



REPUBLIC OF KENYA



KENYA LAW
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**Atalitsa v Rift Valley Sports Club (Cause 47 of 2019)
[2023] KEELRC 112 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 112 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 47 OF 2019
HS WASILWA, J
JANUARY 26, 2023**

BETWEEN

ROBERT ATALITSA CLAIMANT

AND

RIFT VALLEY SPORTS CLUB RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for allegedly failing to pay him his terminal dues despite following due process provided for under the Respondent's Human Resource manual in resigning from the said employment. He sought for the following reliefs;
 - a. Gratuity of Kshs 161,000.
 - b. Payment for accrued leave days (21), rest days and Public Holidays pay all amounting to Kshs 1,255,333.32.
 - c. Payment for overtime worked of Kshs 2,208, 577.77.
 - d. House allowance of Kshs 252,000.
 - e. Certificate of service.
 - f. Interest in (a) and (b) above
 - g. Costs and interest of this suit.
2. The Respondent entered appearance and filed a response to claim on the August 26, 2019 denying the entire claim and in particulars avers that the Claimant was not diligent in carrying out his duties as he was found engaging in activities that created a conflict of interest against the club and being dishonest in his dealing. Also that he did not follow the procedure of resignation provided for under Clause.5.9(b) of the Human Resource manual as such is not deserving of the reliefs sought.



Claimant's case.

3. The Claimant was employed by the Respondent as it's Club manager vide the employment contract dated March 1, 2017 which was to run for three years ending on February 28, 2020. His salary as indicated in the said contract of employment was Kshs 140,000.
4. He stated that he carried out his worked diligently in accordance with his job description and the Human Resource manual.
5. On February 26, 2018, due to personal reasons he tendered his resignation and gave one-month notice, which was to end on March 27, 2018. After the notice period he cleared from the Respondent and handed over his duties to the then acting manager.
6. It is his case that he was not paid his terminal dues despite request informing his decision to contract the services of an advocate who wrote a demand letter dated May 24, 2018, which the Respondent in the letter of May 27, 2018, refused to pay the Claimant on the basis that the Claimant had occasioned actual loss of monies and warranties.
7. The Claimant maintained that it followed due procedure provided for under clause 5.6(a)(i) of the Human Resource manual in tendering his resignation and therefore should be paid his terminal dues.
8. It was his case that he is seeking pay in lieu of leave for 21 days, Gratuity/service pay for the year worked and the entire claim as prayed. On overtime, he stated that he worked for 105 hours in a week as opposed to 52 hours provided for under the *Employment Act*, thus seeks to be awarded overtime for the extra hours worked. He further prayed for the 10 Holidays worked.
9. During hearing, the Claimant testified as CW-1 and adopted his witness statement which reiterated the Claimant's case and in addition stated that he now works at Rockway Hotel as General Manager. He testified that the reason he was not paid his terminal dues was on allegations of taking stock and purchasing a laundry machine which was done by his predecessor, Nelson Omondi who joined the company a week before he resigned.
10. It was his testimony that the stock taking was for the period between 23rd and March 27, 2018, the last week of his employment, which he was served at the verge of exiting the Respondent's employ and thus did not have enough time to give a proper response, In any case that the shortage as indicated in the report was of Kshs 113, 905 which was ballooned to Kshs 203,389 in the Respondent's defence. He told this Court that he was the General Manager but not the one in charge of stock taking. That stock taking was in the department of accounts and that his work was to receive report and act on them. On the issue of purchase of washing machine, he stated that the purchase was done above board and met the specification required.
11. Upon cross examination, he testified that Nelson, his predecessor was the one that discovered the missing stock. He quickly added that stock taking was done by his junior, the accounts department. He also testified that he was part of the procurement process that acquired the machines but that the Finance committee was the one with final say on such procurement. He denied ever being the head of Hannington Solutions Company that supplied the Respondent the washing machines. He stated also stated that he had not taken his leave for the year worked when the contract had provided for 24 days leave. He admitted in conclusion that he has not stipulated the specific overtime worked in his claim.



Respondent's Case.

12. The Respondent in its response stated that the Claimant failed to follow due procedure of resigning provided under its Human Resource manual in that he failed to clear with the head of department and chairman of welfare fund as required under Clause 5.9 (b). Further that he failed to fulfil the conditions stipulated in the acceptance letter therefore is not deserving of certificate of service.
13. It was stated that the Claimant before resigning had engaged in illegalities that occasioned the club loss of money amounting to Kshs 203,389 and other opportunities which was in breach of section 19 the Human Resource manual.
14. On leave and gratuity pay it was stated that the Claimant contravened the provisions of clause 5.3 of the Human Resource manual as such any dues on this head are subject to surcharge occasioned by his illegal conduct and activities.
15. The Respondent called its chairman of the Board of director, Ms Emily Lagat, who adopted her witness statement filed on August 26, 2019 which reiterated the defence to claim and upon cross examination she testified that the Respondent has not paid the Claimant his terminal dues because of the loss of stock and procurement issues. She testified that the Respondent lost Kshs 165,455 worth of stock which was blamed on the Claimant because he was the one in charge of the entire club and heads of department. It was her testimony that procurement is done by a committee then approved by the manager.
16. On re-examination she maintained that the manager being in charge was accountable for any loss. Additionally, that the Claimant as per the email marked as exhibit AOB2 was the director of Hannington Solutions limited.

