



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1342 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th May 2016)

DAVID MUTISOCLAIMANT

VERSUS

CITY CLOCK (K) LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed an Amended Memorandum of Claim dated 15th October 2012 where they pray for judgment against the Respondent for:
 - a. *Benefits and damages for distress mental agony annoyance caused by travelling from Kenya to Tanzania and Uganda and special damages caused to my family for the last 16 years in wilderness assessed at Kshs. 30,000,000.00.*
 - b. *Hardship Allowance.*
 - c. *(i) Unpaid salary for 4 years (2002 – 2005) 104,300*
 $x 4 x 12 = \text{Kshs. } 5,006,400).$
(ii) Leave Allowance for 11 years (11 x Kshs. 3,476.70
 $x 21 = \text{Kshs. } 803,110)$
(iii) House Allowance for 16 years (16 x 12 x 41,500 =
 $\text{kshs}7,689,000)$
(iv) Service for 18 years
(v) Unpaid Overtime (12 x 15 x 104,300 = Kshs.18,774,000)
(vi) Gratuity (19 x Kshs. 104,300 x 15 = Kshs. 20,025,600)
 - d. *Travelling expenses 5 times after retirement at (USD 2500 = Kshs. 207,500).*

- e. *10% share of the Company.*
- f. *Costs and interest of this suit.*

Facts of the case

- 2. The Claimant was employed by the Respondent on or about January 1993 as a Technician. He was posted to Uganda in 1995 earning a Salary of Ushs. 318,201 and later promoted to top workshop manager in 1996 and worked there until 2001.
- 3. In the year 2001 the Claimant was promoted to operations manager and posted to Dar es Salaam Tanzania where he was to receive a salary of USD 650 and later USD 950.
- 4. The Claimant submits that after his transfer to Tanzania, he was not paid his salary between 2001 and 2004 until February 2005 where he was issued with an appointment letter and paid the salary in USD 650 and later USD 950, moreover, he states that via verbal agreement with Mr. Tilman Wolf Proskie, the Chief Executive Officer of the Respondents Company, he was to receive 10% of the company shares.
- 5. The Claimant further states that he was not paid his leave allowance for a period of eleven years from 1997 until 2009. This was going against Section 28 (1)(a) of the Employment Act 2007 which states that:

“An Employee shall be entitled after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay”.

- 6. Further the Claimant prays for House Allowance as is entitled under Section 31 of the Employment Act 2007:

“(1) An employer shall at all times at his own expenses, provide reasonable housing accommodating for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, to obtain reasonable accommodation”.

(2) This section shall not apply to an employee whose contract of service:

- a. ***Contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***
- 7. The Claimant states that the consolidated salary given to the Claimant was not inclusive of his housing allowance and that he is duly entitled to the allowance and prays for the Court to award the same.
- 8. The Claimant further states that he is entitled to gratuity and refers to a letter dated 14th of March 2011 from the Group Chief Executive City Clock (K) addressed to the Claimant stipulating that the Company shall pay an ex gratia payment of 15 calendar days for every completed year of service, and feels that it is only in order that such sums are paid.
- 9. The Claimant also states that he is entitled to service pay for 18 years worked. He argues that membership to NSSF should not bar him from this entitlement and rely on the case of **Elijah Kipkoros Tonui v. Ngara Opticians t/a Bright Eyes Limited** where Justice Rika stated:

“Basic membership to the National Security Fund or other schemes is not in itself a bar to an employee accessing service pay under Section 35(5)...”

10. The Respondents filed a response to the matter dated 4th October 2012 where they admit that the Claimant was in their employment but deny the assertion that his salary was unpaid between 2001 and 2004 and the verbal agreement for transfer of 10% of the Company's shares putting the Claimant to strict proof of those allegations.

