



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1408 OF 2013

JOSEPH OKAL MONDA.....CLAIMANT

- VERSUS -

KIGUTHA FARMERS (K) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 02.09.2013 through Lucy Njiru & Company Advocates. The claimant prayed for judgment against the respondent as per amended memorandum of claim filed on 18.04.2016 for:

- a) Annual leave pay for 2010 to September 2012 2 years 8 months Kshs. 10, 312.40.
- b) Overtime 771 hours x 85 Kshs. 65, 539.00.
- c) 53 unpaid working days Kshs. 12, 190.00.
- d) Pay in lieu of notice Kshs.5, 156.20.
- e) Prorate 18 months x 3 years making 36 days 230 per day Kshs. 8, 280.00.
- f) Unremitted NSSF Kshs. 3, 200.00.
- g) Pay for using own tools Kshs. 12, 000.00.
- h) Pay in lieu of 96 off days worked Kshs. 40, 160.00.
- i) Guarding for 17 months without pay Kshs. 117, 300.00.
- j) Public holidays worked for 4 years Kshs. 66, 240.00.
- k) Sum of amount as claimed Kshs.324, 909.00.
- l) Such other dues as may be found due to the claimant.
- m) Any other relief as the Court may deem fit to grant.

n) Costs and interest of the suit.

The claimant's case is that he was employed by the respondent as a guard in February 2010 and summarily dismissed in September 2012 when he demanded to be paid 53 days and 7771 hours worked but not paid. He claimed for terminal dues as set out above.

The memorandum of response to the claim was filed on 11.10.2017 through Jesse Kariuki & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs. The respondent's case is that the claimant was not employed by the respondent in February 2010 as a guard but he was engaged for various duties by the respondent on casual basis and the initial such engagement was in February 2010. The respondent's case is that the claimant was engaged for a few days in a month and paid at a daily rate and he did not serve continuously. Further in September 2012 the respondent did not dismiss the claimant as alleged but the claimant worked in a nearby school and he deserted duty and he is not entitled to pay in lieu of termination notice. Thus the claimant is not entitled to any of the remedies as prayed for. A reply to response was filed on 18.10.2017.

The Court has considered the pleadings, the evidence and submissions on record. The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The claimant has filed a bank statement showing that the respondent consistently paid monthly salary to the claimant's salary account with the bank. The respondent per the consent order agreed to remit all unremitted NSSF dues that had been claimed in the present suit.
- b) The claimant testified that in August 2013 he went to his bank for monthly pay and he discovered that the amount deposited by the respondent was lower than usual or as agreed. When he went to the respondent to complain, he was told that his employment had ended. He then filed suit for terminal dues. However, in cross examination the claimant admitted that he used to be paid for the days worked inclusive overtime.
- c) The claimant testified that the monthly pay varied in accordance with the actual days worked.
- d) He testified that the as per the muster roll prorated pay was made by the respondent to him in lieu of rest days.
- e) He did not have record on the value of the tools and uniform he used on the official assignments and for which he claimed a refund from the respondent.
- f) He admitted that in 2014 he was employed by a nearby school as a guard.

The Court returns that by his own evidence the claimant has confirmed that he was a casual employee paid on a daily rate and the accumulated wage was remitted at his bank account on monthly basis. There were breaks in the service and it was not continuous. The pay included overtime, and off days. He also confirmed that after August 2013 he was employed by a nearby school as a guard. In the circumstances the Court finds that the claimant's case was incredible and the remedies prayed for were not justified. The Court returns that the suit will fail. In view of the partial consent on record each party will bear own costs of the suit.

In conclusion the claimant's suit is hereby dismissed with orders that each party will bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE