



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 24 OF 2013

M. YUSUF JIN.....CLAIMANT

VERSUS

CARBO WORKS EAST AFRICA LTDRESPONDENT

J U D G M E N T

The claimant was employed by the respondent in the year 2001 as Operations Manager at Mombasa branch for a monthly salary of ksh.67,348/ and worked until 5/2/2012 when he resigned from the employment. He brings this suit claiming terminal dues amounting to ksh.975,050/ including salary arrears, outstanding leave days, service gratuity, cash expended on casual workers and unremitted NHIF and NSSF deductions.

The respondent in a response admitted that the claimant worked for her between 2001 and 5/2/2012 for a salary of ksh.67,348 but avers that he deserted duty. The respondent further admits that the claimant,s claim for 3 months salary arrears save that salary for January 2012 will be withheld as notice pay since no notice was served. She also admits 57 days as outstanding for leave but denies the claim for gratuity because the claimant was a member of NSSF. She further denies the claim for reimbursement and unremitted NHIF and NSSF deductions which according to her was not justified and that he learned the said unsubstantiated claim from the resignation letter.

When the suit came up for hearing on 13/6/2013, the counsel recorded a consent interim judgment for payment of ksh.275,485 being 3 months salary arrears for November and December 2011 and January 2012, cash pay for 57 outstanding leave days and ksh.17000 petty cash reimbursement.

After several adjournments to secure a settlement on the remaining issues, the case was heard exparte on 28/8/2013 when the claimant testified as CW1 and the respondent did not attend the hearing. CW1 told the court that he was employed in June 2001 as the Operations and Sales Manager for the respondent's Mombasa branch. That his salary was ksh.67348 per month and worked until he resigned by serving a notice dated 5/2/2012 which he produced as exhibit 1. That he was denied his terminal dues even after serving a demand letter through his advocate.

That on 13/6/2013 a consent judgment was recorded for part of his claim and he was now praying for the outstanding claims for 26 leave days, refund of unremitted NHIF deductions of ksh320 per month for 44 months, and NSSF not remitted. He produced NSSF statements for October 2008 to December 2011 showing that no remittance was made (exhibit 2). He also produced NHIF statement for May 2008 to December 2011 (exhibit 3) showing that no remittance were made.

As regards the leave days outstanding, he contended that as at the time of resignation he had been advised by the accountant that he had 109 days leave outstanding and he forfeited 26 of the days towards termination notice because he only served 5 days of the Notice period on leaving a net of 83 days. That after being paid for 57 days in respect of the consent judgment he still had a further 26 outstanding leave days. He also claimed for service gratuity at the rate of 18 days per year of service. After the close of the hearing the parties were directed to file written submission but non was filed.

The court is satisfied that it has the jurisdiction to determine the dispute herein by dint of Section 12 of the Industrial Court Act read with Article 162(2) of the constitution of Kenya. The issues for determination arising from the pleadings and evidence is whether the claimant is entitled to any dues over and above the ones agreed vide the consent judgment on 13/6/2013.

I have considered the prayer for 26 days due and dismissed it. The claimant produced exhibit 4 which is internal memo with a summary of leave records showing that as at 31/1/2012 had leave balance of 57 days not taken. The court will therefore not be persuaded by hearsay evidence of the alleged 109 leave days. In any case the accountant was never called to testify.

The court has however considered and awarded the claim for the refund of NHIF and NSSF deductions which were never remitted to the relevant authorities. The statement for NHIF show that deductions were remitted upto October 2008. It means therefore that the months when NHIF was not remitted were 39 months. The refund due is therefore ksh.12480 calculated from the monthly deductions of ksh.320/-

The court also awards a refund of NSSF deductions of ksh.200/- per month for the period between October 2008 to October 2011 which total to 37 months. According to the statement of NSSF remittances, no remittances were made for the claimant although he was deducted. The court awards a refund of ksh.200x37 which total to ksh7400/.

The prayer for gratuity is dismissed for lack of legal basis or any evidential proof. That issue of lack of legal basis for the prayer was raised by the defence but no amendment was done to the claim to substitute the prayer for gratuity to that of service pay nor was any evidence adduced to prove that the claimant was entitled to 18 days gratuity per each year of service.

In summary the court enters judgment for the claimant against the respondent as follows;

- a. **refund of NHIF deductions12,480**
- b. **refund of NSSF deductions..... 7,400**

19,880

- c. **interest from December 2011.**
- d. **costs of the suit.**

Orders accordingly

Signed, dated and delivered this 27th September 2013

ONESMUS MAKAU

JUDGE