



**Oratah v Hornbill Pub Limited (Cause 1781 of 2016)  
[2023] KEELRC 1219 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1219 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1781 OF 2016**

**B ONGAYA, J  
MAY 25, 2023**

**BETWEEN**

**BAKARI MUKOLWE ORATAH ..... CLAIMANT**

**AND**

**HORNBILL PUB LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant initially filed the memorandum of claim on September 2, 2016 through M/S Kipkenda & Company Advocates. The claimant stated that he was employed by the respondent on November 25, 2006 as a Chief Security Personnel doubling up as a storekeeper until May 16, 2016 when he resigned at a time his monthly salary was Kshs 11, 000.00. he claimed for:
  - a. Service pay for 9 years served Kshs 49, 500.00.
  - b. Leave earned but not paid 14 days Kshs 5, 133.00.
  - c. Overtime for 7 hours for 9 years 5 months Kshs 621, 810.00.
  - d. Total Kshs 676, 443.00.
2. The respondent filed on October 6, 2016 the reply to statement of claim through Ngeresa & Okallo Associates Advocates. The respondent pleaded that the claimant was employed as a guard and not Chief Security Personnel doubling up as a stoker. He voluntarily resigned on May 16, 2016. he was fully paid his terminal dues and the claims made were denied. The respondent counterclaimed for Kshs 11, 000.00 one month pay in lieu of notice in view of the claimant's abrupt resignation.
3. On April 3, 2019 the claimant filed response to reply to statement of claim and reply to counterclaim. The claimant pleaded that he served the respondent a proper termination notice and therefore the counterclaim was unfounded.



4. The claimant filed an amended statement of claim through Hans Oichoe Advocate of Rene & Hans LLP. The claimant introduced a claim for earned but unpaid wages for employment as a storekeeper or stock taker Kshs 617, 934.13. Thus the total amount claimed rose to Kshs 1, 294, 377.13. the respondent filed the amended reply to amended statement of claim and denied the claimant worked as a chief security guard and storekeeper or stock taker.
5. The claimant testified to support his case. The respondent's witness (RW) was Ronney Benson Macharia. The Court has considered the material on record and the final submissions filed for the parties. The Court returns as follows.
6. To answer the 1<sup>st</sup> issue, the Court returns that by his own evidence, the claimant had confirmed that he was a guard and not doubling up as a storekeeper or stock taker. His testimony was that revellers at the pub would sometimes engaged in fights and in the process there would be breakages of bottles and glasses. He could intervene and in the process also report on scope of such breakages – and such reporting is what he called stock taking or storekeeping. The court returns that such reporting was inherent in the guarding job description by way of accounting for incidents of insecurity by way of damage to respondent's property. Thus, the claimant served purely as a guard and nothing more. By that finding, as urged for the respondent the claim for earned but unpaid wages for employment as a storekeeper or stock taker Kshs 617, 934.13 is found baseless and misconceived and lacking contractual basis. In any event, particulars of its computation remained at large. The claim is declined as misconceived and unjust.
7. To answer the 2<sup>nd</sup> issue, the Court returns that the claimant resigned abruptly on May 16, 2016. The claimant has failed to show that he in fact delivered the disputed resignation letter dated April 16, 2016. Weather he resigned by calling RW or not, by his own pleading and witness statement he states he resigned on May 16, 2016. There is no mention of a one-month notice. Having resigned suddenly on May 15, 2016, the Court returns that the Counterclaim must succeed and the claimant is liable to pay the respondent Kshs 11, 000.00. In his testimony, the claimant stated, "I resigned on May 17, 2016 in the morning. I resigned. We discussed about payment increase. Boss did not want to increase my pay. I had no sufficient rest. So I resigned. I gave one-month notice. It was a notice on April 16, 2016. I did not record reason was about salary. NSSF was deducted. Leave was taken except last one." The claimant's account on how and when he resigned is clearly contradictory. He cannot be trusted in alleging he gave a notice while giving an account that as at morning of May 17, 2016 he would be willing to continue working if the boss agreed to pay rise –rendering the alleged notice purportedly dated April 16, 2016 not believable.
8. To answer the 3<sup>rd</sup> issue, the Court returns that by his testimony, the claimant was a member of NSSF so that the claim and prayer for service pay will collapse. As submitted for the respondent, section 35(6) (d) of the *Employment Act, 2007* bars award of service pay in view of NSSF membership.
9. To answer the 4<sup>th</sup> issue, the Court returns that the claim for overtime will fail on the basis that the account by the claimant is a speculative and moving hours that cannot with certainty establish the overtime hours. Further no basis was pleaded and evidence provided for the rate of computation of the amounts claim – and which the Court finds was arbitrary. The claimant testified thus, "I reported at work at 6.00pm and it was moved to 8.00pm. I checked out according to job. Sometimes at 10am or sometimes at 1 pm. I reported at work at 8.00pm until 11am or even 1.00pm following day. I was a night guard. The pub operated all night I do not know if the licence was for 5.00pm to 11pm." By that testimony, it appears each day the claimant worked had a varying check-in and check-out time rendering the claim for overtime as claimed untenable.



10. To answer the 5<sup>th</sup> issue, the Court returns that the claimant's testimony that he had 14 leave days was not challenged at all and he is awarded Kshs 5, 133.00 as claimed.

11. Considering the margins of success, each party to bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties with orders:

a. The claimant to pay the respondent a sum of Kshs 5, 867.00.

b. Each party to bear own costs of the suit and counterclaim.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25<sup>TH</sup> MAY, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

