



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1144 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th April 2016)

PETER MBUGUA.....CLAIMANT

VERSUS

JAMES MUIGAI THUNGU T/AELDORET EXPRESS CO. LTD...RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant Peter Mbugua filed his Memorandum of Claim through the firm of Robert Muthama & Associates Advocates on 11.07.2011 and an amended Memorandum of Claim on 20.1.2015. He stated that the issues in dispute between the parties are:

i. *Issuance of a Certificate of Service as required by section 15 of the Employment Act 2007.*

ii. *Payment of terminal dues made up as follows:*

• <i>Salary arrears for November–April 2011</i>	-	108,000/=
• <i>One months salary in lieu of notice</i>	-	18,000/=
• <i>Service gratuity @ 15 days per year worked</i>		
<i>Shs. 9,000 x 10 years</i>	-	90,000/=
• <i>Leave for 10 years</i>	-	180,000/=
• <i>Twelve months compensation under Section 15</i>		
<i>of the Labour Institutions Act for</i>		
<i>loss of employment</i>	-	216,000/=
<i>Grand Total</i>	-	612,000/=

2. The Claimant avers that he was employed by the Respondent with effect from August 2001 to April 2011 at an average salary of Shs. 18,000/= per month. He states that he was an exemplary employee and executed his duties diligently but the Respondent failed and/or refused to pay his salary in time or at all

such that by 6th April, 2011, he had unpaid salary of Shs. 108,000/=.

3. That the Respondent on 6th April, 2011, without any reasonable cause verbally terminated the Claimant's employment and refused to pay his salary arrears and terminal dues despite demand being made through the Ministry of labour and his advocates. He states that he is lawfully entitled to a certificate of service from the respondent, the payment of his salary arrears and terminal dues.

4. He therefore prays for:

- i. **Kshs. 612,000/=**
- ii. **Costs of this suit**
- iii. **Interest on (i) and (ii) above**
- iv. **Any other relief this Honourable Court may find just to grant.**

5. The Respondent filed their Replying Memorandum on 8th August, 2011, where they state that the Claimant together with others wrote a letter to the Ministry of Labour reporting a trade dispute claiming to have been wrongfully dismissed and the Ministry of Labour responded by inviting the Respondent's officials for a meeting.

6. The Respondent's operations manager attended the meeting on 13.7.2011 and denied having dismissed the Claimant and his counterparts but rather accused them of absconding duty. During the meeting it is alleged that the Respondent agreed that they return to work pending settlement of their salaries. They state that they were awaiting for a comment from the labour official when the instant cause was filed. They state that the Claimant collected his salary for the months of November, 2010 to February 2011 but has not worked from March 2011 to date.

7. The Respondent denies the pay package claimed by the Claimant and states that his package was as follows:

- a. **Gross pay – Kshs. 6000/=**
- b. **Travelling allowance – Kshs. 400/= per day paid monthly in advance.**
- c. **Less N.H.I.F. – Kshs 140/=**
- d. **Less N.S.S.F. – Kshs. 200/=**

8. The Respondent urges the Court to dismiss the Claimant's case with costs.

9. In evidence the Claimant stated that he had worked for the Respondent for ten (10) years from August 2001 to April 2011 at which time he was earning Kshs. 18,000/= per month. He stated that he left the Respondent due to complaining of low pay leading to his dismissal.

10. He stated that he had not been paid for a whole year and when he and his colleagues approached the Respondent on the issue they were told there was no money. At this point he states they went to the Labour office whereby the Respondents were summoned to appear and still the results were not forthcoming. He denied ever absconding duty but as alleged by the Respondent but rather he was sacked. He prays for his claim to be allowed.

11. In cross examination he denied absconding from duty and also denied ever being paid salary from November 2010 to April 2011. He denied that the signature on App. B was his and maintained that he was not paid for six months prior to his dismissal. He also states that he was terminated when he went to ask for his pay and was not given a termination letter.

12. The Respondent put up one witness one Joseph Nganga Thungu who is a director of the Respondent. He denied that the Claimant worked with them from 2001 but stated that he was employed in November 2010 to March 2011. It was RW1's contention that they did not owe the Claimant any money and that his basic salary before deductions was Shs. 6,000/= per month and Shs. 400/= per day as his allowance and referred to a payment voucher produced by the Claimant as PM2. RW1 also stated that the Plaintiff was

never sacked but absconded from duty.

