



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 619 OF 2014

MOSES ONYANGO AGAK.....CLAIMANT

v

LANET COUNTY HOTEL.....1st RESPONDENT

OLOIKA COUNTRY LODGE.....2nd RESPONDENT

JUDGMENT

1. On 20 March 2017, the Court fixed the Cause for hearing on 9 November 2017 and the Claimant was directed to serve a hearing notice.
2. When the Cause was called out for hearing on the scheduled date, the Respondents and their advocate on record were not present.
3. On record was an affidavit of service deposing that a hearing notice was served upon Gatu Magana & Co. Advocates but they declined to accept service on the ground that the firm was not on record.
4. The record shows that *Gatu Magana & Co. Advocates* filed a Memorandum of Appearance on behalf of the Respondents on 12 January 2015 and Answer/Defence to Claim on 9 December 2015.
5. There is no Notice of Change or an order granting leave to the firm of *Gatu Magana & Co. Advocates* to cease from acting for the Respondents.
6. In consideration of the above, the Court allowed the hearing to proceed and the Claimant gave sworn testimony and produced exhibits.

Employment relationship

7. In terms of employment, the Claimant testified that he was employed by the 1st Respondent in 2008 and though not issued with a formal contract, he was issued with a *To Whom It May Concern* letter dated 27 August 2010, to confirm the employment relationship.
8. The Claimant also produced another *To Whom It May Concern* letter from the 2nd Respondent certifying that he worked with it from 2009 to June 2014.
9. According to the Claimant, the Respondents share similar ownership/directorships.
10. The Court is satisfied that the Claimant had an employment relationship with the Respondents.

Fairness of termination

11. On the circumstances leading to the end of the employment relationship, the Claimant stated that on 11 June 2014, a director John Mugo called him and other employees and informed them that due to theft of some television sets, their services were no longer required. There was no dismissal letter or notice.

12. The Claimant reported to the Labour Officer and after conciliation, the Respondents paid him Kshs 9,000/- .

13. There is no evidence that the Claimant was given notice of termination of contract as required by section 35(1) of the Employment Act, 2007 or that the procedural requirements of section 41 of the Act were complied with.

14. Further, by failing to attend the hearing, the Respondent has failed to discharge the legal burden placed on employers by sections 41, 43 and 45 of the Employment Act, 2007.

15. The Court therefore finds that there was unfair termination of employment.

Underpayments

16. The Claimant also contended that he was underpaid as he was an *ungraded Artisan* in terms of the Regulation of Wages Orders.

17. The Claimant was a Disc Jockey and the Court is unable to accede to his contention that he was an *artisan*. The artisan contemplated by the Regulation of Wages Orders is one whose duties relate to technical work such as mechanics or engineering, and not a Disc Jockey.

National Social Security Fund Contributions

18. The Claimant sought Kshs 13,800/- on account of deductions made but not remitted to the National Social Security Fund and he produced a Statement from the Fund.

19. However, the Claimant did not produce any evidence of membership of the Fund and this head of claim is therefore not proved.

National Hospital Insurance Fund Contributions

20. The amount of contributions deducted and not remitted was not disclosed and the Court finds this head of claim not proved.

House allowance

21. The Claimant sought Kshs 165,918/- on account of house allowance from September 2008 to June 2014, but he did not disclose the formula used to arrive at the figure and the Court declines to award the same.

Casual work July 2014

22. Considering that it is not clear as to the breakdown of the Kshs 9,000/- paid to the Claimant through the Labour Office on 18 August 2014, this head of claim is declined.

Annual leave

23. Under the head of annual leave, the Claimant sought Kshs 82,437/- for the period of employment.

24. The general law of employment provides for leave on full pay.

25. The Claimant's testimony that he did not go on leave remaining unchallenged, and considering the failure by the Respondents to file leave records, the Court would allow this head of claim.

Service pay

26. No sufficient evidential foundation for this relief was laid and it is declined.

Pay in lieu of notice

27. Considering the payments made to the Claimant through the Labour Officer, this head of claim is declined.

Compensation

28. The Claimant served the Respondents for about 16 years and considering the length of service, the Court would award maximum compensation (cumulative monthly wage was Kshs 6,500/-).

Conclusion and Orders

29. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(i) Leave	Kshs 82,437/-
(ii) Compensation	Kshs 78,000/-
TOTAL	Kshs 160,437/-

30. Claimant to have costs on half scale.

31. File to be transmitted back to Nakuru after this judgment.

Delivered, dated and signed in Nairobi on this 19th day of January 2018.

Radido Stephen

Judge

Appearances

For Claimant Ms. Wachira instructed by Wachira Wanjiru & Co. Advocates

For Respondent Gatu Magana & Co. Advocates

Court Assistant Nixon