



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

CAUSE NO 858 OF 2012

JEREMIAH ALUGAYA MASIEMO.....CLAIMANT

VERSUS

TIMES TREK SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Jeremiah Alugaya Masiemo against his former employer, Times Trek Services Limited. The claim is contained in a Memorandum of Claim dated 18th May 2012 and filed in Court on 22nd May 2012. The Respondent did not file any response in spite of due service. The Court therefore heard the Claimant ex parte on 2nd March 2017.

The Claimant’s Case

2. The Claimant pleads that he was employed by the Respondent as a night watchman at a monthly salary of Kshs. 3,000 effective 16th May 2008. He was not issued with a letter of appointment. He however produced a document issued by the Respondent confirming retention of his original identity card as proof of his employment.

3. The Claimant’s salary was increased to Kshs. 4,000 from December 2010. He claims that he was not paid salary for the months of October, November and December 2011 and upon demanding his salary arrears he was summarily dismissed on 25th December 2011.

4. The Claimant states that he worked throughout for twelve (12) hours without rest day and without leave. He was neither housed nor was he paid house allowance. The Claimant further claims that throughout his employment with the Respondent he was underpaid.

5. The Claimant lodged a complaint at the District Labour Office in Nyayo House, Nairobi on 24th January 2012 but conciliation efforts did not bear any fruit.

6. The Claimant’s claim is as follows:

- a. 3 months’ wages.....Kshs. 25,389.00
- b. 1 month’s wages in lieu of notice.....9,732.00
- c. 3 years’ annual leave @ 24 days.....23,356.80

d. Severance pay.....	14,598.00
e. House allowance @ 15% of basic wage.....	36,007.20
f. 12 months' salary in compensation.....	101,556.00
g. Overtime @ 20 hours/night (480 hours/month)	
h. Rest days	
i. Public holidays	
j. Underpayment	
k. Certificate of service	

Findings and Determination

7. There are two issues for determination in this case:
- a. Whether the Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

8. The Claimant states that he was dismissed after demanding his salary arrears for the months of October, November and December 2011. The Respondent did not adduce any contrary evidence to counter the Claimant's account which the Court adopts, reaching the conclusion that the Claimant was dismissed without justifiable cause and without due process.

Remedies

9. In light of the above finding, I award the Claimant eight (8) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the dismissal transaction.

10. The claims for one (1) month's wages in lieu of notice and three months' wages for October, November and December 2011 also succeed and are allowed.

11. The Claimant further claims house allowance. Section 31 of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

12. The Claimant told the Court that he was not issued with a letter of appointment nor a pay slip and as held by **Mbaru J** in **Robai Musinzi v Safdar Mohamed Khan [2012] eKLR** where an employer fails to document the employment of an employee, the terms are subject to interpretation by the Court. In this regard the Court did not find any evidence that the monthly salary paid to the Claimant was inclusive of house allowance.

13. I therefore allow the claim for house allowance at the rate of 15% of the basic salary and adopt the resultant figure of Kshs. 4,600 as the Claimant's monthly salary for purposes of this claim. In the absence of any leave records, the claim for leave pay also succeeds and is allowed.

14. The claims for underpayment, overtime compensation and severance pay were not proved and are dismissed.

15. Finally I enter judgment in favour of the Claimant in the following terms:

a. 8 months' salary in compensation.....	Kshs. 36,800
b. 1 month's salary in lieu of notice.....	4,600
c. 3 months' salary for October, November and December 2011.....	13,800
d. House allowance for 3 years and 7 months.....	25,800
e. Leave pay for 3 years (4,600/30x21x3).....	9,660
f. Prorata leave for 7 months (4,600/30x1.75x7).....	<u>1,878</u>
Total.....	92,538

16. This amount will attract interest at court rates from the date of judgment until payment in full.

17. I direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

18. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF JUNE 2017

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JUDGE

Appearance:

Mr. Onenga for the Claimant

No appearance for the Respondent