11. Further, the Respondent sets out a counterclaim stating the following:

- a. ***That the Respondents avers that as a result of the Claimant's failure to travel to Dar-es-Salaam to clear with the management on the date indicated on the letter dated 14th March 2011, and on subsequent dates agreed between the Respondent's Management and the Claimant when the clearing was adjourned to, the Respondent incurred travelling expenses, specifically the Group Chief Executive incurred travelling expenses of USD 2,624(2 trips), the General Manager incurred travelling expenses of USD 1,516 (2 trips) while the Chief Accountant incurred travelling expenses of USD 2,235 (3 trips) all amounting to USD 6,375.***
- b. ***The Respondent avers that as a result of the Claimant's failure to clear from the quarters where he was housed from April 2011 to August 2012, 16 months, the Respondent incurred a storage fee of USD 200 a month amounting to USD 3,200.***
- c. ***Accordingly, the Respondent's claim against the Claimant is for a total USD 9,575 plus interest.***

12. The Respondent rebuffs the claims that the Claimant worked as a driver, crane operator and guard in the Tanzania office as he failed to prove them in examination and in evidence and relies on the case of **David Getare Nyangau v Houseman General Contractors Ltd [2013 eKLR]** where Linnet Ndolo J stated that:

"A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that "he who alleges must prove".

13. They further state that the Claimant's allegations that he was not paid his salary between the year 2002 – 2005 was unwarranted as the Claimant was paid his salary as evidenced by the petty cash vouchers attached where loans were advanced to him and deducted from his salary, letters where the Respondent instructed the manager of Stanbic Bank Ltd for Uganda and Tanzania to effect transfers of staff salaries as well as pay slips for the period of 2001 to 2005 which are attached to the bundle of documents. He was also maintained on the Kenyan pay roll for payment of NSSF and NHIF.

14. The allegations that his salary remained unpaid are mere allegations and the Claimant had failed to prove them. They rely on the case of **Techno Service Limited v Michael Karue Wachira [2013] eKLR** where Abuodha J stated that:

"It is a settled rule of evidence that he who alleges must prove. That is to say any person who wants a court or a tribunal to make a finding in his or her favor concerning a question in dispute must as a matter of duty bear the burden of providing facts and evidence to persuade the court or tribunal that they are entitled to a determination in their favor.."

15. As to the agreement that the Claimant receives 10% of the Company's shares the Respondent insists that these are mere allegations which the Claimant failed to prove.

16. The Claimant's claim for hardship allowance is also disputed as the Respondent reiterates that the letters of appointment provided for a consolidated salary where there was no provision for hardship allowance. The Claimant was working in Uganda and Tanzania in areas which cannot be classified as hardship areas. They rely on the case of **Kenya Ferry Service Limited v Dock Workers Union (Ferry Branch) [2015]** where Justice Rika stated that:

“The introduction of hardship allowance in the Collective Bargaining Agreement has not been justified by Respondent. Hardship allowance is given to employees who are subjected to work environment which would render them liable to bodily harm. It is not the same as extraneous duty allowance, which is made in consideration for additional responsibilities....”

17. The Respondent therefore states that Uganda and Tanzania do not fit within hardship areas and the claim should fail.

18. As to the claim for unpaid leave, the Respondent states that such claim should fail as the Claimant has failed to provide any documentary evidence to support the allegations. They aver that on their part they endeavored to ensure that the Claimant was entitled to his 21 days leave with full pay and where necessary was paid in lieu of leave.

19. As to the claim for house allowance, the Respondent states that the letter of appointment clearly shows that the Claimant was to be provided with accommodation including all basic amenities such as water and electricity. His claim that he used to sleep behind a workshop are untrue and asks the Judge to rely on the case of **Samson Mwangi Gaita v Kensalt [2013] eKLR** where the Judge Onesmus Makau stated that:

“The claim for arrears in house allowance is also dismissed because the salary paid was consolidated..”

20. The Respondents state that the claim for service pay should fail as the Claimant was being paid his statutory deduction. They state that where an employee is a member of the National Social Security Fund, they are not entitled to service pay. They rely on the case of **Samson Mwangi Gaita v Kensalt** supra where Judge Onesmus Makau stated:

“Secondly the court has considered the issue of relief sought and is agreeable that the Claimant is entitled to some accrued employment benefits with respect to the contract of service between December 2007 and 11th August 2010. In assessing the benefits payable, the court has considered that the Claimant was acting in person and asked the court to award other reliefs that it considers just. In the other period between 2007 – 2010, the Claimant was not a member of a pension scheme but was a contributor of NSSF. Under Section 35 of the Employment Act, he loses any claim for service pay. He is not qualified to claim severance pay because he was not declared redundant.”

21. The claim that the Claimant was unable to spend time with family should also fail because the Respondent on several occasions facilitated the Claimant’s travels to spend time with his family and attached invoices for air tickets in their bundle.

22. The Respondent states that the Claimant was not entitled to *ex gratia* payment as it was in the discretion of the employer. They rely on the case of **George Assey v Mabati Rolling Mills Ltd [2014] eKLR** where Judge Radido Stephen stated that:

“37 The contract document produced did not provide for payment of ex gratia as the name suggests is paid at the discretion of the person paying it. It cannot be a right..”

23. The Respondent further states that the claim for overtime should also fail as the Claimant failed to prove that he worked overtime. Moreover, the Respondent states that it is the practice of the employer not to grant overtime. They rely on the case of **Albert Ouma Okeyo v Maguna Andu Self Selection Stores LTD [2013]** where Judge N Abuodha states that:

“The practice in the employment industry is that management staff are not normally entitled to overtime. The logic behind this is that they are part of the management and can be called to duty outside their regular hours and this is already catered for in the reasonably good salaries and allowances they are given”.

24.As to gratuity, the Respondent states that the Claimant is not entitled as he was member of NHIF and NSSF. They rely on the case of **Nocholus Lihugu Bwumira v Colette Gureshi t/a Wild Earth Wellness Centre Limited [2016] eKLR** where your ladyship stated:

“18... on gratuity, I have looked at the Claimant’s pay slip for February 2012 annexed by the Respondent which shows remittances for NSSF and NHIF”.

19.. having been a member of NSSF the Claimant is not therefore entitled to payment of gratuity as Section 35(6) of the Employment Act forbids payment of such payment for NSSF members.”

25.The Respondent also stated that the Claimant is not entitled to claims of damages for distress and mental agony caused by travelling from Kenya to Tanzania to Uganda as those were the terms of his employment which he was aware of when he took up the position. He is therefore not entitled to those damages.

26.As to the claim for terminal dues, the Respondent states that payment of the monies was hinged upon the Claimant surrendering all petty cash and account for outstanding monies in his workshop account, surrendering all the company property in his possession and vacate all the quarters he had been occupying in Tanzania.

27.The Respondent was also going to facilitate the transportation of the Claimant’s belongings from Tanzania to Kenya. The Claimant only submitted accounts on the 9th of August 2012 a day after this suit was filed and this has effectively delayed any payment due.

28.As to the counterclaim. The Respondent states that they should be awarded the reliefs sought.

29.Having considered the averments of both parties, the issues for consideration are as follows:

- a. ***What was the nature of the employment relationship between the Claimant and Respondent?***
- b. ***How was this relationship terminated?***
- c. ***What remedies if any the Claimant is entitled to.***

30.From the documents on the file, the Claimant’s Appendix 1 is a salary voucher showing he was employed in January 1993 by City Clock Uganda.

31.The nature of that relationship and how it ended is not clear but from Claimant’s documents Number 1 and 2 – City Clock (K) had indicated that the Claimant was their employee. Document number 2 is dated 15th October 1997 and the letter stated that the Claimant had been transferred to Uganda but still working under City Clock Kenya though it is not clear at what point he ceased.

32.Appendix 2 (Respondents documents) is Claimant’s letter of appointment to City Clock Uganda Limited dated 1.3.1999. He was confirmed in this employment on 1.3.2000 (Respondents Document Number 3). On 30.10.2004 (Respondents Document No. 5) the Claimant tendered his resignation from City Clock Uganda Limited. His work permit was duly cancelled on 31.3.2005 as per Respondent Document Number 6.

33.On 1.2.2005 the Claimant was now employed by City Clock Tanzania as per Respondents Document Number 8. He was engaged as Operations Manager.

34.The only common thing resorting in these appointments is the fact that the appointment letters are signed by one W. Proske the Managing Director who appears to be the Managing Direct of City Clock Kenya, City Clock Uganda and City Clock Tanzania. There is no mention however in the appointment letter that there was movement from City Clock Uganda to City Clock Tanzania as the appointment letters are all distinct.

