



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 275 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 28th April, 2015)

DANIEL KIPROP AYABEICLAIMANT

VERSUS

PARBAT SIYANI CONSTRUCTION LIMITEDRESPONDENT

JUDGMENT

1. The Claimant herein filed his Statement of Claim on 28/2/2013 through the firm of Mengich & Associates.

The Respondent is a Limited Liability Company Incorporated and having its registered offices at Nairobi.

Claimant's case

2. The Claimant avers that, he was employed by the Respondent between 1st February 2009 until 7th August 2012 as an engineer. No letter of employment was however issued to the Claimant. On 14/7/2012, the Claimant gave notice of his intention to terminate his contract of service for personal reasons. The notice was duly acknowledged by the Respondent. The Claimant completed his notice period on 14th August 2012 which is the date he had indicated will be his last day at work. However on completion the Respondent failed to honour its contractual obligation to pay him his salary and due outstanding to date.

3. The Claimant claims from the Respondent therefore is for payment of his accrued 7 months leave in 2012 – 73,146.650

5 days salary worked in August 2012 at Kshs.120,750 x 5 ÷ 26 =23,221.15/=

3 years gratuity at 14 days a year = 105,000 x 42 days ÷26=169,615.40/=

Wages for June and July 2012 at 120,750 per month = 241,500/=

All totaling 1,168,982.50/=

Respondent's case

4. The Respondent filed their Memorandum of Reply on 10/5/2013 through the firm of Kelvin

Mogeni Advocates. They denied the Claimant's averments. They however admitted that the Claimant is entitled to payment of 212,216/= being June and July 2012 salary at 106,108/= per month and that house allowance is not payable.

They deny breach of any terms of contract nor bad faith on their part. They aver that given that the Claimant left on his volition he is not entitled to payment of anything.

Issues for determination

5. Upon hearing the parties herein, the issues for determination are as follows:

Whether Claimant is entitled to prayers sought following his decision to exit from Respondents services.

On this issue as indicated in parts of this judgment, the Claimant was never issued with any appointment letter. This in itself contravenes provision of Section 9(1) and (2) of the Employment Act 2007 which states as follows:

1. ***A contract of service:-***

- a. ***for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***
 - b. ***which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.***
2. ***An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).***

Further; Section 10(7) of Employment Act 2007 states that:

“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”.

Because the Respondent failed to issue the Claimant with an appointment letter, the burden of proving or disapproving any term of the contract rests on the Respondent.

6. In his claim, the Claimant avers that he resigned as he needed to pursue further studies at Moi University. Of course the Respondent avers he was not entitled to anything as he voluntarily left employment. This in my view is improper thinking given that the contract of such nature could be terminated by the Claimant after giving due notice as he did. If the Claimant did not have this leeway then it would be tantamount to subjecting him to forced labour against the provisions of Article 30 of the Constitution which states:-

“(1) A person shall not be held in slavery or servitude.

2. A person shall not be required to perform forced labour.”

7. This is also against the provisions of ILO Constitution 98 Forced Labour Convention which Kenya has ratified.
8. Having chosen to resign, the claimant is entitled to what is due to him including leave he had not taken for 7 months in 2012.
9. The Claimant is also entitled to payment of house allowance which he was never paid during the

time he worked as this is an entitlement under Section 31(1) and (2) of Employment Act 2007 which provides as follows:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation 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, as will enable 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

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).”

10. The Claimant is further entitled to payment of his 3 year gratuity as claimed being gratuity at 14 days salary a year for each year worked being 3 years.

= $14/30 \times 120,750 \times 3 = 169,050/=$

11. The Claimant is therefore awarded as follows:

1. *leave for 7 months in 2012 = 73,146.65*
2. *3 years gratuity = 169,050*
3. *Wages for June and July 2012 = 241,500/=*
4. *House allowance for the period worked = 15% of monthly salary x 42 months = 0.15 x 105,000 x 42 = 661,500/=*

TOTAL awarded = 1,146,196.65/=

5. He should also be issued with a Certificate of Service.

The Respondent will pay costs of this suit.

Dated and delivered in open court this 28th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance Claimant

No appearance for Respondent