



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 237”B” OF 2014

BETWEEN

ANDREW M. MWONGELA CLAIMANT

VERSUS

MBUKONI LOGISTICS LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Jackson Muchiri Advocate instructed by Jackson Muchiri & Associates, Advocates for the Claimant

*Musinga & Company Advocates for the
Respondent*

ISSUE IN DISPUTE: TERMINAL BENEFITS

AWARD

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

1. The Claimant filed his Statement of Claim on 15th May 2014. He states he was employed by the Respondent Transportation Company as a Sales Executive on the 1st September 2009, earning an all-inclusive salary of Kshs. 18,000 per month. He resigned on 1st June 2013, citing frustrations from the Respondent, in undertaking his responsibilities.

2. He states he worked excess hours without compensation; he was never allowed to take annual leave or paid in lieu of such leave; and was not enrolled in any gratuity or service pay scheme. He therefore claims from the Respondent:-

- a. Service pay for 3 years at Kshs. 18,000 x 3 = Kshs. 54,000.
- b. Annual leave pay for the 3 years worked at Kshs. 54,000.
- c. Overtime for an average of 3 hours a day for 44 months x Kshs. 3,375 = Kshs. 445,500.
- d. Certificate of service.
- e. Interest on [a] [b] and [c] above.
- f. Costs of the Claim.

3. The Respondent did not participate in the hearing of the dispute on 2nd December 2014. It was communicated to the Court by the Advocate for the Claimant that the Advocate for the Respondent, had appeared on the hearing date improperly dressed, and had asked the Claimant's Advocate to indulge him as he changed into proper attire. The Court noted it was 11.00 a.m. when this request was made, while the Court started its session at 9.00 a.m. The request was declined by the Court, and the Claimant directed to proceed *ex parte*.

4. There is on record a Statement of Response which the Court has an obligation to evaluate. The Respondent states the Claimant was employed by the Respondent as stated in the Claim, but on probation from 1st September 2009, and confirmed 6 months later. It is denied that the Claimant resigned out of frustration or at all; according to the Respondent, the Claimant deserted. He was in the process of being investigated by the Respondent for diverting business to the Respondent's rivals, when he deserted. His contract required him to work from 8.00 a.m. He had 1 hour of lunch break. The number of working hours were not specified. He did not put out a request for annual leave. In the alternative and without prejudice to the foregoing, the Respondent avers it summarily dismissed the Claimant in July 2013 for having committed, or being reasonably suspected of having committed a criminal offence against the Employer's property; failure to report to work; absenteeism; and absconding of duty. He is not entitled to any of the prayers sought.

5. The Claimant testified on 2nd December 2014. He told the Court he was employed on 1st September 2009. It was agreed between the Parties that the Claimant would be confirmed after 3 months and his salary raised. There was no confirmation and salary was not raised. He worked from 8.00 a.m., ordinarily up till 8.00 p.m., but on other occasions up to 9.00 p.m. He worked on Saturdays and Sundays. He was not paid for the overtime work done. He felt he was being overworked, and resigned on 1st June 2013. He never went on annual leave and was not compensated in lieu of leave. He was not subscribed to the National Social Security Fund, or any other Scheme. He availed N.S.S.F Statements to show contributions were not made. He combined various other roles- working as Messenger and Debt Collector. He prays the Court to uphold the Claim.

The Court Finds and Awards:-

6. The Claimant was employed by the Respondent Transport and Courier Company as a Marketing Executive, effective from 1st September 2009. His contract of employment, dated 8th October 2009, shows he earned an all inclusive salary of Kshs. 18,000 per month.

7. He wrote to the Respondent on 1st June 2013, terminating the contract. He was not summarily dismissed as suggested by the Respondent. His letter of termination does not reveal that he was frustrated into resignation. He states he had received much kindness from the Respondent. Whatever the case, his was a voluntary resignation.

8. The Statement of Accounts from the N.S.S.F shows contributions on the account of the Claimant ceased in September 2009 when he was employed by the Respondent. He would therefore be entitled to service pay for 3 complete years of service. ***The Court grants him service pay at the rate of 18 days' salary for 3 years, at a monthly rate of Kshs. 18,000, worked out as follows: Kshs. 18,000 divided by 26 working days = Kshs. 692 x 18 = Kshs. 12,461 x 3 years = Kshs. 37,384***

9. There were no annual leave records given by the Respondent to contradict the Claimant's assertion that he took no annual leave and was not compensated in lieu of such annual leave, for the duration of 3 years. ***He is allowed 21 days of annual leave x 3 years = 63 days which translated into cash in lieu of leave amounts to Kshs. 18,000 divide by 26 working days =Kshs. 692 x 63 days = Kshs. 43,615***

10. The contract indicates the Claimant resumed duty at 8.00 a.m. He had 1 hour of lunch break. It is not shown when he left work at the end of the day. He says he worked ordinarily up to 8.00 p.m., sometimes up to 9.00 p.m. He claims an average of 3 hours for 44 months. The Respondent did meet the requirement of Section 27 [1] of the Employment Act 2007, by leaving the hours of work open ended. This law states:

“an Employer shall regulate the working hours of each Employee in accordance with the provisions of this Act and any other written law.

The specific number of working hours must be known. Instead the Respondent explains in paragraph 10 of its Response that *“the nature of his work dictates that Employees’ working hours are flexible.”* Even in sales and marketing, it is important that Employers fix specific number of working hours, otherwise it would not be possible to know when the Employee has done excess hours and merits overtime pay.

11. The Regulation of Wages [General] Order sets the normal working week at no more than 52 hours, spread over 6 days of the week. The Court is ready to find the Claimant worked from 8.00 a.m.to 8.00 p.m. – 11 hours in a day, which for 6 days, averaged at 66 hours in a week. This was 14 hours beyond the maximum hours allowed in a 6 day working week. He worked for a total of 44 months or 176 weeks. His excess hours were $176 \times 14 = 2,464$ hours.

12. Under the General Order overtime is payable at one and a half times the normal hourly rate. Excess hours worked on the Employee's normal rest day or public holiday, are compensated at twice the normal hourly rate. Where the Employee is not employed by the hour, the hourly rate is deemed to be not less than one two-hundred-and-twenty- fifth of the Employee’s basic monthly wage. In the case of the Claimant, his normal hourly rate would translate to Kshs. $18,000 \times 1/225 =$ Kshs. 80.

13. *Adopting the formula above, the Claimant is granted overtime pay of 2,464 hours at one and a half times of Kshs 80 = Kshs. $120 \times 2,464$ hours = Kshs. 295,680.*

14. The Respondent failed to participate in the hearing of the dispute on flimsy grounds, and exercising the discretion granted under Section 12 [4] of the Industrial Court Act, the Court grants costs of the Claim to the Claimant. Certificate of Service be released to the Claimant. No order on the interest.

In sum, IT IS ORDERED:-

[a] The Respondent shall within 30 days of the delivery of this Award pay to the Claimant service pay at Kshs.37,384; annual leave pay at Kshs. 43,615; and overtime pay at Kshs. 295,680 - total Kshs. 376,679.

[b] Certificate of service shall be released by the Respondent to the Claimant forthwith.

[c] Costs to the Claimant.

[d] No order on the interest.

Dated and delivered at Mombasa this 27th day of February 2015

James Rika

Judge