35. On 8/12/2010, the Claimant wrote a retirement letter to the Managing Director City Clock East Africa (Claimant's Appendix 6). This letter of retirement was followed up by another dated 20/1/2011 from Claimant's Advocate.
36. This was replied to on 14.3.2011 by City Clock Kenya (Group Chief Executive) stating that the retirement had been allowed and that the Claimant would be paid for his salary for days worked if any, leave dues if any and ex-gratia payment of 15 calendar days for each completed year. This was to be paid less tax deduction.
37. The Claimant was also required to surrender all petty cash and account for all moneys outstanding in his workshop account and also surrender all company property and vacate his premises in Dar es Salam. It was also agreed in the letter that the company would fuel his pick up from Dar es Salam.
38. He was expected to clear from the premises between 14th and 16th March 2011 and thereafter collect his dues from head office. This letter was signed on 14.3.2011 by Claimant agreeing to these terms.
39. The Communication that follows between Claimant and Respondent show that by July 2011, the Respondent was still asking him to submit the company accounts and other documents needed to enable Respondent do their audits.
40. They were still asking him to clear out from his accommodation. This was still the position on March 2012. In May 2012, the Claimant through his Advocates wrote a demand notice demanding payment of Claimant's terminal dues. The Respondents were still insisting that payment of the dues was tied up to the handover of accounts as explained in their former communication with the Claimant.
41. Whether the Claimant finally made the accounts or not but it is clear that he was never paid his terminal dues.
42. Having analyzed the chronology of events above, it is apparent that the Claimant worked for City Clock (K) Limited as his payslips whether in Uganda or Tanzania are titled City Clock (K) Limited the Respondents herein.
43. The Claimant duly retired in December 2010 having worked for Respondent since January 1993, a span of 18 years. At the time of retirement in 2010, the Claimant's salary was USD 650 as per Appendix 4-5 dated 1.2.2005. This translates to 65,000/= as per the current dollar rates at the exchange of 100/= to the dollar.
44. However Appendix at page 48 on Respondents documents show a transfer of 950 dollars as salary for Respondent being his last pay in December 2010 = 95,000/=.
45. On issue of the benefits the Claimant is entitled to, the letter from the Respondent acknowledging the benefits the Claimant was to be paid (page 11 of the Respondents documents) stated that he would be paid:
- ***Salary worked for if any.***
 - ***Leave dues if any.***
 - ***Ex-gratia payment of 15 days for each completed year of service.***
46. This was agreed upon and signed for by Claimant and Respondents on 14.3.2011. The Respondents cannot therefore renege on this agreement and state that the Claimant is not entitled to service pay because of NSSF membership. This being the case, this Court finds that the Claimant should be paid as already agreed upon in this letter.

47. On issue of leave, the Respondents have produced documents from their bundle at page 166 dated 30.6.2003 to page 179 dated November 2010 showing that the Claimant applied for his leave days and they were approved but for the leave applied for on 8/11/2010, it is apparent he was told not to go for leave which was 21 days plus 5 days off duty total 26 days until after the visit by the Respondents. But there is an indication that he was paid a full months salary in lieu of proceeding on leave and so there was no leave pending.

48. The Respondents on their part have counter claimed for other expenses, they aver the Claimant caused them to incur due to not accounting for the accounts and also not clearing from the premises. The counter claim is for US 9,575/= plus interest. It was however incumbent upon the Respondents to prove how this amount arose. They claim it is storage charges but no receipt of payments of these amounts was produced before this Court. The counter claim fails on that account.

49. What therefore is payable to Claimant is his ex-gratia payment of 15 days calendar days for each year worked as per the letter dated 14.3.2011. This is equivalent to $\frac{1}{2} \times 950 \text{ Dollars} \times 18 \text{ years}$.

50. This translates to:

$$\frac{1}{2} \times 95,000 \times 18 = 855,000/=$$

Less statutory deductions

51. This amount will attract interest at Court rates with effect from the date of retirement till payment in full.

52. The Respondents will also meet costs of this suit.

Read in open Court this 11th day of May, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

B. Musau for Respondent – Present

Magu holding brief Kabue for Claimant- Present