Njiru v East African Cable Limited (Employment and Labour Relations Cause 272 of 2018) [2023] KEELRC 2732 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2732 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 272 OF 2018

BOM MANANI, J

NOVEMBER 2, 2023

BETWEEN

JASON MARIGI NJIRU ..... CLAIMANT

AND

EAST AFRICAN CABLE LIMITED ..... RESPONDENT

JUDGMENT

1. Save for the claim for overtime pay, the facts in the cause are largely not in contest. The parties are in agreement that they had an employment relationship that ran from April 2012 to June 2017. They also agree that the Claimant was employed as a security supervisor. The parties agree that during the currency of the relation, the Claimant used to work between 6.00 PM and 6.00 AM every work day, a total of twelve (12) hours.

2. The Claimant's case is that the contract of service between the parties provided for work hours that fell between 8.00 AM and 5.00 PM during workdays. This included one (1) hour for lunch break. However, this was varied so as to require the Claimant to work between 6.00 PM and 6.00 AM.

3. According to the Claimant, these changes were allegedly introduced without first varying the work hours as captured in the written contract of service between the parties. The Claimant further avers that he was allegedly not remunerated for work done outside the time that was stipulated in the letter of appointment.

4. Although in the statement of defense the Respondent generally denied the claim, during oral testimony, its witness admitted that the Claimant was engaged to work between 6.00 PM and 6.00 AM daily. However, the said witness contended that this engagement fell within the terms of the contract between the parties.

5. To support this assertion, the Respondent's witness stated that although the letter of appointment provided that work hours were to run from 8.00 AM to 5.00 PM, the same contract reserved

the Respondent's right to require the Claimant to work outside these hours. Further, it was the Respondent's case that since the Claimant was a security supervisor, he was part of the management, a fact that disqualified him from claiming overtime pay.

Issues for Determination and Analysis

6. The only issue for determination in the case is whether the Claimant is entitled to overtime payment as claimed. From the evidence on record, it is clear to me that the parties entered into a written contract of service dated 25th April 2012 by which the Claimant's work hours were spelt out as falling between 8.00 AM and 5.00 PM.

7. It is true that the Respondent reserved the right to require the Claimant to work for longer hours than eight (8) per day. However, there is nothing in the letter to suggest that if he worked for longer hours, the Claimant was not entitled to be remunerated for the extra hours.

8. The contract of service that was signed by the parties on 25th April 2012 was for a fixed period of one year. However, they continued to engage as employer-employee after the expiry of this term. Therefore and absent evidence to the contrary, the parties are deemed to have continued to engage on the same terms as those in the letter dated 25th April 2012.

9. Section 27(1) of the *Employment Act* requires employers to set the time frame within which employees are to work per day. The essence of this is to ensure that employees have time to rest.

10. Parties to an employment contract are at liberty to fix the amount of time that an employee ought to work in a day. However, whatever the agreement, it must not go outside the boundaries that have been set by the rules.

11. Regulation number five (5) of the Regulations of Wages (General) Order, 1982 provides for the maximum number of hours that an employee is to work in a day. Employees working on night shifts are required to work for a maximum of sixty (60) hours per week spread over six (6) days in a week. This translates to an average of ten (10) hours per day.

12. Any work that is done outside this timeframe is considered as overtime for which the employee is entitled to extra pay. Under regulation six (6) of the aforesaid Order, an employee who puts in extra hours than is sanctioned by law is entitled to be remunerated for the extra time at the rate that is equivalent to one and a half times of his hourly pay for every extra hour that he is engaged.

13. The Respondent's witness admitted that the Claimant used to work between 6.00 PM and 6.00 AM every day. In the face of this admission, there was no need for additional evidence by the Claimant to establish this fact. Therefore, the submission by counsel for the Respondent that the Claimant did not tender evidence to demonstrate that he used to work between 6.00 PM and 6.00 AM per working day does not make sense.

14. Although the Respondent asserts that the Claimant was not entitled to be remunerated for work undertaken outside the statutory maximum hours allegedly because he was part of management, no evidence was tendered to show that the Respondent's employees at supervisory level fall in management. Further, no evidence was tendered to show that there was an agreement between the parties or that there exists a rule or a clause in an applicable Collective Bargaining Agreement which disentitled the Claimant to claim for overtime pay.

15. The Respondent has placed heavy reliance on the decision in Ngunda v Ready Consultancy Limited (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR) to suggest that it is not liable to pay the Claimant overtime pay. However, the two cases are distinguishable.

16. First, unlike in the instant case, the employer in the Ngunda case did not admit that the employee worked overtime. The Respondent's witness in the current case admitted in court that the Claimant used to work for twelve (12) hours per day from 6.00 PM to 6.00 AM. Therefore, it is inaccurate for the Respondent to argue that there is no evidence on record to demonstrate that the Claimant put in the extra work hours that he claims.

17. Second, in the instant case, there was adequate evidence to demonstrate how the extra hours accrued. The Claimant's evidence was that his work hours used to run from 6.00 PM to 6.00 AM, a period of twelve (12) hours. During cross examination, the defense witness admitted this fact. With the evidence by the Claimant and the admission by the defense witness, there is sufficient evidence on record to demonstrate when the extra work hours were incurred.

18. The Respondent introduced in evidence a voucher showing that the Claimant was paid his terminal dues and released the Respondent from further claims. However, the Claimant disputes this assertion.

19. The Claimant indicates that at the point of payment, he indicated to the Respondent that he was still entitled to overtime pay. He avers that he expressed this position by making a note of it on the face of the discharge voucher in question.

20. In cross examination, the Respondent's witness confirmed this fact. He confirmed that the Claimant expressed his claim for overtime dues on the discharge voucher.

21. Given the above evidence, I am satisfied that by executing the payment voucher, the Claimant did not release the Respondent from the Claim for overtime dues. It is clear from the record that the Claimant expressed his position on the right to recover this amount on the payment voucher that he signed.

Determination

22. As a result, I find that the Claimant is entitled to claim for the extra hours that he worked. However, since regulation 5 of the Regulations of Wages (General) Order, 1982 contemplates employees working on night shift to work for ten (10) hours in a day, the Claimant can only claim for two (2) hours per day as the extra time worked.

23. The evidence on record shows that the Claimant was first engaged on 5th April 2012. He worked until 7th June 2017. This means that the Claimant worked for an average of sixty-two (62) months. This converts into one thousand six hundred and twelve (1612) days taking into account that a month has approximately twenty-six (26) working days after excluding the four (4) rest days. Therefore, the Claimant is deemed to have put in two (2) extra hours every of the above working days. This converts into three thousand two hundred and twenty four (3,224) hours for the period under consideration.

24. An employee who works overtime is entitled to be paid for the overtime session at an hourly rate that is equivalent to one and a half times of his hourly salary. From the evidence on record, the Claimant's monthly salary was Ksh. 45,740.00. Thus, his daily rate was Ksh. 1,525.00. Concomitantly, his hourly rate on a ten (10) hour day works out to Ksh. 152.50.

25. From the applicable formula, the Claimant's hourly overtime rate was Ksh. 228.75 (Ksh. 152.50 + Ksh. 76.25= Ksh 228.75). Therefore, for 3224 hours he was entitled to Ksh. 228.75 x 3224 hours = Ksh. 737,490.00.

26. Accordingly, I enter judgment for the Claimant for the aforesaid amount of Ksh. 737,490.00.

27. I award the Claimant interest on the aforesaid sum at court rates from the date of this decision.

28. I award the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M Manani