respondent's explanation is that these deductions were in respect of advances made to the Claimant, which were documented by cash payment vouchers. An analysis of these vouchers reveals the following:

a. Voucher No. 4705 dated 4th November 2010 for Kshs. 30,000 appears to have been executed before the effective date of the Claimant's employment with the Respondent;

b. Voucher No. 8888 dated 6th May 2011 for Kshs. 10,000 does not disclose the nature of advance nor does it bear the recipient's details;

c. Voucher No. 9514 dated 14th June 2011 for Kshs. 10,000 bearing the narration of 'Director's Account' appears to have no nexus with salary advance and has no recipient's details;

d. Voucher No. 7068 dated 20th November 2011 for Kshs. 32,609 is cancelled and unsigned;

e. Voucher No. 12804 dated 27th December 2012 for Kshs. 10,000 does not disclose the nature of advance nor does bear the recipient's details;

f. Voucher No. 13101 dated 9th February 2012 for Kshs. 7,000 does not disclose the nature of advance and does not bear the recipient's details;

28. In sum, the Court finds that these vouchers do not support the deductions made from the Claimant's salary and the claim for refund thereof must therefore succeed.

29. Regarding the claim for unremitted NSSF dues, the only thing to say is that any such dues would be payable to NSSF and not to the Claimant. This was the holding by this Court in **Beatrice Ayieko (suing as Administratrix of the Estate of Oscar Smith Njinuli-Deceased) v Cellulant Kenya Limited [2014]**

eKLR, from which I have no reason to depart. This claim therefore fails and is dismissed.

The Respondent's Counterclaim

30. The Respondent's counterclaim against the Respondent is two-fold:

- a. One month's salary in lieu of notice.....Kshs. 60,000
- b. Excess airtime allowance paid.....76,500

31. In his letter to the Respondent dated 6th April 2012, the Claimant states that he did not wish to renew his contract. It is however clear that the Claimant's one year contract had expired in November 2011 and yet he continued working for the Respondent well into the first quarter of 2012. The only logical conclusion is that by the time the Claimant wrote his letter dated 6th April 2012, his contract had been renewed by conduct of the parties.

32. To my mind this was a perfect case of legitimate expectation as restated by **Rika J** in ***Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR*** where my brother Judge isolated extended service beyond the period provided in a written contract as a key ingredient of legitimate expectation.

33. In effect, the Claimant's letter dated 6th April 2012 was a resignation without notice rather than a notification of non-renewal of contract. Consequently, the Respondent's counterclaim for one month's salary in lieu of notice succeeds and is allowed.

34. In light of the earlier finding on the issue of airtime, the counterclaim on excess airtime allowance fails and is dismissed.

Final Orders

35. I therefore enter judgment as follows:

In favour of the Claimant:

- a. Salary for March 2012.....Kshs 60,000
- b. Salary for 6 days in April 2012 (60,000/30x6).....12,000
- c. Fuel allowance (12,000x17 months).....204,000
- d. Responsibility allowance (33,000x17 months).....561,000
- e. Airtime allowance (3,000x17 months).....51,000
- f. 10 days' leave pay (60,000/30x10)..... 20,000
- g. Uanauthorised deductions.....83,750
- Total.....991,750**
- Less advance to the Claimant.....(40,000)
- Balance.....951,750**

In favour of the Respondent:

One month's salary in lieu of notice.....Kshs. 60,000

36. The net effect is that the Respondent will pay the Claimant the sum of **Kshs. 891,750** being the amount net of amount allowed in counterclaim.

37. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

38. The Claimant is also entitled to a certificate of service.

39. Since both parties' claims have succeeded in part only, I direct that each party will bear their own costs.

40. It is so ordered.

DATED AND SIGNED AT MALINDI THIS 30TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Githinji for the Claimant

Miss Ameyo for the Respondent