



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 601 OF 2016**

**JACOB MUTHI MUTEMI.....CLAIMANT**

**VS**

**HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim as amended on 15<sup>th</sup> May 2017, the Claimant seeks service pay and unpaid leave for nine (9) years. The Respondent's response is dated 25<sup>th</sup> October 2016.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Rajab Yeri Kombe. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a Mechanic from 24<sup>th</sup> November 2006 until 10<sup>th</sup> December 2015, when he resigned. At the time of resignation, the Claimant earned a monthly basic salary of Kshs. 15,000 plus a house allowance of Kshs. 3,000.

4. The Claimant adds that he is yet to be paid his dues and therefore claims the following:

- a) Service pay for 9 years (Kshs. 9,000 x 9 years).....Kshs. 81,000
- b) Unpaid leave for 9 years (Kshs. 10,500 x 9 years).....94,500
- c) Certificate of service
- d) Costs plus interest

**The Respondent's Case**

5. In its Response dated 25<sup>th</sup> October 2016 and filed in court on 26<sup>th</sup> October 2016, the Respondent admits that the Claimant was in its employment until November 2015, when he resigned.

6. The Respondent avers that the Claimant's resignation was in breach of Section 35 (1)(c) of the Employment Act to the extent that the Claimant did not give the Respondent adequate notice period. The Respondent therefore raises a counterclaim in the sum of Kshs. 15,000 being one (1) month's salary in lieu of notice.

7. In response to the Claimant's claims, the Respondent states that the Claimant was a registered and contributing member of the National Social Security Fund (NSSF) and is therefore not entitled to service pay.

8. The Respondent further states that the Claimant utilized all his annual leave days and any unutilized days would have been forfeited by virtue of limitation of time.

**Findings and Determination**

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

- a) Whether the Claimant is entitled to the claims made;
- b) Whether the Respondent has made out a proper counterclaim against the Claimant.

### **The Claimant's Claims**

10. The Claimant claims service pay for the entire period of his employment with the Respondent. He however admits that he was a contributing member of NSSF to which the Respondent remitted all his dues. The simple answer to this claim therefore lies in Section 35(6) of the Employment Act, which precludes contributing members of NSSF from laying a claim for service pay. This claim therefore fails and is dismissed.

11. With regard to the claim for leave pay, I have this to say; the Claimant himself told the Court that prior to his resignation, he had asked for and was granted five (5) days' off to attend to his sick father. He did not bother to explain to the Court why he did not take part of his annual leave instead of asking for off days. The claim for leave pay was therefore not proved and is dismissed.

### **The Respondent's Counterclaim**

12. The Claimant testified that upon travelling to his rural home, he found his father very ill and he therefore came back and resigned. He produced a his resignation letter dated 10<sup>th</sup> December 2015, by which he gave a resignation notice of seven (7) days.

13. According to evidence adduced by the Respondent, the Claimant handed in his resignation letter on 18<sup>th</sup> December 2015. Further, the Claimant's NSSF provisional statement of account, also produced by the Respondent, revealed that as at December 2015, the Claimant was already working for another employer by the name Exxon Investments Limited.

14. The Court therefore formed the opinion that the Claimant found another job but instead of negotiating for a smooth exit from the Respondent, he cheated his way into getting off days by using his father's illness, real or imaginary, as an excuse. The Court found the Claimant's conduct in this regard most unethical and dishonest.

15. What is clear is that the Claimant did not give the requisite resignation notice to the Respondent and in accordance with Sections 35(1)(c) and 36 of the Employment Act, the Respondent is entitled to one (1) month's salary in lieu of notice. Attempts made by Counsel for the Claimant in final submissions, to suggest that because the Claimant's salary was paid fortnightly, he was not required to give a full month's resignation notice, go against the Claimant's own pleadings that he was a regular employee.

### **Final Orders**

16. In the end, I dismiss the Claimant's entire claim and enter judgment against him in favour of the Respondent in the sum of Kshs. 18,000 being one (1) month's salary in lieu of notice.

17. The Claimant will also meet the costs of this case.

18. These are the orders of the Court.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mrs. Kyalo for the Claimant

Mr. Onyango for the Respondent