



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1694 OF 2014**

**FRANCIS MWAURA GITAU.....CLAIMANT**

**VS**

**NYALA TEA ESTATE LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 29th September 2014 and filed in Court on even date the Claimant has sued the Respondent for unlawful dismissal and failure to pay terminal dues. The Respondent did not file a response and the matter therefore proceeded as an undefended claim.

**The Claimant's Case**

2. In his Memorandum of Claim, the Claimant states that he was employed by the Respondent on 23rd January 2011 in the position of Security Guard. His monthly salary as at the time of leaving employment was Kshs. 7,643. The Claimant however testified that he was employed in January 2008 at a daily rate of Kshs.250.00.

3. The Claimant further states that on 2nd February 2014, he was asked by his supervisor, Paul Nthiga to report to the Manager, Jared T. Kamau the following day. Upon meeting Kamau, the Claimant was informed that operations had been scaled down and he would therefore be re-deployed. The Claimant was however never re-deployed and upon visiting the Respondent's premises to inquire on the future of his employment he was locked out. He pleads that he was not paid his terminal dues.

4. The Claimant's claim is as follows:

- a) A declaration that the termination of his employment was unlawful and unfair
- b) One month's salary in lieu of notice (minimum wage).....Kshs.9,295.00
- c) House allowance for the entire period of service.....167,310.00
- d) Leave pay for the entire period of service.....27,876.00
- e) Overtime compensation (public holidays).....20,449.00

- f) Overtime compensation (off days).....89,232.00
- g) Overtime compensation (extra hours worked).....250,965.00
- h) Underpayment (2011-2014).....59,472.00
- i) Service gratuity for 3 years.....13,943.00
- j) 12 months' salary in compensation for unlawful termination.....111,540.00
- k) Costs plus interest

### **Findings and Determination**

5. The issues for determination in this case are as follows:

- a) Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by this Court;
- b) Whether the Claimant has made out a case for unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

### **Employment Relationship?**

6. This case proceeded as an undefended claim and there was therefore no admission by the Respondent with regard to the existence of an employment relationship between the Claimant and itself. That being the case, the Court must ask itself whether the Claimant has, on a balance of probability, established an employment relationship capable of enforcement.

7. In the final submissions filed on behalf of the Claimant, a copy of his provisional National Social Security Fund (NSSF) statement of account for period between 1st January 1973 and 28th February 2015 was attached. This statement does not reflect the Respondent as the Claimant's employer.

8. Moreover, the Claimant testified that his salary was paid monthly through the bank but did not produce any records to prove this. Additionally, the Claimant testified that he was terminated alongside his colleague but did not bother to call this colleague to corroborate his testimony.

9. This Court is fully aware that it is the responsibility of the employer to document the employment relationship. However, even in cases where the employer fails to do so, the employee still bears the burden of establishing the existence of an employment relationship either through documentary evidence or corroborative *viva voce* evidence.

10. In my view, the Claimant's word alone is not enough to prove the existence of an employment relationship. In the instant case, the Claimant's word was all the more doubtful because the date stated in the Memorandum of Claim as the commencement date of his employment was different from the one given in his testimony before the Court.

11. Overall, the Court finds that the Claimant failed to establish the existence of an employment relationship between himself and the Respondent and his claim therefore has no basis and is dismissed with no order for costs.

12. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF FEBRUARY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Wathome for the Claimant

No appearance for the Respondent