



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 851 & 861 of 2011

1. JOSEPHAT AMBUBI MUSUMBA

2. KASAVU MUSYOKI MUSEMBI.....CLAIMANTS

VS

VEGRO KENYA LIMITED..... RESPONDENT

AWARD

Josephat Ambubi Musumba and Kasavu Musyoki Musembi the Claimants herein both filed claims against the Respondent Vegro Kenya Limited under cause No. 851 and 861 of 2011 respectively. The 2 claims were on consolidated and heard together.

Josephat Ambubi Musumba's case is that he was employed by the Respondent on a one year fixed term contract or 1st June 2004 which expired on 31st May 2005. The contract was renewed on 1st June 2005, 1st June 2006 and 1st June 2007. The last contract was for 7 months from 1st May 2008 to 30th November 2008 and was never renewed. The Claimant continued to work on similar terms until 30th November 2009 when he was terminated. He learnt about his termination from a colleague when he reported to work in the night. He was employed as head mechanic and his last salary was Kshs.18,440 per month. Upon termination he was paid Kshs.24,162 being leave and service pay. He seeks payment of overtime and damages for being terminated without notice. He was working from 6.30 pm to 4.30 am but was only paid overtime up to May 2006. He seeks payment of overtime from June 2006 to date of termination which is 2016 hours translating to 247,833.60. His last contract did not provide for overtime.

KASAVU MUSYOKI MUSEMBI'S case is that he was employed by the Respondent as a driver, heavy commercial vehicle on 1st June 2006 and terminated on 30th November 2009.

Like the 1st Claimant, he went to work and was asked by colleagues why he was at work when he was no longer an employee. His last fixed term contract commenced in May 2008 and expired on 30th November 2008. He continued working without a contract until 30th November 2009 when he was terminated. His last salary which was inclusive of house allowance was Kshs.14, 485. He was paid Kshs.12,138 as terminal benefits. He prays for notice overtime and compensation. He used to work for 12 hours every days from 4 pm to 4 am and was never paid overtime.

The Respondent called one witness **MR. JOHN AVESA MATANI** the human resource officer. He admitted knowing both claimants. He stated that the contracts for both Josephat Ambubi Musumba and Kasavu Musyoki Musembi expired on 30th November 2008. Both of them were aware about the expiry dates and signed to acknowledge payment of terminal dues which were composed of overtime, gratuity at

18 days per year worked, leave and public holidays worked. In cross examination he stated that Musumba reported to work at 6.30 pm and worked for 10 hours. Kasavu worked from 4.30 pm to 4.30 am that is 12 hours. He confirmed that both of them were not paid overtime.

The facts of these 2 cases are fairly straightforward.

Josephat Ambubi Musumba was employed on 1st June 2004 as a head mechanic on a fixed term contract of 1 year. The contract was renewed severally ending with the contract for the period 1st May 2008 to 30th November 2008. Thereafter he continued working without a contract until 30th November 2009 when he reported to work and was later asked by his colleagues why he was reporting to work when he was no longer in employment. His last salary was Kshs.18,440. He was later paid Kshs.24,162 as terminal dues.

The case of Kasavu Musyoki Musembi is the similar. He was employed on a fixed term contract on 1st June 2006. His last contract was from 1st May to 30th November 2008. Thereafter he worked without a contract until 30th November 2009 when he reported to work and was later asked by his colleagues why he was at work and he was no longer an employee. His last salary was Kshs.14,485 per month. He was paid terminal dues of Kshs.12, 138 by cheque.

The Claimants pray for the following:-

1. Josephat Ambubi Musumba
 - (a) 30 days' pay in lieu of notice Kshs.18, 440.
 - (b) 2016 hours overtime. Kshs.247, 833.60.
 - (c) 12 months' salary compensation Kshs.221, 280.00

TOTAL: Kshs.487, 553.60

2. Kasavu Musyoki Musembi
 - 30 days salary in lieu of notice Kshs.14, 485.00
 - 1740 hours overtime Kshs.168, 026.90
 - 12 months salary compensation Kshs.173, 820.00

TOTAL: Kshs.356, 331.00

The procedure for termination of employment is contained in sections 41 of the Employment Act. The employer is required to explain to the employee the reasons for termination. In the cases of the 2 Claimants, the employer did not explain or give any reason to the employees. Instead the Claimants found out from their fellow colleagues that they had been terminated when they reported for work. The letters purported to have been written to the Claimants to inform them that their employment was being terminated were never received by them. In any event the letters have the following shortcomings:-

1st, the letters are dated the very date that the employees were expected to leave service.

2nd, the letters refer to payment up-to 31st November 2009 which is a non-existent date as the last day of November is 30th.

3^{rdly}, the letters refer to expiry of a contract that was non-existent as the last contracts signed by the

Claimants, and which was confirmed by RW1 expired on 31st November 2008. Having worked without a contract for 1 year, the contracts were by operation of the law converted to monthly contracts terminable by 1 months notice or payment of 1 months salary in lieu thereof as provided in section 35 (1) (c) as read together with section 36 of the Employment Act.

For these reasons I find that the termination of Employment of Josephat Ambubi Musumba and Kasavu Musyoki Musembi were unfair.

I now look at the prayers of the Claimants.

1. 30 DAYS SALARY IN LIEU OF NOTICE

As I have already stated, both Claimants are entitled to 1 month's salary in lieu of notice. Josephat Ambubi's salary was Kshs.18, 440 while Kasavu Musyoki Musembi's salary was Kshs.14, 485. I give judgment to each one of them in the said sums respectively.

2. OVERTIME

The RW1 admitted that Josephat Ambubi worked from 6.30 pm to 4.30 am for 6 days a week therefore working for 10 hours a day or 60 hours per week. The contract he signed provided for 45 hours a week. He therefore worked for an extra 15 hours every week. Mr. Ambubi testified that he was last paid overtime in May 2006 and seeks payment of overtime from June 2006 to November 2009 when his employment was terminated. This fact is not contested. He is therefore entitled to overtime for 182 weeks at 15 hours per week which is equal to 2730 hours X1.5 overtime rate equals 4095. The hourly rate as given in the contract is salary divided by 195 or Kshs.94.60. This multiplied by 4095 is 387, 240.

I give judgment to Josephat Ambubi in the said sum of Kshs.387, 240.

Mr. Kasavu Musyoki Musembi worked 12 hours per day coming to 72 hours per week. His contract states that due to the nature of his work his hours of work are not specified. However, he could not be expected to work more hours than other employees. I will therefore use the same number of hours as the other claimant of 45 hours per week. He therefore worked overtime of 27 hours per week. He is thus entitled to 27 hours per week multiplied by 1.5 for all the hours he worked overtime. This adds up to 182 weeks multiplied by 1.5 equals 7371 hours. This multiplied by his hourly rate 74.28 (14485 divided by 195). This comes to 547, 533. I give judgment to the Claimant in the said sum.

3. COMPENSATION

I have already found that both Claimants were unfairly terminated. They are therefore entitled to compensation. Taking into account their length of service and the circumstances under which they were terminated, I award compensation to each of them as follows;

Josephat worked for 6 years. I award him 4 months' salary as compensation. This amounts to (18,440x4) Kshs.73,740.

Kasavu Musyoki had worked for 3 years. I award him 2 months' salary as compensation. This amounts to (14, 485X2) Kshs.28, 970.

In summary I give judgment to each of the Claimants as follows:

Josephat Ambubi Musumba Kshs.497, 420.

Kasavu Musyoki Musembi Kshs.590, 988.

Each party shall bear its costs.

Orders accordingly.

Dated and delivered in Nairobi the 11th day of December of 2012.

**HON. LADY JUSTICE MAUREEN ONYANGO
JUDGE.**

In the Presence of: _____ for Claimant

_____ for Respondent