13. In cross examination he stated that it is the Claimant who never came to collect his dues and they are ready to pay what they believe he is duly entitled to which is Shs. 22,640. He denied that the signature on App. B is forged irrespective of the fact that it shows that the Claimant received his pay in November 2010 but the document was signed on 4.6.11. They admit that the Claimant was not issued with a certificate of service because he has never requested for it.

14. The Respondent submits that there is no evidence that the Claimant was employed in 2001 other than the PSV badge issued on 20th January, 2010 and that this is what should guide the Court. In view of the fact that the Claimant only worked for the Respondent for a few months he is not entitled to the leave pay claimed. In any event, they state that all their employees are entitled to leave when business is low and the Claimant was also entitled to it.

15. The Claimant on the other hand states that this is just a mere denial by the Respondent since they allege that he only worked for them from November 2010 to April 2011 whereas his PSV badge had been issued nine months earlier. Further that in the Respondent's pay roll the Claimant is number 056 out of a total 152 employees which is a clear indication that the Claimant was not a new employee.

16. The Respondent further states that the Claimants gross pay was Shs. 6,000 and a travelling allowance of Shs. 400/= per day paid in advance. The Claimants submit that this is untrue as the salary voucher dated 5.4.2011 marked PM15 shows that the Claimant was paid Shs. 72000 as salary for 4 months translating to Shs. 18,000/= per month.

17. The Respondent alleges that the Claimant is not entitled to salary in lieu of notice since he was never terminated. The Claimant on the other hand submits that he was terminated verbally and as such notice pay is due. The Respondent also feels that the Claimant is not entitled to Service pay because he was a registered N.S.S.F. member. The parties feel they each have a good case and seek for their prayers to be allowed.

18. Having considered evidence of the parties, the issues for determination are as follows:

1. ***Whether the Claimant worked for Respondent and during which period.***
2. ***If so, how the employment of the Claimant with Respondent ended.***
3. ***Whether the Claimant is entitled to the prayers sought.***

19. On the 1st issue, Claimant contends that he worked for Respondent from August 2001 to April 2011 as a conductor. He sought to rely on PM1 – the employment card as proof as this employment PM1 was issued on 20/1/2010.

20. The Respondents on their part deny dismissing the Claimant from 2001 as pleaded but state that he absconded.

21. In the Memorandum of Reply, the Respondents didn't answer to the fact of Claimant being employed on 20.1.2001. They only state that the Claimant reported them to the Labour Officer and they attended a meeting on 13.7.2011 and denied dismissing him. They stated that infact, the Claimant had absconded duty.

22. The Respondent further stated that the Claimant collected his salary for November 2010 to February 2011 but didn't work for the month of March 2011. However, the voucher PM2 shows that the payment received on 5/4/2011 was payment for November – December 2010. This is a pointer to the fact that Claimant worked for Respondent way back in 2010 and his payroll number was 056 and by the time of leaving employment in 2011 April, he had already served for more than one year.

23. The Respondent had never issued him with any letter of appointment.

24. Under Section 10(7) of Employment Act:

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

25. The envisaged letter of contract is supposed to be written within 3 months from the time of employment as provided for under Section 9 of Employment Act 2007.

26. The Respondent failed to issue the Claimant with a written contract and therefore the onus of proving or disproving any term of the contract lies on them.

27. The Respondent should show when they employed Claimant and they have failed to do so.

28. I therefore find that from Appendix PM 1 the Claimant was issued with the employment card on 20-1-2010 and from this I find that he was also not paid his salary arrears as pleaded and the Respondent have not shown any evidence that they paid the alleged arrears.

29. I therefore find for the Claimant and award him as follows:

1. **Salary arrears November – April 2011 – 108,000/=**
2. **One months salary in lieu of notice = 18,000/=**
3. **12 months compensation for unlawful termination**

= 18,000 x 12 = 216,000/=

TOTAL = 342,000/=

4. **Service gratuity is not payable as Claimant was a member of NSSF.**
5. **The Claimant should be issued with a Certificate of Service.**
6. **The Respondent to pay costs of this suit.**

Read in open Court this 20th day of April, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent