



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 498 OF 2014
BETWEEN
KUROH BARAKS WAMAE CLAIMANT
VERSUS
CHINA CAMC ENGINEERING CO. LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kaingu & Company Advocates for the Claimant

No appearance for the Respondent

JUDGMENT

1. The Claimant states he was employed by the Respondent Company as a Driver, on 3rd of January 2012. His contract was terminated by word of mouth by the Respondent, without cause or notice, on 31st July 2014. He worked from 6.00 a.m. to 6.00 p.m. and was to be paid Kshs. 800 per day, translating into a salary of Kshs. 24,000 monthly. He was compelled to work overtime on certain occasions. He would take Senior Managers from their residence at Gede in Malindi to Mombasa where they indulged in clubbing and gambling till the wee hours. He was paid a salary of Kshs. 15,000, instead of the agreed Kshs. 24,000 monthly. He states termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a. 4 hours of overtime everyday for 2 years worked at Kshs. 192,960.
- b. 1 rest day weekly for 2 years at Kshs. 76,800.
- c. 9 Public Holidays over a period of 2 years at Kshs. 14,400.
- d. Annual leave pay over the period of 2 years at Kshs. 48,000.
- e. Unpaid salary of 2 years at Kshs. 216,000.
- f. 1 month salary in lieu of notice at Kshs. 24,000.

g. Gratuity at Kshs. 48,000.

Total..... Kshs. 620,160

h. Proof of contribution to N.S.S.F and N.H.I.F.

i. Certificate of Service to issue.

j. Declaration that termination was unfair.

k. Costs.

l. Interest at court rate from the date of employment 3rd January 2012, till payment is made in full.

2. The Respondent did not file any Response, or attend Court during mention. The matter was set down for formal proof at Malindi, on the 6th March 2017.

3. The Claimant restated the contents of his Pleadings in his evidence. He added he was transferred from Malindi to Nairobi, and told while at Nairobi, that there was no more work. He was not issued any letter of termination. He was not enlisted to the N.S.S.F and N.H.I.F. His salary was changed from Kshs. 800 per day, to Kshs. 15,000 monthly. He worked overtime, an average of 4 hours daily. He did not have rest days. He worked on public holidays without holiday pay. He was issued a letter by Respondent's Senior Human Resource Manager Joseph Liu, indicating the Claimant worked from 3rd January 2012, to 31st March 2013. He explained he left on 31st March 2013, but was recalled and worked up till 31st July 2014.

The Court Finds:-

4. The Respondent has not given any answer to the Claim. Nothing has been filed challenging the Pleadings or Witness Statement filed by the Claimant. The Respondent did not attend Court at any time.

5. Based on the unchallenged evidence given by the Claimant, the Court is satisfied the Claimant was employed by the Respondent as a Driver, on 3rd January 2012, and left upon termination of his contract by the Respondent, on 31st July 2014. Termination was by word of mouth. He had initially left on 31st March 2013 as shown in a document prepared by the Respondent that looks like a Certificate of Service, or Letter of Recommendation, exhibited by the Claimant.

6. The Court accepts, in the absence of evidence from the Respondent that, termination was without notice and without cause. The Respondent promised to pay the Claimant Kshs. 800 daily, as his salary. Instead he was paid Kshs. 15,000 monthly. ***He is entitled to, and is granted Kshs. 216,000 in unpaid salary for the 2 years worked.***

7. The Court is persuaded termination was unfair and ***allows the Claimant compensation for unfair termination the equivalent of 6 months' salary under Section 49 of the Employment Act 2007, at Kshs. 144,000.***

8. The Claimant testified he was overworked, without compensation for the excess hours. He drove the Respondent's Managers from Malindi to Mombasa, where they spent nights, clubbing and gambling. In an ordinary day, the Claimant was kept working from 6.00 a.m. to 6.00 p.m. ***The claim for overtime pay has been established on a balance of probability, and is granted at Kshs. 192,960.***

9. Annual leave pay is granted based on a minimum of 21 days per year, for 2 years, at Kshs. 38,796.

10. Public holidays' pay is allowed at Kshs. 14,400 as prayed.

11. The prayer for rest days similarly appears reasonable, in absence of any evidence from the

Respondent, showing the Claimant did not work 7 days a week. ***The item is granted at Kshs. 76,800.***

12. The Claimant shall have the prayer for 1 month salary in lieu of notice at Kshs. 24,000.

13. Certificate of Service to issue.

14. His prayer for proof of Claimant's contribution to N.S.S.F and N.H.I.F was ambiguous. It is not usual that an order is made for provision of proof. Proof is given as a means of establishing the presence of a grievance, and in justifying grant of a remedy. It is not an end, relief or remedy in itself. What does the Claimant intend to gain by having such proof? This item is rejected.

15. The prayer for gratuity was not established through evidence. There is no contract, collective agreement, statute, or wage instrument shown to the Court, entitling the Claimant to have gratuity. The prayer is rejected.

16. Costs to the Claimant.

17. Interest allowed at 14% per annum from the date of Judgment.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: arrears of salary at Kshs. 216,000; equivalent of 6 months' salary in compensation for unfair termination at Kshs. 144,000; overtime pay at Kshs. 192,960; annual leave pay at Kshs. 38,796; public holiday pay at Kshs. 76,800; and 1 month salary in lieu of notice at Kshs. 24,000- total Kshs. 692,556.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest granted at 14% from the date of Judgment.

Dated and delivered at Mombasa this 31st day of March 2017.

James Rika

Judge