



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1242 OF 2012**

SHADRACK MOSETI ARIEMBA ..... CLAIMANT

**-VERSUS-**

YADAV CONSTRUCTION LIMITED .....RESPONDENT

**JUDGEMENT**

By a Memorandum of Claim dated 20<sup>th</sup> July and filed in Court on 23<sup>rd</sup> July 2012, the Claimant alleges wrongful, unfair and unlawful termination of his employment by the Respondent.

The Claimant prays for payment of NSSF and NHIF deducted but not remitted, 2 months' salary in lieu of notice, unpaid salary for June 2012, House allowance, Service Gratuity and Overtime all totaling Kshs.5,309,760/=, costs and interest.

The Respondent filed its Reply on 21<sup>st</sup> September 2012 in which it admits employing the Claimant as a Truck Driver (4 tonnes) on weekly basis from April 2008 to May 2012 when his services were terminated. The Respondent denies it refused to pay Claimant's terminal dues. The Respondent admits owing the Claimant the sum of Kshs.70,992.90/=.

The Respondent alleges that it offered to pay the Claimant the admitted sum of Kshs.70,992.90 in full settlement of the claim but the Claimant refused. The Respondent urges the Court to dismiss the Claimants claim and enter judgement for the Claimant in the admitted sum of Kshs.70,992.90.

The Parties were heard before me on 8<sup>th</sup> November 2012. The Claimant was represented by **MR. ONDICHO** instructed by Thomas Geoffrey Onyancha & Co. Advocates while **MR. JOHN MWANGU KABUU**, a Director of the Respondent represented the Respondent.

The Claimant testified that he used to work for the Respondent who never paid his dues. He first worked for Sahajanand which changed its name to Yadav Construction while he was working there. He worked from 2005 to 9<sup>th</sup> July 2012. He earned Shs.4,000/= per week adding up-to Shs.16.000/= per month. He was not aware whether the Claimant remitted NSSF and NHIF. They were told that the work had come to an end. They were not given any letter. On the last day he worked he was towing vehicles from the office in Parklands to a house in Mlolongo. He was instructed by a director by the name Lalji Kerai who did not tell him that was the end of his work. He urged the Court to order the Respondent to pay his dues claimed in the Memorandum of Claim. Under cross examination the Claimant admitted having been paid some money when moving from Sahajanand and to Yadav, but alleged that there was some unpaid balance. He admitted he signed an acknowledgement of payment appended as Page 2 of Respondent's Appendix 2. He denied that the only benefits due to him was from Yadav Construction.

**MR. JOHN MWANGU KABUI** for the Respondent testified that the Claimant worked for Sahajanand from 2006 to 2009, that all drivers used to be paid every December. In 2010 the employees moved to Yadav Construction. The Claimant worked as a driver until May 2012 when the company was in a bad financial state following termination of the contract on which the company was working. There was no other site to transfer staff so the company was forced to terminate the employment of everybody as there was no more work. The company received a demand letter from the Claimant seeking payment of Shs.5.3 million. The Claimant was called for a meeting but no agreement was reached. The company worked out his dues as follows:-

1. 2 months' notice	-	Kshs.34,663.20
2. Service Pay for 1 year	-	Kshs. 9,332.40
3. Leave for 1.5 years	-	Kshs.26,987.30

**Total:-**

**Kshs,80,982.90**

The Company is willing to pay the same. He urged the Court to dismiss the claim and order payment to the Claimant in accordance with Building Construction Order. He further urged the Court not to order costs or collection charges as he is in a financial crisis.

Under cross examination he stated he was a director of the Company and originally worked for Sahajanand as Operations Manager. That Sahajanand was a Timber and Hardware Company. That the ownership of Sahajanand and Yadav Construction is the same. The same Company that is Sahajanand started a construction Company and employees were moved to Yadav Construction. The Claimant was not dismissed but was terminated when the contract on which the company was working terminated. That the Claimant was paid service pay and leave pay every year. The Claimant worked 8 hours. The Company had worked out Claimants terminal dues of notice, service and leave.

I have considered the evidence on record and the testimony of the Claimant and RW1. There is no contest on the main facts of the case. The Claimant was employed by Sahajanand in 2005. The Claimant was transferred to Yadav Construction Ltd when the Company started the Construction Company. About May or June 2012 the Company terminated the services of the Claimant on the grounds that there was no

work. The Claimant was not paid his terminal dues which he seeks to be paid. The only issue for determination is therefore if the Claimant is entitled to the terminal dues as claimed.

