



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 109 OF 2013**

**GEORGE WASIANYA.....1<sup>ST</sup> CLAIMANT**

**MARTIN GITHIGI NDUNGU.....2<sup>ND</sup> CLAIMANT**

**MICHAEL OTIENO.....3<sup>RD</sup> CLAIMANT**

**CHRISPINE ODERO.....4<sup>TH</sup> CLAIMANT**

**-VERSUS-**

**RIFT VALLEY AGENCIES LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 8<sup>th</sup> November, 2013)

**JUDGMENT**

The claimants filed a memorandum of claim on 07.05.2013 through Oumo & Company Advocates. They prayed for judgment against the respondent for underpayments; overtime; rest days and offs; public holidays; annual leave; severance pay or gratuity; certificate of service and costs of the suit. The total amount of money claimed is Kshs.3,330,507.25.

The respondent filed the reply to memorandum of claim on 03.06.2013 through Ikua, Mwangi & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimants filed the response to the memorandum of defence on 13.06.2013. The case was heard on 23.07.2013 and on 18.09.2013. It is not disputed that the claimants were employed by the respondent until 31.10.2012 when their respective contracts of employment were terminated on account of redundancy.

The only issue for determination in this case is whether the claimants are entitled to the remedies as prayed for. The court makes the following findings:

1. It is not disputed that the claimants are entitled to the certificates of service as prayed for and the court finds for the claimants accordingly.
2. The claimants' evidence shows that they worked from 8.00 am to 5.00 pm. The respondent's evidence was that on some occasions, there would be breakdowns during field trips and claimants would arrive back late and depending on the circumstances, the respondent would pay the claimants for the extra duty or hours of work. The claimants have not particularized in their evidence the extra hours worked and the specific claim for overtime payments is not shown to

have been demanded for while they were in employment. The court finds that the claims for overtime or rest days and offs, and public holidays were a mere afterthought. The court finds that the claimants are not entitled as prayed for and the prayers shall fail.

3. The evidence shows that the claimants agreed to be paid both a fixed salary and a commission yielding an acceptable and better pay. The court finds that the claimants have in their claim unjustly reneged on the agreement on the monthly payment by invoking the provisions in minimum wage orders. The claims for underpayment will therefore fail.
4. The court has considered the claim for annual leave. The respondent has not opposed the claim and is willing to pay as part of the final dues. The court finds that the claimants are entitled to payment for annual leave as prayed for.
5. The 1<sup>st</sup> and 3<sup>rd</sup> claimants have disputed agreeing to computation of their final dues and as filed in the case. The respondent has admitted that the dues for 2<sup>nd</sup> and 4<sup>th</sup> claimants had not been calculated. The court has considered the circumstances of the case and finds that in absence of any more favourable agreement, the claimants are entitled to statutory redundancy package (under section 40 of the Employment Act, 2007) comprising:
  - i. pay for annual leave due but not paid as prayed for;
  - ii. severance pay at the rate of half gross pay for October 2012 for each claimant for every completed year of service; and
  - iii. one month pay in lieu of termination notice at the rate of gross pay for October 2012.
6. The court has considered the issue of shortages said by the respondent to be due from the claimants. First, there was no counterclaim on that issue. Second, there was no evidence to establish such shortages as against any of the claimants. For the 1<sup>st</sup> claimant, exhibit **RUA 1(b)** shows he was to repay Kshs.61,490.00 at Kshs.2000.00 per month effective 26.11.2009 being a maximum of 31 months and which had lapsed as at time of the termination in October, 2012. In absence of any other evidence on the subject, the court finds that the 1<sup>st</sup> claimant had, on a balance of probability, repaid the shortages as agreed.

In conclusion, judgment is entered for the claimants against the respondent for:

1. The respondent to pay each claimant terminal dues upon redundancy comprising:
  - i. pay for annual leave due but not paid as prayed for;
  - ii. severance pay at the rate of half gross pay for October 2012 for each claimant for every completed year of service; and
  - iii. one month pay in lieu of termination notice at the rate of gross pay for October 2012.
2. The claimants to compute the dues in 1 above and to serve the respondent within 7 days for recording in court on a convenient mention date.
3. The respondent to pay the dues in 1 and 2 above by 1.12.2013, failing interest to run at court rates till full payment.
4. The respondent to deliver to each claimant a certificate of service by 1.12.2013.
5. The respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 8<sup>th</sup> November, 2013.**

**BYRAM ONGAYA**

**JUDGE**