



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1148 OF 2012**

**STEPHEN MBUVI KATHOKA .....CLAIMANT**

**VERSUS**

**PARBAT SIYANI CONSTRUCTION CO. LTD ..... RESPONDENT**

**JUDGEMENT**

This is a claim filed in this court of 5<sup>th</sup> July 2012 by the claimant Stephen Mbuvi kathoka for unlawful termination and failure to be paid terminal dues by the respondent Parbat Siyani Construction Co. Ltd. A defence was filed on 1<sup>st</sup> October 2012 and a Supplementary Reply admitting that the claimant was an employee of the respondent but denied the allegations of unlawful termination or refusal to pay terminal dues.

The claimant stated that on 12<sup>th</sup> January 2009 he was employed by the respondent on verbal agreement as a heavy commercial vehicle driver at a monthly salary of kshs.12, 000.00 without inclusion of house allowance contrary to the government guidelines of kshs.11, 723.00 and house allowance of kshs.1, 758.45 to make a total of kshs.13, 481.45 and thus was underpaid by kshs.1, 481.45 each month he worked for the respondent.

The claimant further stated that he was terminated after writing a letter to the respondent seeking for working protocol on the 20<sup>th</sup> April 2012 which was a follow up to a request he had made seeking to know his account for PAYE, NSSF and NHIF and the deductions. That he was never given monthly pay slips during the duration of his employment making it impossible to know how his salary was broken down and his employment status and that his NSSF and NHIF dues were never remitted. That his terminal was done verbally, no letter was issued and that he was declared redundant which as unfair and centrally to the Employment act and now seeks compensation for unfair termination.

The claimant computed his dues from the respondent as;

- a. One month notice pay at Kshs 22,264.50
- b. Severance pay at Kshs 44,957.20
- c. Pro rata leave at kshs. 8,563.10
- d. 12 months compensation at kshs.267,172.32
- e. NSSF not remitted at kshs.13,800.00
- f. NHIF not remitted at Kshs.13,120.00
- g. Underpayments and overtime at Kshs.287,158.15

Total dues being Kshs.657, 035.27

In evidence the claimant stated that he was employed on 1<sup>st</sup> January 2009 without any contract document or letter of appointment being issued to him by the respondent. He was asked if he could drive heavy commercial vehicles and was immediately hired but given a small motor vehicle and the salary was to be that of a heavy commercial motor vehicle as he had a license for such a heavy commercial vehicle. It was agreed that his salary was to be Kshs.12,000.00 per month and when he complained, he was promised that it would be added and since he needed a job badly, he took up and employment. That after three months on the job, he was given a canter vehicle to move good from the respondent's head office to the warehouse and to various sites in Runda and later to mlolongo area yard where all respondent motor vehicles were kept.

In May 2012 on 30<sup>th</sup> he was terminated without notice or prior warning. That he had asked his employment was in view of the hours he had to work on Sundays and public holidays. That he was never paid overtime or given time off and he worked from 7 am to 7 pm every day. That while at one to the respondents work sites he never took time off at all. On this last day when he was terminated he reported as usual at 7am and was locked out by Mr. Navin who told security guard not to let him in. That upon this lock out he demanded to know what had happened to his employment noting that the times he reported earlier at 6am he would not be compensated for it.

The Claimant noted that his problems with the respondents seem to have started when he wrote a letter to the head office seek gin to know why his terms of work had not been reviewed as promised and the Director Mr. Makes had indicated that his overtime, public holidays would be paid for.

The Director called him after the lock out and indicated that he wanted to incite other employees of the respondent and therefore went to an Advocate who wrote a demand letter and noted that the claimant had not been registered with NSSF and NHIF. Upon receipt of this letter the respondent indicated that they wanted to resolve the issues and it was agreed that the claimant report back to work but in May 2012, he got his April Salary with the underpayment but at the end of May 2012 upon receipt of his salary he was told that his job was no more hence the reason he is in court seeking his dues and compensation for unfair termination.

In cross examination, the claimant confirmed that in 2010 he got a letter of appointment while at Aluminum site of the respondent and a contract even though he did not sign it and the address on it is his. That he drove a pick up and later a canter vehicle a 6-whelled vehicle from March 2010 to the time of his termination. That while he was at the Runda site he would report at 7am or before, check his good for delivery and proceed to various destinations until late in the day and he had not free time as he would supervise and ensure that all goods were loaded, delivered and off-loaded and sign the delivery book.

The claimant also confirmed that when he moved to mlolongo site his salary was kshs.17, 250.00 from 2010 and that this was still an underpayment since he had been transferred and was now under mavoko municipality and not Nairobi yet under his contract, he was to be based in Nairobi head office and under the Labour regulations he should have been paid Kshs14, 319.00 per month. That this was later increased to Kshs.19, 000.00 in 2011 but he claims underpayments for all the months he worked for the respondent.

That the claimant's dues to NSSF and NHIF were not paid until 28<sup>th</sup> September 2012 when he was already in court. That no termination notice was given at all.