**(i) NSSF and NHIF deducted and not paid**

The Claimant seeks payment of NSSF and NHIF deducted but not paid. During his examination in chief he stated that he did not know whether NSSF and NHIF were paid on his behalf. The Claimant did not submit any evidence to show that any NSSF or NHIF was ever deducted from his salary. He stated that he was paid Shs.4,000/= weekly. There is no evidence that any deductions were made from his salary. The Claimant's Counsel did not question RW1 over deductions of NSSF or NHIF from the salary of the Claimant.

I find that the Claimant has not proved that NSSF and NHIF was deducted from his salary and not remitted to both NSSF and NHIF. The Claimant has not even demonstrated how he arrived at the figure of Shs.38,400 for NSSF and Kshs.15,360 from NHIF.

The claim for NSSF and NHIF is accordingly dismissed.

**(ii) 2 Months' Salary in lieu of Notice**

The Claimant claims Shs.32,000/= being 2 months' salary in lieu of notice. The Respondent admitted offering the Claimant Shs.34,663.20 on account of 2 months' salary in lieu of notice.

I find that the Claimant is the one who refused to collect the said Shs.34,663.20 and there was no need to file a claim for Shs.32,000/= as claimed which is indeed less than what was offered by the Respondent.

**(iii) Unpaid Salary of the month of June**

The Claimant alleged that he worked up-to 9<sup>th</sup> July 2012. He however claims salary for June 2012 only. The Respondent stated that they stopped operations and paid salary up-to 30<sup>th</sup> May 2012 and that if the Claimant worked for June he would have been paid weekly. The salary would not have accumulated for the month.

I agree with Respondent. I find that the claimant was not truthful about the last day of work as he has not claimed salary up-to 9<sup>th</sup> July 2012 when he alleges that he stopped working.

The claim for salary for June 2012 is therefore dismissed.

**(iv) House Allowance**

The Claimant was paid weekly at the rate of Shs.4,000/= weekly rates of pay are normally consolidated. The Claimant did not demonstrate that the salary he was paid was less than the consolidated statutory minimum rate of pay. The Claimant has also not shown that he even made a claim for house allowance for the entire period that he worked for the Respondent.

The claim for house allowance has not been proved and is hereby dismissed.

**(v) Service Gratuity**

The Claimant claims service gratuity at  $24 \times 16,000 \times 12$  coming to a figure of 4,608,000. He does not state the rate at which the service gratuity was payable or what the multiplier of 24 and 12 used to multiply with the salary stand for.

The Respondent stated in the Memorandum of Response and through the testimony of RW1 that the Claimant was paid service gratuity every year up-to December 2010 and attached a petty cash voucher and a discharge voucher signed by the Claimant confirming payment of leave and gratuity up-to December 2010. The Respondent offered to pay Claimant for 2011 at the rate of 15 days per year worked being Kshs.9,332.40.

I find that the Claimant has not proved his claim and award him Shs.9,332.40 as offered by the Respondent.

**(vi) Overtime**

The Claimant prayed for overtime in the sum of Kshs.60,000/=. He did not explain how he arrived at that figure. In his testimony the Claimant only stated that he was not paid overtime. He did not state that he ever worked overtime or if he did when and how many hours. RW1 stated that the Claimant worked for 8 hours a day.

I find that the Claimant has not proved that he worked any overtime or demonstrated how he arrived at the sum of Kshs.60,000/= claimed. The claim for overtime is dismissed.

**(vii) Leave**

The Claimant did not claim annual leave. The Respondent however offered to pay leave for one and a half years at Shs.26,997.30. I award him the said sum of Kshs.26,997.30 based on admission by the Respondent.

The upshot is that the whole of the claim by the Claimant is dismissed and judgement entered for the Claimant as admitted and offered by the Respondent in the total sum of Kshs.70,992.90. The Claimant

shall also be issued with a Certificate of Service.

Each party shall bear its costs.

Orders accordingly.

Read in open Court and signed on this 18<sup>th</sup> day of June 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**  
**JUDGE**

**In the presence of:-**

**Mugambi** holding brief for **Onyancha**

\_\_\_\_\_ for Claimant

No appearance

\_\_\_\_\_ **for** Respondent

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The Respondent alleges that it offered to pay the Claimant the admitted sum of Kshs.70,992.90 in full settlement of the claim but the Claimant refused. The Respondent urges the Court to dismiss the Claimants claim and enter judgement for the Claimant in the admitted sum of Kshs.70,992.90.

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**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:-**

**Mugambi** holding brief for **Onyancha**

\_\_\_\_\_ for Claimant

No appearance

\_\_\_\_\_ **for** Respondent