



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2403 OF 2012

JOAB ASHITIBA HASHON CLAIMANT

VERSUS

SAMARITAN MEDICAL SERVICES RESPONDENT

JUDGEMENT

1. The claimant is an adult male and the respondent a non-governmental organisation operating as a health care provider and also invests in education and other related areas and services.
2. The claimant was employed by the respondent as an Administrator on 16th February, 2000 at a wage of Kshs.4, 500.00 per month. The claimant was in charge of running the organisation of the respondent and which included administration, accounts, and supervision of workers. He never took leave or off days. The claimant was not registered with the NSSF or NHIF until 2009.
3. The salary was increased over time and the last earned salary was Kshs.22, 500.00 per month.
4. The claim is also that the claimant worked as a construction foreman at the school site from 6th July, 2009 to 14th January, 2010 a period of 180 days. He was to be paid Kshs.2, 000.00 per day which was not done.
5. The claimant was involved in transporting school children to school and back for 6 months and using his motor vehicle KXL 402 at an agreed Kshs.5, 000.00 per month but was never paid.
6. By notice dated 1st December, 2011 to the respondent, the claimant gave a two months resignation from employment. This was after 12 years of diligent service to the respondent. His terminal dues were not paid.
7. The claims are for;
 - a) *Gratuity/service at 30 days for each year at Kshs.270, 000.00;*
 - b) *6 years leave Kshs.135, 000.00;*
 - c) *Work as a foreman for 180 days Kshs.360, 000.00;*
 - d) *Transport costs Kshs.30, 000.00;*
 - e) *Hire of vehicle KXL 402 Kshs.825, 000.00;*

f) Costs and interests.

8. The claimant testified in support of his claim. Upon employment by the respondent, the business was young and required him to work overtime and undertake multiple duties to grow it. As he was the Administrator of the school; the claimant encouraged the student population by carrying the young students in his motor vehicle to advertise the school. The vehicle colours were changed on the understanding that the respondent would meet his costs of Kshs.5, 000.00 for hire. This money was never paid.

9. The claimant would take leave to go and preach in Tanzania in 2006. The leave due is for 6 years not paid.

10. While the claimant was attending to his duties, he was also required to supervise as the foreman of a construction site for the respondent. He was not paid for his time.

Defence

11. In response the respondent admit to employing the claimant but deny all the claims made. The claimant was an administrator for the respondent but was not in charge of accounts as alleged. The respondent had hired a Cashier/Finance officer and who reported to the claimant.

12. The claimant took all his due leave days. He took Saturday half day off and on Sunday he was not at work. The last salary earned was Kshs.22, 500.00 per month after an increment over time.

13. The claimant was not the construction site foreman and whatever role he did was part of his administrative duties. Such were without payment of extra remuneration as these duties were in the course of his normal employment. Where the claimant transported students to and from school, this was not under the respondent agreement. Any claims thereto should not be made from the respondent. The claimant had the duty to collect his costs from the students or parents as the beneficiaries.

14. All terminal dues were paid to the claimant. No off days or leave are due or owing. The claimant being a part-time preacher was able to travel to Tanzania and Uganda during his leave days and thus cannot claim the same as being due. The suit should be dismissed with costs.

15. In evidence the respondent witness was Dr Gloria Khamis a Director of the respondent and who testified that upon the employment of the claimant as the respondent's Administrator, he tendered his resignation notice taking effect on 31st January, 2012. This was accepted by the respondent and the claimant's employment ended.

16. Ms Khamis also testified that when the claimant was employed by the respondent, the respondent was a young entity, just starting non-governmental work in the community and the claimant was undertaking human resource duties. Initially he did not take his annual leave but as a pastor he took some few days off to go on church missions. This was then regularised. It was also part of the claimant's duties to organise for employees to take leave days.

17. The respondent did not instruct the claimant to undertake construction work supervision. When the school construction was on-going, he was only required as the administrator for oversee as his residence was nearby. The claimant was paid for his fuel costs in this regard. For 6 months the claimant was paid for his fuel costs to the construction site.

18. The claimant out of his own volition offered to transport students in his vehicle. He was to be paid by the parents. The respondent was clear that they could not afford to pay for transport. As a sign of goodwill the respondent offered to repair his vehicle. There was no other claim made until the claimant resigned. Any claims made for the use of his vehicle are not in good faith.

19. The claimant as the administrator was required to follow deduction of statutory dues before

remittance. As the responsible officer for the respondent, the claimant failed to register as a member of NSSF or NHIF and should not claim anything as a result of his omissions.

20. At the close of the hearing, both parties agreed to file written submissions. Only the claimant filed his written submissions.

21. It is common ground that the claimant was the Administrator for the respondent earning Kshs.22,500.00 per month. He was issued with a written contract of employment. The claimant resigned from his position with the respondent dated 1st December, 2011 and being a two months' notice taking effect on last day of January, 2012.

22. The claimant has made claims for payment of his service gratuity on the grounds that he was not registered with NSSF and NHIF claims from leave for 6 years on the grounds that he did not take such leave for 6 years due to his role in working for the respondent in its formative years; claims for work at a construction site as extra duties and for costs in transporting students to and from school for the benefit of the respondent. That his vehicle was used for the benefit of the school but the respondent failed to compensate him for its use.

23. Section 20 and 21 of the Employment Act, 2007 makes it the duty of the employer to ensure statutory deductions and effect and remitted as appropriate. It was thus the duty of the respondent as the employer to ensure that the claimant as the employee, his position notwithstanding that he was compliant with statutory requirements with regard to effecting all statutory deductions for all employees inclusive of himself. Such deductions and remittance become apparent where an employer is able to issue an itemised pay statement to each individual employee.

The implications of such a deduction are outlined in the pay statements issued in terms and in accordance with the provisions of section 20 of the Act.

24. Therefore, when the employer fails to ensure the deduction and remittance of the statutory dues as appropriate, the provisions of section 35 (5) and (6) become applicable. The employee whose statutory dues have not been remitted has the benefit of a service pay. The claim by the claimant for the payment of such service pay at 30 days is not explained; in this case I find a payment of 15 days for each year worked as an appropriate compensation in view of the employer and respondent failing in ensuring that his salary had a deduction and remittance of what the requisite statutory dues.

25. Leave is claimed for 6 years. The claim is based on facts that from the year 2006 and going back to 2000 the claimant was deeply involved in running the business and was not able to take leave. The benefits of section 28 of the Employment Act, 2007 have been cited. My reading of section 28 is that leave earned must be taken within 18 months when due and where such a claim predates the applicable law, section 90 of the Employment Act, 2007 comes into effect. The claim is not stated to be in continuum or a continuing injury and going back to 2006. To thus make the claim on the basis of section 28 of the Act, such would offend mandatory provisions of both sections 28 and 90 of the Employment Act, 2007. The claim for leave is not due.

26. The claim for work as a foreman is premised on the grounds that the claimant was made to undertake duties of a foreman at a construction site. It is agreed by both parties that the claimant was at all material times the Administrator of the respondent. Such role was over various other roles including that of finance and cashier. The claimant was overseeing the growth of the respondent. I find no separate contract of employment for the role of a foreman or manager at a construction site. To allow such argument would out rightly negate the claim for dues arising out of the regular and position held by the claimant as an Administrator for the claimant. Had the claim been for overtime hours worked, such would have been a reasonable claim but to claim for costs incurred while undertaking tasks associated with the employer in the course of the role of Administrator defeats the same. Such cannot stand as justified.

27. Use of personal property for the benefit of the employer without written consent, approval or authorisation is clearly not part of the employment contract. Where the claimant had the use of his vehicle

and found it necessary to transport students to and from his place of work, such should have been with clear approval, consent and authority of the respondent where the respondent was making a commitment to pay for the same or that the claimant had the consent and approval of the students and or their parents and guardians. To use his vehicle from his home and on the way pick and deliver students at the respondent school where not approved by the respondent or the parents therefore becomes a personal matter that the claimant must resolve outside his employment. In terms of section 10 of the Employment Act, 2007 the claimant ought to have ensured that all his terms and conditions of employment were reduced into writing. To thus make commitments for and on behalf of the respondent without mutual agreement, he cannot claim for the additional costs therefrom. Such a claim has no justification.

28. The claim for notice pay does not arise in a case of a resignation that was accepted in its terms and conditions.

In conclusion therefore, judgement is hereby entered for the claimant for service pay at Kshs.135,000.00 and each party to bear own costs.

Delivered in open court at Nairobi this 30th day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants - David Muturi & Nancy Bor

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