



**Mandalia v Coolxtreme Limited (Cause 1481 of 2016)
[2024] KEELRC 59 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 59 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1481 OF 2016
MA ONYANGO, J
JANUARY 25, 2024**

BETWEEN

PEUSH MANDALIA CLAIMANT

AND

COOLXTREME LIMITED RESPONDENT

JUDGMENT

1. The suit herein is filed by the Claimant who was an employee of the Respondent from 2nd April 21012 to 1st April 2016 when he tendered his resignation notice, in which he indicated that his last working day would be 1st April 2016.
2. It is the Claimant's case that upon his resignation the Respondent failed to pay his terminal dues.
3. In the Memorandum of Claim dated 14th July, 2016 the Claimant prays for the following:
 - a. Gratuity for 4 years Ksh1,500,000/=
 - b. Leave pay (35.125days) Kshs. 878,125/=
 - c. Overtime for the period April to June 2014 Kshs. 567,600/=
 - d. Interest on (a), (b), (c) and (d) above at court rates form 1st April, 2016 until payment in full.
 - e. Costs of the suit with interest thereon from the date of judgment until payment in full.
 - f. An order that the Respondent do issue the Claimant with a certificate of service.
 - g. Any other order as this Honourable Court may deem fit and just.
4. The Respondent filed a statement of Response dated 6th September 2016 in which it admits employing the Claimant on the following terms:



- a. Either Party may terminate the contract by giving notice or pay in lieu of notice
 - b. The Claimant shall be eligible for 21 working days paid leave per year.
 - c. The Claimant being of Managerial level shall not be entitled to overtime.
5. The Respondent denies that it refused to pay the Claimant his terminal dues and avers that the Claimant is not entitled to the prayers sought in his Claim.
 6. The Respondent states that it prepared a certificate of service for the Claimant which the Claimant refused to collect.
 7. It is further the Respondent's averment that the Claimant refused to surrender the Respondent's property including monies due from the Claimant for services rendered by the Respondent for which the Respondent duly raised invoices as follows:-
 - 29/11/2013 invoice No. 7921 Ksh.25,087.54
 - 11/9/2014 invoice no. 8655 Ksh.60,320.00
 - 15/0/2014 invoice no. 8662 Ksh.82,342.60
 - 05/09/2014 invoice No. 9650 Ksh.72,152.00
 - 31/03/2016 invoice no. 10091 Ksh.119,480.00
 - 21/05/2016 invoice No. 10222 Ksh.60,000.00
 - TOTAL KSH.419,382.14
 8. The Respondent prays that:
 - a. The Claim herein against it be dismissed,
 - b. The Respondent be awarded as against the Claimant the sum of Ksh.419,382.14 as set out herein at paragraph 7,
 - c. A declaration that the Claimant has no valid claim against the Respondent,
 - d. The Respondent be awarded the Costs of this cause.
 9. The Claimant filed a response to the Respondent's Statement of Response and an answer to Counterclaim dated 12th October, 2016 in which he denied that there was any written contract between him and the Respondent. The Claimant further denied that there was a verbal contract between him and the Respondent to the effect that being a manager he would not be entitled to overtime.
 10. The Claimant stated that his contract with the Respondent was verbal and included a term that he would be entitled to gratuity. That it was further a practice of the Respondent to pay gratuity to employees who left its service.
 11. The Claimant annexed copies of a cheque dated 25/1/2013 and workings of final dues for one ALNOOR LAANI dated 30/11/2012 in which payment of Ksh. 1,230,00.00 was made on account of service pay for the period starting from 1st September, 2006 to 30th November, 2012 to the said ALNOOR LALANI, upon termination/Resignation.
 12. The Claimant denied that he owed the Respondent Ksh.419,382.14 as set out in paragraph 7 of the Response.



13. At the hearing the Claimant testified on his behalf. The Respondent called one Hesbon Natse Makani its former Human Resource Manager who testified on its behalf. The parties thereafter filed and exchanged written submissions.
14. At the hearing the Claimant stated that he would rely on his witness statement and documents filed with his claim and reply to counter claim which included a payslip, appointment letter, resignation letter and the gratuity documents for Alnoor Lalani referred to above.
15. The Claimant testified that out of the list of documents filed by the Respondent only pages 8 and 16 were issued to him. He stated that there was only one delivery note at page 17 confirming delivery of items at page 16. That all other documents had no delivery notes signifying that they were never delivered to him as he did not receive the items.
16. On overtime pay the Claimant testified that between April and June, 2014 the Respondent's auditors put a lot of pressure on the Managing Director and the Claimant who was the General Manager. That they had to do the accounting at the Managing Director's residence in the evening after work.
17. He testified that he would go to work from 7.30 am to 4 pm and thereafter go to the residence of the Managing Director where he worked on the accounts upto 10 or 11 pm. That this was because the Managing Director did not trust the Chief Finance Officer (the CFO)
18. At cross examination the Claimant testified that he did not sign a contract and the contract produced by the Respondent did not bear his signature.
19. He testified that the Managerial staff of the Respondent were entitled to overtime and that he had paid overtime to the Chief Finance Officers, General Managers and Project Engineers.
20. That even RW1 was paid overtime. He settled that he was not able to produce documents on overtime payments as they were sensitive documents in the custody of the Human Resource Manager.
21. On gratuity the Claimant testified that he was claiming 15 days salary for every year of service. That having worked for 4 years he was claiming 60 days pay or 2 months salary as gratuity. He testified that all employees were being paid gratuity including the Managing Director.
22. The Claimant testified that he gave resignation notice of 3 months which he extended by two (2) weeks and even worked in June 2016 for a couple of days to finalize the accounts of a client which the Respondent's Chairman personally promised to pay for.
23. The Claimant testified that there was handing over during which he handed over all the Respondent's property in his possession including the car. That he did so under instructions of the Chief Finance Officer. That the Human Resource Officer was present during the handing over.
24. He stated that the only pending items were the finalization of accounts for Dusit Hotel and Trade bank Hotel.
25. For the Respondent, RW1 Hesbon Makani adopted his witness statement and documents filed by the Respondent as part of his evidence.
26. RW1 testified that the Claimant took his leave days. That the documents for application for leave were in the Claimant's personal file but were not produced in court.
27. He testified that the Claimant was not entitled to overtime as he was in a management position. That it is in the Rules and Regulations of the Company that Managerial staff are not entitled to overtime.



