



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

CAUSE NUMBER 353 OF 2013

BETWEEN

KAZUNGU NGARI YAA.....CLAIMANT

VERSUS

MISTRY V. NARAN MULJI & CO.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

J.K. Mwarandu & Company Advocates for the Claimant

Wandai Matheka & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his initial Statement of Claim, on 24th October 2013. The Statement has variously been amended, culminating in Re-Amended Statement of Claim filed on 10th March 2017.
2. He avers that he was employed by the Respondent in 1986 as a Shamba Boy. He earned a daily wage of Kshs. 52. Later on he was promoted to become a Security Guard. His contract was terminated by the Respondent on 6th August 2011. His salary was Kshs. 9,000 as of the date of termination.
3. The Claimant states termination was without notice. No valid reason was given in justifying termination. He prays for Judgment against the Respondent in the following terms:-
 - a) Declaration that termination was unfair.
 - b) Unpaid house allowance at Kshs. 405,000.
 - c) Unpaid rest days at Kshs. 180,000.
 - d) Unpaid annual leaves at Kshs. 157,000.
 - e) 1 month salary in lieu of notice at Kshs. 9,000.
 - f) 12 months' salary in compensation for unfair termination, at Kshs. 108,000.
 - g) Costs.
 - h) Interest.

i) Any other suitable relief.

4. The Respondent filed a Re-Amended Statement of Response, on 21st July 2017. The Respondent denies every averment made by the Claimant. Without prejudice to this denial, the Respondent states that the Claimant worked as a Casual Employee, on a daily wage of Kshs. 200/300. He was employed on 1st November 1986. He was paid Kshs. 744 in September 2015 as annual leave pay. He was casual, and not entitled to house allowance. He deserted employment. The Respondent did not terminate his contract. The Claim has no merit. The Respondent prays it is dismissed, with costs.

5. The Claimant initially gave evidence, in the absence of the Respondent, and obtained *ex parte* Judgment delivered on 27th June 2014. He was granted service pay at Kshs. 129,807; 6 days' wages for August 2011 at Kshs. 2,076; and notice pay at Kshs. 9,000.

6. Parties agreed in Court to have the *ex parte* Judgment set aside, on 12th November 2014.

7. The Claimant testified afresh on 2nd June 2015. He was halting, and unable to give coherence evidence. It was explained by his Advocate that the Claimant had recently lost a relative, and was not in clear state of mind. He was stood down upon his own request.

8. Thereafter hearing did not take place, mainly because Parties were engaged in negotiation. On 20th March 2018, they reported that they had failed to settle. On 23rd November 2018, they recorded an order to have the Claim considered and determined under Rule 21, of the Employment and Labour Relations Court [Procedure] Rules 2016.

The Court Finds:-

9. There is nothing on record, which would lead this Court to write a different Judgment, from that which was set aside. No evidence, pleadings or submissions have been placed before the Court, to cause the Court reach different findings and conclusion.

10. The Claimant, as stated above, did not offer any fresh evidence, materially different from his initial evidence. He in fact gave incoherent evidence when he appeared before the Court. He offered nothing new, to support the prayers added through Re-Amended Statement of Claim.

11. The Respondent on his part made general denial. The submissions and pleadings by the Respondent disclose nothing which would change the findings and conclusion of the Court in the earlier Judgment. The payment vouchers which are exhibited by the Respondent, do not discount the rate of Kshs. 9,000 monthly, pleaded by the Claimant. The Respondent states that the Claimant earned Kshs. 200/300 daily. The Claimant multiplies Kshs. 300 by 30 days, to come with a monthly rate of Kshs. 9,000, which the Court adopted in its Judgment. There are pay slips exhibited by the Claimant, supporting the figure of Kshs. 9,000 as the monthly pay. Considering long years served by the Claimant, it was not right that the Respondent did not pay him anything in recognition and social security. It was a serious omission on the part of the Respondent to characterize the Claimant as a Casual Employee, after he had worked for 25 years.

12. Parties were given time by the Court, to negotiate settlement, based on the Judgment which was set aside, but they were not able to do so. Relying on the material before it, the Court is persuaded to grant the same Judgment in favour of the Claimant, as was earlier granted. IT IS ORDERED: -

a) The Respondent shall pay to the Claimant 1 month wages in lieu of notice at Kshs. 9,000; 6 days' wages for work done in August 2011 at Kshs. 2,076; and service pay at Kshs. 129,807- total Kshs. 140,883.

b) No order on the costs.

Dated and delivered at Mombasa this 21st day of December 2018.

James Rika

Judge