



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO.753 OF 2012

CHARLES MAINA MUNYUA.....CLAIMANT

-VERSUS-

VICTORY CONSTRUCTION LTD.....RESPONDENT

Mr. Ngala for claimant

Mr. Onyango for respondent

JUDGMENT

The claim was brought by way of a Statement of Claim dated 12th April 2012 and filed on 4th May 2012.

The facts giving rise to the claim maybe summarised as follows:

The Claimant was employed as a plant operator by the Respondent on 2nd February 2007 at a basic salary of Kshs.25,000/=.He worked continuously in that capacity till November 2010.At the time of termination, he earned Kshs.63,000/=.

The Claimant was based at Tawa in Makueni and alleges that he was transferred to Nairobi. When he reported to the Nairobi office, he was not allowed in. He continued to report to work for a whole week without being allowed in until he gave up on 19th October 2010.

He testified that he was paid October 2010 salary upon termination of his employment. He reported the matter to the Ministry of Labour. He told the court that he reported to work from 6 a.m. in the morning till 6 p.m. in the evening. He was paid overtime of Kshs.5,000 per month.

He also worked during all public holidays for four (4) years. He was entitled to one (1) rest day per week but he was not allowed to go.

He claims;

1. *House allowance of Kshs.453, 000/= which was not paid.*
2. *Overtime for public holidays in the sum of Kshs.271,040/=*
3. *Overtime for normal days in the sum of Kshs.201,000/=.*

4. Overtime for rest days in the sum of Kshs.98,560/=.
5. Unpaid salary for 3 months in the sum of Kshs.189,000/=.
6. 4 months salary in lieu of leave days not take in the sum of Kshs.252,000/= less amount paid of Kshs.80,740/=.

Total Claim = Kshs.1, 150,700/=.

The Claimant sent a letter of demand to the Respondent through Kituo Cha Sheria on 31st October 2011 but the same was not heeded.

The Claimant, claims salary for the months of September, October and November 2009 when he was temporarily stopped from working whilst the employer waited for payments from the Government. He conceded that he did not work during the three (3) months but when he was recalled the employer agreed to pay him for the three months.

With regard to leave, he told the Court that he was not granted leave for four (4) years and claims Kshs.252, 000/=. He told the court that he was not paid in lieu of leave.

During conciliation at the Labour Office, he was paid Kshs.80, 740/= and claims the balance of terminal benefits.

He denies that he deserted work as alleged by the Respondent nor did he spoil a grinder as alleged. He told the court that he was transferred orally from Tawa to Nairobi and he duly handed over before he came to Nairobi.

He further testified that he left the grinder with one **Joseph** when he left for Nairobi and the same was okay. He rented a house outside the site and was not paid house allowance for the period he was at Tawa. He now claims house allowance.

The Kshs.80, 740/= paid out by the Labour office was not tabulated to him. He says that he was warned whenever he asked for leave, and was then told to go to Nairobi. He believes that is why his employment was terminated.

He says he did not receive the Kshs 80,240/= in full and final settlement as alleged by the Respondent and the conciliator.

The Respondent filed a Memorandum of defence dated 5th January 2012 on 1st June 2012. The Respondent avers that the Claimant's employment was terminated normally under the terms of his contract.

On the other hand, the Respondent adds that the Claimant disappeared from site and absconded on the 2nd November 2010 after being paid his October 2010 salary.

That on 27th November 2010, the Respondent informed the union that the Claimant had absconded duty. The Respondent denies that it had transferred the Claimant to Nairobi or at all.

The Respondent denies that it owes the Claimant house allowance saying that the salary he received was all inclusive and in any event the workers were housed at the site.

Respondent also denies owing the Claimant with respect to work done during public holidays. The Claim for overtime is similarly denied.

Furthermore, the Claimant was registered with the National Social Security Fund (NSSF) and his dues were duly remitted therefore he is not entitled to service gratuity.

The Respondent produced a letter dated 27th November 2010 wherein it reported to the union that the Claimant has absconded from duty.

The Respondent called one usher **Mbuka** to testify in support of its case.

He told the Court that he was an Assistant Manager employed by the Respondent and he knew the Claimant well. That the Respondent had a construction site at Tawa, Makueni and its Head office was at Baba Ndogo area in Nairobi.

That the Claimant absconded from work and came to Nairobi where he met the Director and was asked to report back to the site, but he did not do so.

On 27/11/2010, the Respondent reported his disappearance to the Union. The Respondent was later summoned to the District Labour Office where the matter was settled pursuant to conciliation meetings. That the Claimant signed a document in full and final settlement of the matter upon receiving payment.

He told the court that the Claimant earned a gross salary of Ksh.50,399/17 which included house allowance .The statutory deductions were made and remitted including NSSF. He denied that the Claimant was entitled to any extra payment for over time as had agreed to Kshs.5,000/= over time.

Furthermore, the claimed salary in September, October and November 2010 is not founded well as the Claimant did not work during those months.

He told the court that all workers including the Claimant went on leave but did not produce any leave records.

He told the court further that the employees went home on Saturdays and Sundays at the end of the month when they were paid. He also said the Claimant took one rest day per week but again did not produce any records to that effect.

Analysis

It is noteworthy that the Claimant did not make any claim for compensation or payment of damages for unlawful termination of his employment.

He only claims terminal benefits as outlined in the Memorandum of Claim and written submissions.

House Allowance

The Claimant has failed to prove that he was entitled to payment of house allowance as claimed or at all. To the contrary the Respondent has demonstrated that the Claimant was paid a gross salary of Kshs.59,399/17 which amount the Claimant states was his basic salary. The Court finds that the claim has no basis and same is dismissed.

Public Holidays, Overtime, Rest days and Leave.

The Claimant states that he worked during public holidays and was not paid double rates when he worked as such. He has listed eleven (11) recognized holidays which he worked for four (4) years.

The Respondent has not produced any employment letter, pay slips or any other employment record to show the terms and condition of service applicable to the Claimant.

This is the case with respect to the claims for overtime, rest days and leave.

Section 74 (1) obliges the employer to keep records;

(e) Of an employee's weekly rest days specified in section 27.

(f) Of an employee's annual leave entitlement, days taken and days due specified in section 28

(g) Were the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee.

The employer is thus obliged to produce records to rebut any claims made by an employee. Where the employer fails to produce such records, an adverse presumption may be made in favour of the employee.

Accordingly the court finds that the Claimant has established that he was not given one (1) rest day per week for four years. He was not paid double rates for 11 public holidays per year for four years. He was not paid in lieu of leave for 21 days per year for four years. With regard to the claim for overtime, he was paid Kshs.5,000/= overtime per month as agreed with the employer and therefore the claim for overtime has not been substantiated and same is dismissed.

The Claimant admitted that he did not work during the three (3) months in respect of which he claims payment of salary arrears and therefore his claim for salary arrears is not well founded and same is dismissed.

The court therefore finds that the Claimant is entitled to payment of Kenya Shillings:

1. *Kshs.191, 905/= in lieu of 4 years leave at 21 days per year.*
2. *Kshs.438, 640/= being payment in lieu of one (1) rest day per week for four years.*
3. *Kshs.100, 565/= being payment of salary for 11 public holidays for four years.*

Total payment due to the Claimant is Kshs.731, 110/=.

The Respondent is also to pay costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 19th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE