



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 196 OF 2013**

**MESHACK KIIO IKULUME**

**CLAIMANT**

**v**

**PRIME FUELS KENYA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Meshack Kiio Ikulume (Claimant) was employed by Prime Fuels Kenya Ltd (Respondent) through a letter dated 27 December 2006 as an Articulated Truck Driver.
2. The appointment was to commence on 2 January 2007. The Claimant was to get a gross monthly salary of Kshs 20,000/-.
3. The contract provided that the Claimant would work from Monday to Saturday excluding public holidays.
4. Through a letter dated 30 April 2013 the Claimant wrote to the Respondent giving one month notice of resignation. The notice indicated the Claimant's resignation would be effective 1 May 2013.
5. Subsequently, the Claimant cleared with the Respondent's departments save for pending final dues from the Finance Department. It appears the Respondent failed to pay the final dues.
6. On 10 July 2013 the Claimant lodged a Memorandum of Claim, witness statement and submissions in which the issue in dispute was stated as *terminal dues of Meshack Kiio Ikulume from Prime Fuels (K) Ltd.*
7. The Claim was served upon the Respondent which in turn filed its Reply to Memorandum of Claim on 17 October 2013.
8. I heard the cause on 28 October 2013.

**Claimant's case**

9. In the Memorandum of Claim, the Claimant asserted that he used to work continuously on Sundays and public holidays and was owed, after resignation terminal dues of  $\frac{1}{2}$  salary for six years, salary entitlements for May 2013, 333 days public holidays from 2007 to May 2013 all totaling Kshs 868,261/80.
10. In testimony, the Claimant stated that he was employed by the Respondent effective 2 January 2007 and that he tendered his written resignation on 30 April 2013 and that on expiry of the notice he asked for his dues, was given a clearance form which was completed by the relevant

- departments except Finance because they did not reach agreement on what he was to be paid. The salary for May 2013 was not paid.
11. The Claimant produced his appointment letter, resignation letter, clearance form and copy of pay slip for May 2013 and confirmed that he was a member of the National Social Security Fund and was issued with a Certificate of Service.
  12. In the course of the hearing the Claimant sought and got leave to include a prayer for driver league of Kshs 15,000/- for February/March 2013.
  13. He also stated that worked for a total of 71 public holidays and worked from 2007 to 2013. He further stated the Respondent had records of trip logs to show which days he worked.
  14. He now seeks the benefits set out in paragraph 4 of the Memorandum of Claim.

### **Respondent's case**

15. The Respondent filed its Reply to Memorandum of Claim on 17 October 2013 and simply denied the allegations set out in the Memorandum of Claim and put the Claimant to strict proof.
16. The Respondent did not call any evidence or produce any records or documents.
17. In effect, the Respondent raised no real disputes of fact. This is because the Respondent did not plead or produce any document to the contrary to what was asserted by the Claimant nor did it allege any material facts as against the Claimant.
18. The Respondent relied on mere and bare denials and put the Claimant to strict proof but gave no indication it had evidence to dispute the truth of the Claimant's allegations. Bare denials can never suffice to give rise to a dispute of fact where the facts averred fall within the knowledge of the denying party.
19. I just need to note that in the employment relationship the employer is obliged to keep and produce records in legal proceedings pursuant to sections 10(2)(3),(7) and 74 of the Employment Act.
20. The practice of mere denials and putting Claimants to strict proof is not the practice or procedure of or applicable in the Industrial Court. This is borne out by the statutory obligation placed upon employers in sections such as the one referred to and sections 43, 45 and 47 of the Act in claims for unfair termination. This was not such a claim but it is true that it is employer who keeps attendance logs, muster rolls and such other documents.
21. I will deal with each of the Claimants claims seriatim.

### **½ salary for six years worked**

22. The Court was not informed whether this head of claim was based on a contractual or statutory foundation. If the Claimant meant service pay as provided under section 35(5) of the Employment Act, 2007 he would not be entitled to the same because he testified that he was a member of the National Social Security Fund and therefore section 35(6) of the Act is implicated.

### **Salary and entitlements for May 2013**

23. The Claimant testified and was not challenged that he did not receive his salary and entitlements for May 2013. He put the claim at Kshs 56,374/- The Respondent had calculated this sum and issued the Claimant with an itemized pay statement.
24. In its submissions filed on 18 November 2013, the Respondent acknowledged in the conclusion that the Claimant is entitled to the unpaid salary for the month of May 2013 of Kshs 56,374/-. I would therefore award him this head of claim.

### **71 Public holidays from 2007 to May 2013**

25. Under this head, the Claimant sought Kshs 128,382/20. In the submissions filed with the Memorandum of Claim he asserted that there were 71 public holidays between 2007 to May 2013.
26. The Respondent on the other hand argued in its submissions that this particular head of claim was unsupported by evidence. It also submitted that the head of claim was contrary to rules 4, 5, 13 and 14 of the Industrial Court (Procedure) Rules, 2010 and further that parties are restricted to

- their pleadings.
27. The rules deal with the details to be set out in respective parties pleadings and verifying affidavits. The Memorandum of Claim was supported by a verifying affidavit though the Memorandum did not particularize in detail the public holidays in contention save to state they were 71 public holidays from 2007-2013 which the Claimant sought Kshs 128,382/20.
  28. But the substantive law does not give much support to the thrust of the Respondent's submissions. Within the employment relationship and statutory framework created by section 10(3) and (7) of the Employment Act, it is incumbent upon an employer to furnish an employee with particulars of his entitlement to public holidays and holiday pay so as to be capable of precise calculation and to prove or disprove in the context of this particular case that the Claimant was paid or was not entitled to be paid for public holidays worked.
  29. Further it is the duty of an employer to keep certain employment records including hours of work and produce the same in legal proceedings. I am not aware of any practice or policy within the employment relationship requiring employees to keep records of attendances and hours/days worked.
  30. Within the factory settings it is always the responsibility of the employer to keep muster rolls though with advancement in technology records can be captured biometrically or through electronic cards.
  31. On the submission that parties are restricted to their pleadings, this position may not strictly hold true or be applicable in the employment relationship and the practice and procedure of the Industrial Court because employees do not keep records, a responsibility placed on employers and also because some of the claims have a statutory foundation on what employees are entitled to as of right (overtime, pay for work on public holidays etc) and the Constitutional provision in Article 41 on the right to fair labour practices.
  32. The Fourth Schedule to the Regulation of Wages (General) Order provided for 11 public holidays including Moi Day.
  33. This would have remained so until 27 August 2010 because after the Constitution 2010 was promulgated, Moi Day has not observed. The holidays reduced to 10 or so days per year.
  34. The Claimant would therefore have been entitled to at least 67 public holidays, and if he worked on those days he is entitled to compensation.
  35. To get the figure claimed of Kshs 128,382/20 the Claimant used a formula of basic pay divided by 30 to get the daily rate which he multiplied by the number of days (77 days). The formula was wrong.
  36. Pursuant to regulation 6 and 7 of the Regulation of Wages (General) Order, the correct formula for purposes of calculating overtime worked during rest days and public holidays is to calculate the hourly rate and multiply the rate with the total number of hours. The hourly rate is 1/228 of the basic salary.
  37. The Claimant's basic salary must have increased during the period of service. But using the last basic salary of Kshs 27,125/- the hourly rate of the Claimant was Kshs 118.
  38. The Claimant unchallenged evidence is that he worked 71 days, which I have reduced to 67 days. Each working day was 8 hours and therefore for the 67 days the Claimant would be entitled to overtime for the equivalent of 536 hours totalling Kshs 114,536/-. Because this was work done on a public holiday the formula is to use twice the hourly rate which is Kshs 236/-.
  39. The Claimant would be entitled to a cumulative sum of Kshs 126,496/-. But because the Claimant's salary was not static during the period in issue and the Court was not informed of the salary for each year (pay slip was produced only for May 2013), I would discount the sum of Kshs 126,496/- by half to Kshs 63,248/-.

### **333 Sundays worked from January 2007 to May 2013.**

40. According to the letter of appointment, the Claimant was supposed to work Monday through Saturday. Sunday was his normal rest day. The formula would be the same save that the 333 days need to be converted to hours, at 8 hours of work per day. This comes to 2664 hours. The hours multiplied with the twice normal hourly rate of Kshs 236/- gives Kshs 628,704/-.
41. For similar reasons referred to in paragraph 35 above I would discount the sum by half to Kshs 314,352/-. I would award the Claimant the discounted sum.