28. On the invoices produced by the Respondent, RW1 testified that they were equipment and installations for cooling system in the Claimant's residence which the Claimant requested for. He testified that the invoices he produced in Court should have delivery notes which were not in court. That the Claimant signed for the work in the invoices.
29. RW1 testified that he was not aware other employees were paid gratuity and the same was not provided for in the terms of service.
30. He stated that he never met Alnoor Lalani. That gratuity is paid only if it is in the contract.
31. He testified that the Claimant did not return a car and laptop. He stated that proof that the Claimant was issued with the items are in the Respondents records.
32. RW1 testified that he processed the Claimants terminal dues but the Claimant refused to accept the same. That the Claimant did not demand a certificate of service.

Analysis and Determination

33. I have considered the pleadings, evidence on record and submissions filed by the parties. The issues arising for determination are whether the Claimant is entitled to the terminal benefits claimed and whether he owes the Respondent as claimed in the Response to the Memorandum of Claim.
34. It is not in dispute that the Claimant was employed by the Respondent in various capacities, the last of which was in the position of General Manager earning a salary of Ksh.750,000 per month as evidenced by copy of his payslip. It is further not in dispute that the Claimant resigned from employment through the resignation notice dated 1st January, 2016 to take effect on 1st April 2016.
35. The Claimant prayed for gratuity at the rate of 15 days per year worked being Ksh. 1,500,000 for the 4 years he worked for the Respondent. The Claimant submitted that although he was a member of NSSF, the Respondent paid gratuity or service pay to other employees and failure to do so to the Claimant would be discrimination. The Claimant produced evidence of payment of service pay to one Alnoor Lilani who from the documents produced by the Respondent, was also a member of NSSF until he left service in November, 2012.
36. The Respondent did not produce any documents to prove that the said Alnoor Lilani had a contract which provided for payment of gratuity to him. Denial of the same to the Claimant would thus constitute discrimination.
37. I find that the Claimant is entitled to gratuity or service pay at the rate of 15 days per year worked as claimed and award him Ksh.1,500,000.
38. The Claimant prayed for leave for the 4 years worked. RW1 stated that they the Claimant went on leave and filled leave forms. None of such forms were availed to court. RW1 was not even able to accurately tell the number of leave days that the Claimant was entitled to per year.
39. According to the *Employment Act* an employee is entitled to 21 leave days every year.
40. According to section 10(3)(a) and 74(1)(f) of the *Employment Act* an Employer is required to keep records of an employee's annual leave entitlement, days taken and days due as specified in Section 28 of the Act. Section 10(6) as read with 10(7) provide that an employer who fails to produce particulars of records in legal proceedings shall bear the burden of proving or disproving all alleged terms of employment.



41. In the instant case, the Respondent failed to prove that the Claimant took leave. The Claimant is therefore entitled to 35.125 days as claimed in the sum of Ksh.878,125 which I accordingly award him.
42. Lastly. The Claimant prayed for overtime specifically for the months of April to June, 2014. He testified that during this period he was forced to prepare accounts at the Managing Director's residence after working hours as the Managing Director did not trust the Chief Finance Officer.
43. The Respondent did not dispute that the Claimant worked overtime. The Respondent only stated that management staff were not entitled to overtime.
44. The Rules & Regulations produced by the Respondent was not proved to have been part of the terms and conditions of service for the Claimant as he did not sign the same. Further, some of the provisions therein, such as resignation notice of 30 days and transportation to and from home as stipulated in the document were clearly at variance with the Claimant's terms of employment. The Claimant's notice period was 3 months and he was issued with a car and paid a car benefit of Ksh.4200 in addition as is evident from the documents in the court record.
45. In addition, the Claimant explained the circumstance under which he was compelled to work overtime, which did not fall under normal overtime pay. The overtime was for a limited duration and for a specific assignment.
46. I am convinced that the Claimant is entitled to overtime for the months of April to June, 2014 and award him the same as prayed in the sum of Kshs. 567,000.
47. On the prayers of the Respondent, the Claimant admitted that he owed only the first invoice of Ksh.25,000.00 and the last invoice of Ksh.60,000.00. The Claimant stated that all other invoices produced by the Respondent did not have corresponding delivery notes to prove that he received the items or services. The Respondent did not prove that the goods and/or services were supplied to the Claimant. I therefore award the Respondent only the sum of Ksh.85,000 being the sum admitted by the Claimant.

Conclusion

48. In conclusion, I award the Claimant the sum of Ksh. 2,945,725 together with interest. Of this sum the Respondent will be entitled to set off the sum of Ksh. 85,000 owed to it by the Claimant.
49. The Respondent shall pay the Claimant' costs of the suit. Interest shall accrue at court rates from date of Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024

MAUREEN ONYANGO

JUDGE