Claimant's Submissions.

17. The Claimant submitted on two issues; whether the Respondent's actions of withholding the Claimant's terminal dues was justified and whether the Claimant is entitled to the reliefs sought.
18. On the first issue, it was submitted that the reason tendered by the Respondent for withholding the Claimant's terminal dues was because the stock taken on the March 26, 2018 was short by Kshs 177,455 which was based on a preliminary report pending the final report which was to be submitted within 24 hours but was never submitted. It was argued that the said stock taking was done three days to the end of the Claimant's resignation notice period, just when the Claimant had submitted his final report on the position of the Club thus making it impossible to factor in the issue. Further that the loss was from stock taking department, which had a head who ought to have been questioned on that issue.
19. On the second reason, for purchasing washing machines for the Respondent, the Claimant argued that the said machines were procured after following due procedure and in any case that there was no complaint on the specification and or functionality of the said machines as such the issue does not justify the actions by the Respondent.
20. With regard to the reliefs sought, the Claimant submitted on gratuity that paragraph 12 of the Employment contract provides for payment of gratuity either on completion of the contract or on resignation. On overtime pay, it was submitted that the nature of the Claimant's work as captured at paragraph 1 of the employment contract was to effect that he was to work overtime which was not factored in his monthly salary. The Claimant also prayed for 24 days leave pay as provided for under paragraph 5 of the Employment Contract, arguing that he never took his leave for the year worked. He also prayed for House allowance, Public holiday pay and rest day.



Respondent's Submissions.

21. The Respondent on the other hand submitted on one issue; whether the Claimant is entitled to the reliefs sought. It then argued that the Claimant breached clause 11 of the Employment contract and Clause 5.9 of the Respondent's Human Resource manual in failing to clear with the chairperson of the board. It was argued that when the Claimant tendered his resignation and before leaving the Respondent's employ, stock taking was carried out and it was discovered that some stock was missing which issue was never raised by the Claimant when he was the chairman and in charge of the entire club and all departments therein. Therefore, that the Claimant failed in his core duty and subjected the Respondent to loss, which loss is to be deducted from his terminal dues as communicated in the letter of March 29, 2018.
22. It was argued further that the Claimant breached the provisions of clause 19 of the Respondent's Human Resource Manual when he sourced two washing machines from a company that he had an interest in, thus causing conflict of interest in the procedure.
23. It was submitted that the reliefs sought by the Claimant are miscalculated and exaggerated when the Claimant was in its employ for only 11 months inclusive of probation period of 6 months that ended on September 1, 2017.
24. It was submitted with regard to gratuity that the Claimant could have been entitled to it if he had worked for at least one year. On leave pay, the Respondent submitted that the probation lapsed and confirmation of employment began on September 1, 2017 therefore that the Claimant had worked for it for 5 months thus leave pay should be pro-rated for that period. On House allowance the Respondent submitted that the salary given was consolidated as captured by the payslips tendered as evidence. On Holiday and overtime, the Respondent submitted that the Claimant did not work on these days, in any event that the Claimant has not tendered any evidence to support these claims.
25. I have examined the evidence and submissions of the parties herein. The claim by the Claimant is for payment of his terminal dues.
26. The Respondents in opposing this claim aver that the Claimant is not entitled to his dues as his resignation was irregular and that he cost the Respondents loss of kshs 165,455/= worth of stock.
27. The Claimant insisted he followed the process for resignation and even gave 1 month notice.
28. My consideration of the evidence submitted by both parties show that indeed the Claimant resigned from the employment of the Respondent.
29. He gave them adequate notice as envisaged. The method the Respondent wanted applied in a resignation is not any method known in law as the employment contract between the Claimant and Respondent was based on free will and the Claimant was free to resign upon giving the requisite notice or pay *in lieu*.
30. In fact the resignation was acknowledged by the Club Chairman *vide* a letter of 28/3/2018 promising to pay the Claimants final dues less value of stock worth 203,389/=.
31. In this claim however the Respondents have not filed any counter claim on the alleged short stock.
32. Their insistence that the Claimant owns them stock should have been pleaded and proved. This was not done.
33. What therefore remains is that the Respondents are obliged to pay the Claimant his terminal dues having resigned from the Respondents employment.



34. I therefore find the claim by the Claimant is merited and is allowed as follows;

1. Gratuity kshs 161,000/=
2. Payment of 21 days leave = 140,000/=
3. House allowance as pleaded kshs 252,000/=

TOTAL = 553,000/=

Less statutory deductions

4. The Respondents will pay cost of this suit plus interest at Court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kirui for respondent – present

Okoyo for claimant – present

Court Assistant - Fred