In defence the respondents stated that the claimant started work with them on from 7<sup>th</sup> June 2009 and the gross salary was after his statutory deductions and net pay was reflected in the schedule to KRA and that at all times the respondent had remitted NSSF and NHIF contributions with the claimant being registered as NSSF No. 099239914 and NHIF No. 20592818 for his statutory remittances to these bodies. The claimant PAYE deductions were done by the respondent through his PIN No. P051139140V and that the claimant's salary was above the minimum wage guidelines and that he got one month notice before termination. That the respondent works in construction in various sites depending on projects and employees commence work from their sites at different times and leave after clocking the scheduled 8 hours per day. That none of the respondent employees exceed 8 working hours a day hence no overtime claim arise and that the claimants should attend at NSSF and NHIF to regularize his payment or

contributions and his claim herein be dismissed.

The respondent called no evidence.

Both parties made written submissions.

It is the duty of an employer who seeks the services of an employee to issue such an employee with employment particulars as under section 10 of the Employment Act. These are mandatory provisions. From these particulars an employee is able to know what his or her terms and conditions of employment entail and if there is a dispute the employee and employer are able to indicate which conditions or terms are the subject of dispute.

If the employer for one reason or the other is not able to immediately issue this communication to a new employee, the law allows such an employer a duration of two months to do so. This should be about 60 days when the employee has already reported to work and in service. This is ample time for any employer to use to regularize their records and do what the law demands of them. Reduce any oral contracts of employment into writing and ensure the employee has copy of the terms and conditions of their employment.

In this case I note the claimant insisted that he was employed under a verbal contract and was not issued with any employment contract or letter of appointment. However the respondent has annexed a letter of appointment that was issued to the claimant. My perusal of this document indicates this was a letter signed by the claimant as there are similarities between his signature on his claim and on this document. However this is not the kind of letter envisaged as under section 10 of the Employment Act. The one issued to the claimant states;

***Letter of Appointment***

*Employer/company Details:*

*Parbat Siyani Construction Ltd*

*P.O. Box 10748-00100,*

*Nairobi, Kenya*

***Date of Enrolment: 07/06/09***

*Employee's Details:*

*Name: Stephen Mbuvi Kathoka*

*ID No: 20592815*

*Address: P.O. Box 27 Kithyko-Masinga*

*Yours faithfully*

*Parbat Siyani Construction Ltd*

*[Singed]*

*Head of Department*

*I agree and accept the company's employment terms & conditions*

*[Singed]*

*Signature of applicant*

However this falls short of the legal requirements as the particulars that should appear on a letter of appointment;

**10.** (1) *A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—*

(2) *A written contract of service shall state—*

(a) *The name, age, permanent address and sex of the employee;*

(b) *The name of the employer;*

(c) *The job description of the employment;*

(d) *The date of commencement of the employment;*

(e) *The form and duration of the contract;*

(f) *The place of work;*

(g) *The hours of work;*

(h) *The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*

(I) *the intervals at which remuneration is paid; and*

(j) *The date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and*

(k) *Any other prescribed matter*

(3) *The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—*

(a) *Any terms and conditions relating to any of the following—*

(i) *entitlement to annual leave, including public holidays, and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);*

(ii) *Incapacity to work due to sickness or injury, including any provision for sick pay; and*

(iii) *Pensions and pension schemes,*

This duty vested on an employer should not be abused as any ambiguity arising from a false interpretation of its provisions the same will be to the benefit of the employee subject to any acts of unfair treatment.

Equally even where there are oral contracts, the provisions of the law apply in equal measure.

Notice pay is calculated at one month pay where parties have no contractual notice period. The respondent indicated that a notice was issued to the claimant on 25<sup>th</sup> April 2012 and that the claimant refused to sign or accept it. This evidence is not supported by any evidence as if this were correct; the claimant worked the whole of May and therefore was in contact with the respondent officers for a whole month. If indeed he had refused to accept his termination notice, his last postal address as per the letter of appointment was not used to deliver this very important communication. This notice pay will be awarded to the claimant into the absence of evidence that it was indeed issued.

Severance pay is due to a claim for redundancy and as outline in section 40 of the Employment Act. This did not stand out as one such case. This is declined.

Pro rata leave claimed was based on the fact that for the last part of the time served by the claimant he never took his leave. This was not opposed by the respondent and the court will grant the amount claimed at subject to confirmation by the respondent as to the last salary received by the claimants.

The statutory dues to NSSF and NHIF are deducted from an employee's salary as a part contribution from the employer and an employee. An employee so registered and deducted these dues can only appreciate their import if they are need of the NHIF dues or upon retirement they realize that their pension was never remitted by their employer. A pay slip would be the primary document to give notice to an employee that indeed this deduction is ongoing and failure to get this document, there is a reasonable presumption that it is either not being remitted or even if deducted, the employer is keeping this regard for motives that are not clear. I note the deductions attached to the respondents' response all relate and are extracted on 26<sup>th</sup> September 2012, a date after the claimant was terminated and when the matter was already filed in court. If these records had already been submitted to the NSSF and NHIF nothing prevented the respondent from giving this information to the claimant in good time.

I also note that the claimant had gone out of his way to instruct his advocates to make this demand of his statutory deductions. But the respondent did not oblige. It therefore goes at the time of the claimant's employment his statutory dues to NSSF and NHIF were not remitted. These dues are however due to these statutory bodies and not to the claimant. But when not paid to an employee the court can award service pay at one month for each year worked as under section 35(5) of the Employment Act. From the claimants evidence I take it he served from January 2009 to May 2012 being 3 complete years. I will award three months pay at the claimants last salary with respondent as service pay.

By the claimants own admission once he was employed he drove a vehicle that was not heavy commercial vehicle until after some time. He drove a canter and he admitted in cross examination that his salary was not Kshs.12, 000.00 as claimed since this was increased. Even though he was promised the pay equal to that of a heavy commercial driver and he had a driving license of a heavy commercial driver, his own admission indicate that he did not drive such a vehicle and he cannot place him on a level equivalent to what he wanted but what was offered to him. The alleged underpayment does not therefore arise. The promise to have his salary increased was conditional and he took his job on this promise, whether the promise was met is something different, as the offer that he accepted was not that of driving a heavy commercial vehicle. I will not grant this.

Unfair termination arises where an employer terminates an employee without giving any reasons and even where a termination notice is issued the reasons must be given to the employee. It was the claimant evidence that he wrote to the respondent seeking to know his working protocol. This was sent to the respondent who seems to have realized their mistake and invited the claimant to settle the matter and as the claimant stated in his evidence under oath, he was accused of inciting other employees of the respondent and he was locked out of the work place.

Having established that no notice was issued to the claimant and that the letter of appointment issued to the claimant was deficient in material areas, by seeking to have his working protocols well outlined for him was a reasonable issue to rise with his employer and to be penalized for it with a lock out was most unfair. I will award compensation equivalent to 3 months pay.

Overtime where due to an employee is payable upon termination. In the absence of the claimants work records the respondent has the duty to submit this record to court. In the defence the respondent stated that all employees worked for 8 hours at different times and would clock out once they attained 8 hours. This is a record of the respondent that is crucial to determine how many hours and days the claimant worked each month. The claimant stated that he worked from 7a.m. to 7p.m. a period of over 12 hours per day instead of 8 hours meaning an overtime of 4 hours per day and based on his salary of kshs.19, 000.00 he was owed the sum of Kshs.80.00 per day and for the 3 years served for 1095 days all overtime amounting to kshs.87,600.00 **Overtime due will be awarded.**

**I therefore find the claimant was unfairly terminated and will enter judgment for the claimant. That said, to outline the dues payable to the claimant, I will direct the respondent as under section 73 of the Employment Act to produce the claimants records to enable this court compute his final dues and confirm the award. This to be submitted in a Further Affidavit indicating the last pay of the Claimant, the schedule of his work hours, the leave days taken and overtime served in excess of the contract period.**

Read in open court on 31<sup>st</sup> May 2013 in the presence of both parties.

This matter will be mentioned within seven (7) days from today the 31<sup>st</sup> May 2013 for the court to confirm the award payable to the claimant.

On 7<sup>th</sup> June 2013 the matter was mentioned but the respondent had not filed the affidavit with the required records. The matter was placed for another mention on 10<sup>th</sup> June 2013.

On 7<sup>th</sup> June 2013, the respondent filed a Supplementary Affidavit attaching the NSSF schedule and NHIF compliance certificate but no pay slips or confirmation of the claimant's last salary was attached. The claimant was also in court where he confirmed that his last salary was kshs.19,000 less statutory deductions.

The Court directed the respondent to furnish the Court with the last pay slip of the claimant by 2.30p.m. To enable the court finalise the computation of the dues payable to the claimant. In the absence of these records from the respondent noting that as under section 10 of the Employment Act that every employer should keep this record and make it available to court in any claim and noting that time has been given to enable the respondent furnish the court with these records but failed. I will take the word of the claimant as having not been controverted in any material way and make an award based on his last salary as claimed at Kshs.19,000.00

**I therefore enter judgment for the claimant as against the respondent in the following terms;**

1. **A declaration the claimant termination by the respondent was unfair.**
  - a. **an award of 3 months as compensation at Kshs. 57,000.00;**
  - b. **One month pay in lieu of notice at Kshs. 19,000.00;**
  - c. **service pay for 3 years at kshs.28,500.00;**
  - d. **pro rata leave at Kshs.8,563.00; and**
  - e. **Overtime due 87,600.00.**

**Total dues amount is Kshs. 200,663.00.**

2. **the claimant be issued with all his pay slips as claimed**
3. **A certificate of service is issued to the claimant.**
4. **Cost of the suit awarded to the claimant**

**Judgement dated this 11<sup>th</sup> June 2013**

**M. Mbaru**

**Judge**