



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 696 of 2012

ALBERT MBUGUA KIMAMA.....CLAIMANT

VERSUS

WINKA HOLDINGS LTD.....1ST RESPONDENT

JUDGEMENT

The facts of this case are straight forward and not contested. The Claimant ALBERT MBUGUA KIMAMA was employed by the Respondent WINKA HOLDINGS LTD as a driver in a school run by the Respondent in the name and style of Winka Academy. His employment commenced on 23rd May, 2005. His starting salary was later increased to Kshs.10, 500 which the Claimant earned until he voluntarily resigned on 8th February, 2012. The Respondents letter of acceptance of the resignation reads in part as follows;

Dear Albert,

“RE: ACCEPTANCE OF RESIGNATION

We make reference to your letter of resignation, you personally hand delivered to the undersigned on 9th January, 2012 informing the office of your decision to terminate your services with the company with effect from 8th February, 2012.

We would like to inform you that your resignation has been accepted.

Your last working will be 8th February, 2012.

Your February 2012 salary shall be paid only for the days worked. You shall receive your Certificate of Service and final dues below in agreed part payments, less any liabilities and statutory deductions as stipulated by the law upon completion of the clearance process.

1. Service pay (at a rate of 5 days for every complete year worked);
2. Leave days accrued up to 8th February 2012 (calculated on pro rata basis);

In the meantime, please arrange to hand over all company property in your possession to the Administrative Assistant, who will issue you with a clearance form. Please return this clearance form to facilitate the computation and processing of your final dues for settlement. Kindly note that these dues will be paid net of any loans/advances/other amounts owed to the company.

Finally, the management takes this opportunity to thank you for the services rendered to the company and wish you the best of luck in all future activities.

Kindly acknowledge receipt of his letter by signing, dating and returning to us the attached duplicate copy for our records.

We acknowledge your contribution to Winka Holdings Limited.”

It is the contents of this letter to the effect that the Claimant would be paid service at the rate of 5 days for every complete year of service worked that the Claimant was unhappy with. He reported a dispute to the Ministry of Labour who wrote to the Respondent demanding that it pays the Claimant the following:

- I. Service pay at the rate of 15 days for each completed year of service;
- II. Accrued leave of 43 days;
- III. Statutory under payments as per the referred to regulation of wages (Amendments) orders on yearly basis.

The Respondents replied to the demand from the Ministry of Labour in the following terms:

Dear Sirs,

RE: ALBERT MBUGUA KIMAMA

The above subject matter and your letter dated 20th February 2012 refer.

Having reviewed our records and considered the contents of the above said letter, we are pleased to respond as follow:-

1. We are ready and willing for an amicable settlement. Both parties initiated the separation well and it is unfortunate that the turns or events are as surprising as they were unexpected.
2. According to us, the areas below are not in dispute:-
 - a) His leave days are 46.5 as per our records and are payable.
 - b) Service pay is payable too. The days to apply are the issue. In arriving at 5 days, we were guided by the Employment Act 2007 Sections 35 (5) and (6) as read together with Section 36.

You will agree that our offer of 5 days is infact an improvement on the statutory position that offers no service at all.

- c) Statutory payment.

We agree there is an aspect of underpayment. This needs a consideration of some sort. However, and while it is not our wish to bring up the issue of educating his 2 children, we are finding ourselves doing it.

It is true that this is a benefit that should not be drawn into salary issues but the figures involved are substantial therefore worthy of consideration – we attach a statement.

In the interests of mutual solutions, we are willing to settle arrears for the period 2011/2012 of 9 months or so thereby close the issue.

In the event, our proposal is to resolve on the issue on the foregoing lines subject to the Claimant's agreement.

Thanking you in advance for your intervention and co-operation.

Yours faithfully,

In the memorandum of claim dated 11th April, 2012 and filed in Court on the 25th April 2012 the Claimant seeks the following orders:

- a) Both parties to meet under the guidance of the CPMU, Ministry of Labour and draw up my terminal dues as per the Ministry's recommendations;
- b) A report on the arrived at figure be filed with the Honourable Court by the Ministry for the Court's final ratification and schedule of execution within a reasonable period until the whole amount is fully settled; and
- c) On receipt of the Ministry's report, the Honourable Court to determine costs, incidentals thereto and any other relief as it may deem necessary.

The issue in dispute however is non payment of the rightful ones on resignation. When the case came up for hearing on 2nd August 2012 Mr. Onyizho for Claimant and Mr. Omfony for Respondent agreed to proceed by way of written submissions. The respective submissions for the Claimant and Respondent were filed on 16th October and 30th October respectively.

I must state that I find the submissions most disappointing. To say the least I find them careless and clacking in the analysis of the issues in dispute.

The issues for consideration are the following:

1. If Claimant is lowed arrears of salary arising from underpayments.
2. If Claimant is entitled to service pay
3. Payment of leave days.

Under payments in order to determine whether there was any under payments, it is important to establish what salary the Claimant was entitled to as a driver of a school bus. The Respondent has stated that the vehicles driven by the Claimant were between 2.85 ton and 4.3 ton. This falls into the category of medium size vehicles. The Claimant was therefore entitled to payment of salary as follows:

May 2005 to April 2006	Kshs.7, 873
May 2006 to April 2009	Kshs.8, 818
May 2009 to April 2010	Kshs.10, 405
May 2010 to April 2011	Kshs.11, 446
May 2011 to February 2012	Kshs.12, 877

In addition to the rates given above the Claimant was entitled to 15% of the basic pay as house allowance.

The Claimant is entitled to the difference between the salary he was paid of Kshs.7, 000 from June 2005 to July 2008 and thereafter to the difference between what he was entitled to and Kshs.10, 500. The period upto July 2008 is based on basic salary only while the period from August 2008 is on consolidated salary.

Service Pay

The next issue is service pay. The Claimants contract provided for payment of service pay at the rate of 5 days per completed year of service. The Claimant was a member of the National Social Security Fund (NSSF) as evidenced from the payslip he has attached to his memorandum of claim and payment vouchers. He is therefore not entitled to service pay as provided for under section 35(5) and (6) of the Employment Act. He is however entitled to payment at the rate of 5 days salary for every complete year worked as stated by the Respondent in the acceptance of the Claimant's termination.

Leave

The final issue for determination is outstanding leave days. This is not in dispute as the Respondent has confirmed that the Claimant is entitled to 46.5 days leave.

The Respondent has raised the issue of payment of school fees for the Claimants children. No evidence has been adduced to the effect that this benefit would be recovered from the salary of the Claimant. The same can therefore not be used to set off any payments owed by the Respondents to the Claimant.

Finally I wish to comment on the Claimants letter of resignation. The letter was written on 8th and delivered on 9th February 2012. The resignation took effect on the date of the letter. The Respondent would therefore have been entitled to pay of one month's salary in lieu of notice. I however note that this has not been claimed. Had it been claimed the Court would have offset the amount from the sum payable to the Claimant. Since no claim has been made in respect of the same, it is not payable.

The Claimant is therefore entitled to:

1. Under payments Kshs.
2. Service pay Kshs.
3. Pay in lieu of 46.5 days annual leave Kshs.

There shall be the orders for costs as this is a matter the Respondent offered to resolve out of Court but the Claimant did not give the Respondent an opportunity to discuss settlement.

Orders accordingly.

Dated and delivered in Nairobi this 30th Day of November, 2012.

HON. LADY JUSTICE MAUREEN ONYANGO.

JUDGE.