



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT MOMBASA  
CAUSE NUMBER 372 OF 2014

**BETWEEN**

MARTIN VINDIJA NYAMBUKU.....CLAIMANT

VERSUS

MBUKONI LOGISTICS LIMITED.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. Muchiri Advocate instructed by Jackson Muchiri & Company Advocates for the Claimant*

*Mr. Matheka Advocate instructed by Wandai Matheka & Company Advocates for the Respondent*

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ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on the 7<sup>th</sup> August 2014. He states he was employed by the Respondent as an Operations/ Marketing Assistant, on 1<sup>st</sup> August 2009. He resigned on 4<sup>th</sup> July 2013, citing frustration by the Respondent in performance of his duty. He claims he was forced by the Respondent, to work not less than 3 hours daily, in excess of his normal hours. He was not compensated for the excess hours. Sometimes he was compelled to work on Sundays without pay. He never was allowed to take annual leave. He was not enrolled in any gratuity or service pay scheme. He seeks the following orders against the Respondent:

- a. Service pay for 4 years at Kshs. 32,000.
- b. Annual leave pay of 4 years at Kshs. 32,000.
- c. Overtime of 3 hours for 48 months at Kshs. 162,000.
- d. Certificate of Service.
- e. Costs and Interest.

2. The Respondent filed an Amended Statement of Response on 6<sup>th</sup> July 2015. It is not denied the Claimant was an Employee of the Respondent, and that he resigned voluntarily. He was not compelled to

work excess hours. He was a Field Officer, working predominantly outside the Respondent's Customs Freight Services office, specifically between 8.00 a.m. and 5.00 p.m. Monday to Friday. He went on annual leave or in the alternative, received annual leave pay. He refused to register with the National Social Security Fund, and the Respondent cannot bear the consequences of such refusal. He resigned without notice to the Respondent, and the Respondent demands by way of Counterclaim, Kshs. 8,000 as 1 month notice pay. The Respondent conceded the prayer for annual leave pay but prays the rest of the Claim is dismissed, and Counterclaim allowed.

3. The Claimant testified, and rested his case, on 26<sup>th</sup> June 2015. The Respondent called its Director Mr. Stanley Kavita Mutala, and Supervisor Mr. Geoffrey Mutinda Kithome. They testified on 5<sup>th</sup> October 2015 when the hearing closed. Parties filed their Closing Submissions subsequently, and the Respondent's Counsel made brief highlights on 21<sup>st</sup> October 2015 when the Court reserved its decision for 26<sup>th</sup> February 2016.

4. The Claimant testified the Respondent is a Parcel Delivery Business. He performed general duties. He was frustrated into resignation. He worked long hours. At times he reported for duty at 8.00 a.m. working till 10.00 a.m. He consulted the Manager about the long hours, who promised to consult the Director and revert. He reverted saying he was advised by the Director there were no specific working hours, and the Claimant had to work until he completed his task for the particular day.

5. The Claimant was not paid compensation for the excess hours. He worked Monday to Saturday, and sometimes on Sundays. He was the Operations and Marketing Assistant, and was to look for Clients, and ensure their parcels were delivered. He never went on annual leave. He applied to go once, and was advised by Management if he took annual leave, he should leave never to return. He was not registered with the N.S.S.F. He did not have disciplinary issues.

6. Mr. Nyambuku testified on cross-examination that he voluntarily resigned. He thanked the Employer. He did not make any complaints in the resignation letter. His work involved going to the CFS and the Port. He marketed the Respondent. He was mobile. He would get in touch with his Boss whenever he secured a Client. He would be involved in loading. There was sufficient work to engage the Claimant daily. There were 8 Trucks. He would leave for home once the Truck left the premises. The Supervisor Geoffrey called the Claimant daily. The Claimant did not ask for overtime pay while in employment. He did not seek annual leave in writing. He asked Mutinda and Wambua about overtime by word of mouth. The Director was aware about the Claimant's grievances, but did not resolve them. The Claimant did not just wake up and resign; he gave notice by word of mouth. He finished his testimony on redirection with the clarification that the contract only gave the reporting hour as 8.00 a.m. The departure time was not indicated.

7. The Claimant submits he was not registered under any scheme contemplated by Section 35[6] of the Employment Act 2007, and is therefore entitled to service pay. The Respondent was under obligation to register the Claimant with the N.S.S.F in accordance with Section 19 [1] of the N.S.S.F Act 2013. Annual leave pay is admitted. On overtime pay the Claimant urges the Court to adopt ***Industrial Court Cause Number 237 'B' of 2014 between Andrew Mwongela v. Mbukoni Logistics Limited*** [present Respondent], where the Court found the Respondent liable to pay for overtime work done by Claimant's Colleague, Mr. Mwongela. It is submitted the facts, circumstances and the law in the 2 cases match.

8. Stanley Kavita Mutala told the Court the Claimant was the Respondent's Employee from 2009. He voluntarily resigned in June 2013. He handed the Respondent a letter dated 4<sup>th</sup> July 2013. He was a Field Officer. He was not overworked. The day after he left, Mutala heard the Claimant was working for another Employer.

9. The Respondent is involved in Dry Port Transportation of CFSs. One cannot work beyond 5.00 p.m. He was to be at the Container Depot at Changamwe which opened at 9.00 a.m. to 5.00 p.m. The Claimant looked for work from the Clearing Agents. He did not report to the Respondent's City Centre Office. Sunday was rest day for everyone. The Respondent was ready to pay N.S.S.F contribution if an Employee

registered. Service pay is not merited. Annual leave pay is conceded. There were no excess hours worked to justify overtime pay. Truck loading took no more than 2 hours. The Certificate of Service is ready for the Claimant's collection. The Director testified on cross-examination that the Claimant's contract stated, work started at 8.00 a.m. with no indication on closing time. He agreed the contract should have shown the end time. The default was not deliberate. The Witness did not know if it was the duty of the Employer to register Employees with the N.S.S.F. Mutala underlined that CFS opened at 9.00 a.m. and closed at 5.00 p.m.

10. The Supervisor Mr. Kithome testified the CFS opened at 9.00 a.m. to 5.00 p.m. The Claimant resigned. He did not give any reason for his decision to the Supervisor. The Claimant did not work excess hours. Trucks would be loaded, leave and on occasions, no work remained to be done. Cross-examined, Kithome told the Court there were occasions when an Employee could leave work late. Kithome had himself resigned at one time on salary grievance. He consulted the Director, resolved the Grievance and resumed duty, he told the Court on redirection.

11. The Respondent submits its Counterclaim on notice pay is undefended and should therefore be allowed. The prayer for annual leave pay is conceded. Under Section 35[1] [c] of the Employment Act 2007, an Employee is eligible for service pay when that Employee has issued notice of termination. The Claimant did not issue notice and is therefore ineligible. The case on *Mwongela* which the Claimant relies on in urging the Court to grant overtime pay was undefended. In the present case, the Respondent called evidence showing the Claimant had flexible working hours. The omission on the departure time, in the contract of employment, was through a typographical error. The hours of work were shown in the evidence given to the Court by the Respondent's Witnesses.

*The Court Finds:*

12. Parties agree the Claimant was employed by the Respondent as Operations/ Marketing Assistant on 1<sup>st</sup> August 2009 at a salary of Kshs. 8,000 per month. He resigned voluntarily on 4<sup>th</sup> July 2013. The Respondent agrees he was at the time of resignation, owed annual leave days, valued at Kshs. 32,000. ***The Claimant is granted Kshs. 32,000 in annual leave pay.***

13. The Claimant did not notify the Respondent on resignation. He wrote the resignation letter on 4<sup>th</sup> July 2013 and left the same day. The contractual clause on termination is incomprehensible on the length on termination notice. Parties would have to look at the law on termination notice contained in Sections 35 [1] [c] and 36 of the Employment Act. The Claimant was paid at a monthly interval, and entitled to receive or give 1 month notice of termination, or receive from, or pay to the Employer, 1 month salary in lieu of notice. The Claimant initiated termination but gave no written notice of 1 month to the Respondent. ***He is therefore liable to pay to the Respondent 1 month salary in lieu of notice at Kshs. 8,000. It is ordered he does so, in terms of the Counterclaim.***

14. Section 35 [1] describes a contract of service. It states:

*“A contract of service, not being a contract to perform specific work without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –*

a.

b.

c. *Where the contract is to pay wages or salary periodically at intervals of, or exceeding one month or contract terminable by either Party at the end of the period of 28 days next following the giving of notice in writing.”*

15. Section 35 [5] on service pay states:

*“An Employee whose contract of service has been terminated under Section 35[1] [c] shall be entitled to service pay for every year worked, the terms of which shall be fixed.”*

Subsection [6] makes Employees who are registered under Provident Fund Schemes, Beneficiaries of Gratuity under CBAs, Members of the N.S.S.F and other Schemes more favourable than the Service Pay Scheme created under Section 35 [5], ineligible to be paid service pay.

16. The Court does not agree that the Claimant is ineligible, simply because he did not issue the Respondent notice of termination. His contract was a contract deemed terminable on issue of 1 month notice or payment of 1 month salary in lieu of notice. His failure to issue notice did not change the character of his contract which was terminable through issue of 1 month notice or payment of salary in lieu of such notice. It has been ordered the Claimant pays the Respondent 1 month salary in lieu of notice because it is recognized the contract fell under the contracts of service described in Section 35[1] [c]. This Section is not about eligibility to service pay. It describes what a contract of service is. Section 35[5] and [6] does not make an Employee who has failed to issue a notice, ineligible to service pay. Failure to issue notice has its own consequences and remedy.

17. The Claimant was not registered to the N.S.S.F or any other Scheme contemplated in Section 35[6]. He is eligible to service pay. His salary was Kshs. 8,000. He worked for 4 years. Court's have normally adopted 15 days' salary for every year completed in service from the Wage Orders and from the redundancy law in Section 40 of the Act. This Court has however argued that 15 days' salary in the Wage Orders is a floor, not a ceiling, and regard must be had for the changes in the cost of living from the date these Wage Instruments were put in place, in fixing a reasonable base rate. The Court allows the claim for service pay based on 18 days' salary for every year completed in service, not the 30 days' salary, the Claimant appears to have fixed for himself. ***Service pay is granted at Kshs. 22,153.***

18. ***Mwongela v. Mbukoni Logistics*** was heard and determined *ex parte*. The present cause has benefited from the evidence of both Parties. Overtime pay granted in Mbukoni was granted on the strength of the Claimant's unchallenged evidence. The Director and the Company Supervisor presented their evidence in the present proceedings. They stated the CFS opened at 9.00 a.m. closing at 5.00 p.m. It was not operational around the clock so as to tie down the Employees. The Claimant was not convincing in view of the evidence given by the Respondent. He stated haltingly, that he reported to work at 8.00 a.m. and worked to 9.00 p.m. or even 10.00 p.m. He worked Monday to Saturday... sometimes even on Sundays. He also agreed he was an outfield Officer, who spent time on his own, unsupervised, looking for Parcel Delivery Clients. This was not an Employee tied down to the workplace with a clocking system to guide his hours of work. The Respondent gave the working hours in paragraph 6 of the Amended Response, and in the evidence of its Witnesses, something which was lacking, in the case of ***Mwongela***. The default in the contract, on the time work ended was explained satisfactorily to the Court in the Respondent's evidence. The CFS operated within specific hour. There was nothing to keep the Claimant working excess hours so as to merit overtime pay. There was no work performed on Sundays. The prayer for overtime pay is declined.

19. The Respondent shall release to the Claimant his Certificate of Service forthwith.

20. No order on the cost and interest. IN SUM, IT IS ORDERED: -

***[a] The Respondent shall pay to the Claimant annual leave pay at Kshs. 32,000 and service pay at Kshs.22,153- total Kshs. 54,153.***

***[b] Certificate of Service to issue.***

***[c] No order on the costs and interest.***

**Dated and delivered at Mombasa this 26<sup>th</sup> day of February, 2016.**

**James Rika**

**Judge**

