



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 896 OF 2011

TITUS KALOKI NGUMBI.....CLAIMANT

VERSUS

VICTORY CONSTRUCTION CO. LTD.....RESPONDENT

Mr. Mureithi for claimant

Mr. Kadere for respondent

JUDGMENT

1. The claimant by an amended statement of claim dated 28th March 2012 seeks payment of terminal dues comprising;

(i) One month's salary in lieu of notice – Kshs.9,502/=

(ii) Leave for 2½ years – Kshs.23,755/=

(iii) Service pay for 2½ years – Kshs.11,926.50/=.

(iv) Unpaid salary for the months from August to November 2007 – Kshs.38,008/=.

2. The claimant testified that he was employed by the respondent verbally between 50th October 2005 to 23rd November 2007 to guard construction materials at mile 81 Kitui – Kang'undo road at a monthly salary of Kshs.9,502/=.

3. That the respondent provided him with payslip detailing his statutory deductions including NSSF, NHIF, and COTU deductions.

4. That the respondent failed to pay the claimant salary for the months of August to November 2007 despite being on duty daily.

5. That the site manager informed the claimant that his services were terminated and the materials he was guarding were removed from site on 23rd November 2007.

6. The claimant prays for the terminal dues set out in the statement of claim and general damages for failure to give him notice of the termination, interest and costs.

7. The suit was initially filed in the Resident Magistrate's Court at Yatta as Civil Suit No. 116 of 2008.
8. According to the claimant, the suit was withdrawn, whereas the respondent states that same was dismissed. The claimant's advocate produced a notice of withdrawal of the suit.
9. There being no judgment and/or order determining the matter before this court, the court finds that the matter was withdrawn by the plaintiff and same is not res judicata.

Response

10. The respondent filed a response to the memorandum of claim on 23rd March 2012, in which it states that there was no contract of employment between the claimant and respondent and that the claimant was an employee of Ministry of Works and not employed by the respondent company.
11. RW1 Kirbal Singh Suri testified under oath for the respondent and told the court that he was a Technical Director of the respondent and that the respondent was engaged in road construction. RW1 did not know the claimant personally but from the company records, the claimant was employed as a watchman at the construction site.
12. Respondent shared a compound with the Ministry of Roads and that the claimant was employed by the Ministry of Roads and not by the respondent.
13. RW1 admitted that the respondent paid the claimant a wage of Kshs.10,228/= per month and provided him with a payslip. That they remitted statutory deductions from the claimant's wage.
14. That when the road works were finished, the respondent left the claimant at the site. RW1 denied that the respondent gave the claimant the certificate of service produced by the claimant.
15. RW1 said that he did not know the author of the letter and ordinarily such a letter would come from the respondent's head office, which was not the case.
16. Though RW1 stated that the suit filed at Yatta Magistrate Court was dismissed, he did not provide any record to that effect.
17. RW1 under cross examination admitted that the NSSF statements show that the claimant was employed by the respondent. He admitted that the respondent remitted NSSF dues on behalf of the claimant.
18. RW1 added that the agreement to share the employment costs with the Ministry of Roads with regard to the claimant was verbal.
19. RW1 admitted that respondent paid the claimant a gross salary and not a token as averred in the statement of defence.
20. The claimant produced a notice of withdrawal of the suit at Yatta which RW1 was unable to contest.

Determination

21. Upon a careful analysis of the evidence before court, the court is satisfied that the claimant has proved the particulars of claim on a balance of probability.
22. The claimant has demonstrated that he was an employee of the respondent and was paid a gross salary by the respondent. That the respondent deducted and remitted statutory dues on behalf of the claimant.
23. The defence by the respondent that the claimant was an employee of the Ministry of Roads and that they only paid the claimant a token for shared responsibilities at the construction site is not credible and

the court does not believe it.

24. Accordingly, the court enters judgment in favour of the claimant in the sum of Kshs.71,265.00/= being;

(i) One month's salary in lieu of notice – Kshs.9,502/=.

(ii) Payment in lieu of 2½ years leave – Kshs.23,755.00/=

and

(iii) Unpaid salary for the month of August to November 2007 – Kshs.38,008/=.

The claim for payment of service pay is dismissed because the respondent made NSSF contribution on behalf of the claimant.

(iv) Judgment sum of Kshs.71,265.00/= is payable with interest at court rates from date of judgment suit till payment in full.

(v) Costs to follow the outcome.

Dated and delivered at Nairobi this 7th day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE