



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 133 OF 2014**

**PETER MAKAU MBOKA..... CLAIMANT**

*VERSUS*

**M/S APPOLO TOURS AND TRAVEL LIMITED....RESPONDENT**

Mr Okioma for Claimant

Mr Mugisha for Respondent

**JUDGMENT**

1. The employment of the Claimant was terminated with effect from 31<sup>st</sup> August 2013. Upon termination he was offered;
  - i. Kshs 15,984 in lieu of one month notice
  - ii. Kshs 16,886 being 206 hours overtime
  - iii. Kshs 42,624 severance pay calculated at 20 days salary for each completed year of service.
  - iv. Kshs 8,584 salary arrears in respect of underpayment for the month of March and June 2013 in terms of the CBA.
2. The Claimant was offered a cheque for Kshs 89,406 which he declined to collect. The Claimant filed this suit on 6<sup>th</sup> February 2014 seeking;
  - a. Issuance of a certificate of service
  - b. A sum of Kshs 807,615.15 tabulated as follows;
    - i. One months salary in lieu of leave Kshs 15,984
    - ii. Payment in lieu of 3 years leave not taken (75) days Kshs 46,107.70
    - iii. Leave travelling allowance @ 4000 per year for 3 years not taken
    - iv. Severance pay for 3 years served calculated at 22 days per year Kshs 40,574.75
    - v. Wage underpayments 92,277
    - vi. 5832 hours overtime Kshs 398,370.45
    - vii. 516 hours worked during public holidays at double rate Kshs 70,493.55
    - viii. 12 months maximum compensation for unlawful and unfair termination of employment.
3. The claimant relies on the memorandum of claim and annexures 'pmm (i) to (vi). The claimant also testified under oath in support of the particulars of claim and filed written submissions at the close of the hearing of the suit. The claimant prays for the reliefs sought.
4. The Respondent filed a memorandum of defence on 20<sup>th</sup> February 2014 and a list of bundles of documents on 16<sup>th</sup> July 2015 which it relies upon. The Respondent also called Paul Mutiso Ndungu who gave oral testimony in support of case. The Respondent filed final written submissions upon close of its case.

5. The Respondent denies all the particulars of claim except the admissions made in respect of terminal benefits in the sum of Kshs 89,406 duly offered to the Claimant and a cheque written in respect thereof but the Claimant had declined to take. The Respondent reiterates the offer and prays that the entire suit be dismissed with costs.

### **Issues for determination**

6. Upon careful consideration of the evidence before court from the parties, the following issues stand out for determination;
  - i. Whether the Claimant was owed the various terminal benefits set out in the memorandum of claim and denied by the Respondent.
  - ii. Whether or not the termination of the Claimant was for a valid reason and if the same was done in terms of a fair procedure.
7. The Court will consider each of the prayers for payment of terminal benefit *seriatim* as follows;

### **Underpayment**

8. The Claimant seeks payment of Kshs 92,277 being underpayment as follows:
  - a. Underpayment of Kshs 515.10 from 21<sup>st</sup> August 2009 to 1<sup>st</sup> May 2010 when he was paid Kshs 9,000 although legal notice No 70 of 21<sup>st</sup> May 2009 provided for a minimum wage of Kshs 9,515 for light van drivers
  - b. An underpayment of Kshs 1,466.15 from 1<sup>st</sup> May 2010 to 1<sup>st</sup> May 2011 when the Respondent paid him Kshs 9,000 while legal notice no 98 of 1<sup>st</sup> May 2010 provided for minimum wage of Kshs 10,466.15 and
  - c. Underpayment of Kshs 1774.85 from 1<sup>st</sup> May 2011 when Respondent paid kshs 9,000 and legal notice No. 64 of 1<sup>st</sup> May 2011 provided for minimum payment of Kshs 11,744.85.
9. It is the court's considered view that the claimant was employed in terms of a car rental master lease agreement between Esser Telecom and the Respondent from September 2009. In terms of the agreement each driver was paid Kshs 15,000 per month. The Claimant earned Kshs 15,000 from day one and documentation from page 5 to 74 of the Respondents list of documents indeed show that the drivers including the claimant were paid Kshs 15,000 less statutory deductions. As at the time the claimant left employment it is not in dispute he earned Kshs 15,984.
10. At all material times, the claimant was a member of Transport workers Union (K) and the CBA running from July 20<sup>th</sup> February 2008 to June 2014 provided for minimum wage of Kshs 12,000 for grade B drivers. The Claimant belonged to this category. It is the court's finding that the Respondent did not underpay the claimant at all material times. The onus to prove on a balance of probability the relief sought is on he who alleges. The Claimant has failed to discharge this onus and the claim for Kshs 92,277 in respect of underpayment is dismissed.
11. The Respondent however admitted underpaying the Claimant for the month of March, April and June 2013 in the sum of Kshs 8,585. This award is allowed accordingly.

### **Overtime and Public holidays**

12. The Claimant seeks Kshs 398,370.45 for 5832 hours overtime and Kshs 70,493.55 for 516 hours worked during public holidays. Again the onus is on the Claimant to prove on a balance of probability that he is owed the amount claimed.
13. The Respondent has demonstrated by producing the payslip of the Claimant for the month of August 2013 that the Respondent usually computed and paid out overtime to the claimant and other drivers. In this particular month the claimant was paid Kshs 5,000 overtime. The Claimant did not produce any documentary evidence to show that he had worked overtime for three years and the same was not paid. The claimant has also not tendered any evidence to show that he had

- worked on specific public holiday and was not paid a salary at double rate. The Claimant was employed on a monthly basis and received a monthly salary.
14. The Court finds that the Respondent did pay overtime to drivers who worked overtime. Again the claimant has failed to prove on a balance of probability that he is owed the claimed amount in respect of normal overtime and payment for working during public holidays. The Claims are therefore dismissed for want of prove except payment of Kshs 16,886 in respect of 206 unpaid overtime hours admitted by the Respondent.

**Payment in lieu of Leave days not taken for 3 years and Leave travelling allowance.**

15. The Claimant sought Kshs 46,107 for leave days not taken for a period of three years. According to the Respondent, as at 31<sup>st</sup> August 2013, the Claimant had only 10 days leave pending which the Respondent offered to pay in lieu. The Respondent further informed the court that in the year 2012 the claimant had 24 days pending and 16 days for the year 2013. However, in February 2013 the claimant went on leave for 30 days hence the balance of 10 days. The claimant was paid leave travelling allowance whenever he took leave.
16. The leave application forms at page 95 of the Respondent's bundle of documents clearly show that the Claimant went on leave for 30 days between 2<sup>nd</sup> May 2013 to 6<sup>th</sup> June 2013, a fact not disclosed by the claimant in his statement of claim. It is the court's finding that the Claimant is only owed payment in lieu of 10 days leave in the sum of Kshs 5,328.

**Severance Pay**

17. The claim was fully admitted and Claimant offered to pay Kshs 42,624 which the court awards accordingly.

**Notice Pay**

18. This claim was duly admitted and the court awards the Claimant Kshs 15,984 in lieu of notice.

**Issue ii**

19. A question arises as to whether the termination of employment of the Claimant by the respondent was for a valid reason and if that be the case, if the termination was done in terms of a fair procedure. It is now trite that an employer who wishes to terminate the employment of an employee must in terms of section 43 as read with section 45 of the Employment Act, 2007 have a valid reason for the termination.
20. It is also settled that under section 41 of the Employment Act, the employer who wishes to terminate the employment of an employee for misconduct or poor work performance must afford the employee opportunity to explain why the termination should not take place and in the said forum afford the employee to be accompanied by a union official if the employee is a union member or by a colleague of choice. In both cases, the employee may opt not to be so accompanied.
21. The Claimant told the court that on 31<sup>st</sup> August 2013 he was called to the Human Resource Office and was given a letter of termination. That the reason given in the letter for termination is that the Claimant had refused to travel outside Nairobi contrary to company rules. The letter was produced as exhibit I. the letter is signed by Mr Asif Padamshi, Managing Director.
22. The Claimant disputed that he had refused to travel outside Nairobi and states that he was not given a warning or a show cause letter prior to the date of termination. The Claimant also stated that no disciplinary hearing was held to afford him opportunity to defend himself against these untrue allegations. The Claimant was also not afforded opportunity to be represented by a union representative since he was a union member. The witness for the Respondent Mr Paul Mutiso Ndungu did not contradict the Claimant's evidence in this respect.
23. The Court finds that the Claimant's employment was not terminated for a valid reason in that whereas the Claimant refutes the allegations in the letter of termination he was not presented with any opportunity to dispute the allegations he clearly told the court are false. No letter to show

- cause nor a disciplinary hearing was held prior.
24. The claimant has proved on a balance of probability that the termination of his employment was in violation of section 41, 43 and 45 of the Employment Act, 2007 and was therefore wrongful and unfair and the court so finds.
25. The Claimant is therefore entitled to compensation in terms of section 49(1) as read with section 49(4) of the Employment Act 2007. The Claimant has served the Respondent with a clean record for a period of 3 years. He lost his means of income abruptly and without warning. He was not given a certificate of service to help him look for alternative employment. The Claimant suffered loss and damage as a result and is entitled to eight (8) months' salary as compensation for the wrongful and unfair termination of employment in the sum of Kshs  $(15,984 \times 8) = 127,872$ .
26. In the final analysis the Claimant is awarded as against the Respondent;
- i. Kshs 89,406 terminal benefits admitted by the Respondent
  - ii. Kshs 5,328 in lieu of 10 days leave
  - iii. Kshs 127,872 compensation for the wrongful and unfair termination of employment

**Total award is Kshs 222,606**

- iv. The award is payable with interest at court rates from date of filing suit till payment in full
- v. The Respondent to pay the costs of the suit.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of March 2016**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**