



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 993 of 2012

FRANCIS NZANGI KIVUVA.....CLAIMANT

VERSUS

MR. SIMON MAINA GACHIE.....RESPONDENT

JUDGMENT

1. On 26th November 2012, Mr. Mungai Advocate appeared for the Respondents. He raised various issues. There is the issue of correspondence and service from Claimant and the matter of a Mr. A. O. Jaiko who is said to be a Labour Consultant who allegedly filed the document/pleadings. The Industrial Court impeached the consultant. There is also a question of the propriety of the position of the Respondent. The Claimant has sued Mr.& Mrs. Simon Gachie. In as much as we do not import the Civil Procedure Rules, the Claimant needs to identify who his employer was. He cannot have been employed by both. He needs to clarify.
2. The Court struck out the name of Mrs. Gachie and set 14th December 2012 as the hearing date.
3. On the 14th December 2012, the appearances were as follows:- Francis Kivuva Claimant – present. No appearance by the Respondent. The Claimant proceeded to testify – he stated that he is the Claimant herein - Francis Nzangi Kivuva. He stated that he was employed on 18th February 2007 as a guard at the Respondents residence paid Kshs. 5,000.00 per month. He worked till 2009 when it was raised to 6,000/- He stated that he had some problems and asked for permission to go home and the Respondent declined to give him permission. He could not continue working and gave notice of 1 month. When it came to time of departure he asked for his years of service. That was on 2nd November 2011. He stated that he was not paid and he was told to go that he would be told what the Respondent would pay. He stated that he was not given any pay. He prayed for the Court to order that he be paid as per the Claim plus costs. He stated that there was underpayment of wages, overtime, leave and gratuity for 4 years and resting days – 448 days weekly resting days in 56 months and public holidays. He stated that the total claim was Kshs. 427,565.40 plus costs and interest.
4. The Respondent did not tender any evidence and though served with pleadings did not file any defence. The Cause was undefended. Be that as it may, the evidential burden on the Claimant was never reduced. He testified that he had been employed by the Respondent as a guard earning Kshs. 5,000/- a month. It was the Claimant's testimony that the pay was adjusted to 6,000/- in 2009.
5. The Regulation of Wages (General) (Amendment) Order 2006 under LN 38 of 2006 which applied

to his employment as well. The minimum wage inclusive of House allowance was 5,796/- in 2006. The Regulation of Wages (General) (Amendment) Order 2010 provided a minimum wage inclusive of house allowance of Kshs. 6,839/- for the major cities and 6,340/- for townships. (LN 98 of 2010). The Claimant also attached The Regulation of Wages (General) (Amendment) Order 2011 under LN 64 of 2011 which applied to his employment as well. The minimum wages was 8,463/- inclusive of house allowance.

6. This suggests a steady progression. The wages the Claimant received always fell below the statutory minimum. The Court finds that the Claimant is entitled to the difference in pay for the months he received less than the statutory minimum.

7. The amounts he was entitled to were Kshs. 17,512/- for the 22 months between February 2007 and December 2008, Kshs. 10,068/- between May 2009 and May 2010, Kshs. 16,753/- between 2010 and April 2011. Between May 2011 and November 2011 – 14,778/- making a total of **Kshs. 59,111/-**

8. The Claimant failed to prove he never went on leave, he failed to prove the overtime claimed, public holidays etc and thus cannot recover under those heads. The sum total is that the Claimant's Claim succeeds only to that extent and he is entitled to costs which the Court assesses at 6,000/-.

9. In the final result, the Claimant is entitled to

i. Difference on underpayments **Kshs. 59,111/-**

ii. Costs of **Kshs 6,000/-**

iii. Interest at Court rates on the above sums from the date hereof till payment in full.

It is so ordered.

Delivered, dated and signed in Nairobi on this **25th** day of January 2013

Justice Nzioki wa Makau
Judge Industrial Court