



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 3 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**SHABAN SYAKEN MULATI.....CLAIMANT**

**VERSUS**

**JIANGXI ZHONGMEI ENGINEERING**

**CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

SHABAN SYAKEN MULATI filed this suit through the firm of SITUMA & COMPANY ADVOCATES seeking payment of kshs.810,151, costs, interest and any other orders the court may deem fit to grant. The amount demanded is broken down as below –

- a... Under payment for a period of 16 months..... Kshs.383,889.60
- b... Unpaid arrears for five (5) months..... Kshs.142,688.00
- c... NSSF and NHIF deducted but never remitted... Kshs.15,120.00
- d... Arears for annual leave never granted..... Kshs.28,537.60
- e... Three (3) months' notice of dismissal in lieu.... Kshs.85,612.80
- f... Four (4) months claimant would have workedwith respondent..... Kshs.114,150.40
- g... PAYE funds which were deducted but never remitted..... Kshs.40,173.00

**TOTAL Kshs.810,151.00**

He avers that he was employed by the respondent, a contractor engaged in the rehabilitation of the Kitale-Webuye Road, as a plant mechanic on 17<sup>th</sup> January 2013 but was never issued with a letter of appointment. He avers that he was never informed how much he was to be paid or at what intervals. He avers that he was paid at the rate of Kshs.50 per hour from January to June 2012, Kshs.60 per hour from July to September 2013 and Kshs.70 per hour from October 2013 when he was dismissed for engaging in a strike. He avers that the payment was far below the statutory minimum rate of pay.

The claimant further avers that he was recalled back to work but his pay reduced to shs.40 per hour. He however does not state when or for how long he worked thereafter.

The respondent filed a defence through Barongo and Company Advocates in which it denies the averments in the claim and states that the claimant was paid all his dues for the period he worked for the respondent. The claimant filed a reply to defence joining issues with the respondent.

In view of the sketchy information in this and other related files involving employees of the respondent, this file together with file November 2 of 2015, 3 of 2015, 15 of 2015, 112 of 2015, 113 of 2015, 144 of 2015 and 145 of 2015 were referred to the County Labour Officer to investigate and file a report to guide the court in arriving at a just and fair determination.

In the report dated 20<sup>th</sup> July 2017, the County Labour Officer Kitale states that –

*“Mr. Shaban Syaken Mulati was employed by MS Jiangxi Zhongmei Engineering Company Limited as a Plant Mechanic on 17<sup>th</sup> January 2013.*

*That when Mr. Mutali’ services were terminated him and eight others reported the matter to the labour office Kitale where the undersigned conciliated between the two parties on 27<sup>th</sup> February 2014 and it was agreed that Mr. Mulati Shaban be paid terminal dues amounting to Kshs.20,100/=.*

*That Mr. Mulati was paid Kshs.20,100/= as full and final dues and issued with a certificate of service indicating that he worked with the company from 17<sup>th</sup> January 2013 up to 16<sup>th</sup> February, 2014. After five months he went back to the company and was re engaged afresh, therefore the issue of suspension as alleged is not true.*

*On perusing Mr. Shabani’s records further, it was found that his salary kept on fluctuating as such it was difficult to determine underpayments of wage, however basing on the Building and Construction Industry Wages Order Legal Notice No. 20 of 2013; Mr. Mulati was entitled to a daily house allowance of 20% of basic wage which he was not paid.*

*It is therefore recommended that Mr. Mulati be paid house allowance arrears amounting to kshs.31,136/=...”*

The claimant was given an opportunity to file submissions in respect of the findings and recommendations of the report of the County Labour officer but none appears to have been filed.

### **Determination**

The only issues for determination herein is what period the claimant worked for the respondent and whether he is entitled to the payments sought.

There are payslips on record as filed by the claimant relating to the months of June 2013 to January 2014. There is also a certificate of service for the period 17<sup>th</sup> January 2013 to 16<sup>th</sup> February 2014.

All the payslips reflect payments of NSSF, NHIF and PAYE. There is also a reflection of overtime worked separating normal overtime and overtime on days off or public holidays. The documents filed in the defence do not relate to the claimant and may have been intended for a different file.

In view of the documents on record and the report from the County Labour Officer, I make the following findings and determinations.

1. The prayers for NSSF, NHIF and PAYE are dismissed as there is evidence that the same were paid to the relevant authorities.
2. There is no evidence of underpayments.
3. The claimant is not entitled for payment of arrears of salary for days that he did not work which he refers to as suspension.
4. There is no evidence of the manner in which the claimant’s employment was terminated and he has not therefore proved that he is entitled to notice.
5. The Labour Officers recommendation of payment of kshs.31,136 has not been objected to by the respondent and is payable.
6. The claimant has not denied that he was paid terminal dues covering the period 17<sup>th</sup> January 2013 to 16<sup>th</sup> February 2014 in the sum of Kshs.20,100/=.

For the foregoing reasons I award the claimant the sum of **Kshs.31,136/=** as recommended by the County Labour Officer. The rest of the claim is dismissed.

There shall be no orders for costs.

**DATED AND SIGNED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JUNE 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 5<sup>TH</sup> DAY OF JULY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**