



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC CAUSE 917 OF 2016

JAMES KYAMA.....CLAIMANT

-VERSUS-

MUTHAIGA GOLF CLUB..... RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 17th May, 2016 seeking the following reliefs:

- a) Overtime pay and refund of deductions from the claimant salary.**
- b) Certificate of service**
- c) Costs of suit**
- d) Interest in (a) and (b) above**
- e) Any other relief**

2. The facts of the case, are that the claimant was employed by the Respondent on the 1st September, 2005 as a waiter/barman earning a monthly salary of Kshs. 8,848 which salary was increased to a gross of Kshs. 28700 as at May 2015. He worked until 2nd June 2015 when he resigned from the employment.

3. After the resignation, he was paid Kshs. 221,145 as his terminal dues but he contended that it was less than what he expected since it did not include all the pay for overtime worked from 2nd June 2009 to 2nd June 2015 when he resigned.

4. He further averred that during his employment by the Respondent, the Respondent deducted Kshs. 70,000 from his salary without any explanation and the same was not refund to him after resigning.

5. The Respondent entered appearance on 2nd June, 2016 and filed a response to the claim on the 28th June, 2016 contending that it employed the claimant as a waiter and not a barman as alleged.

6. It averred that that the claimant tendered his resignation on 2nd June, 2015 without notice as provided for under the Collective Agreement (CBA), nevertheless that the resignation was accepted on the 3rd June, 2015 and his dues totaling to Kshs.221,145 was paid to him. The said dues included overtime pay. Consequently, it averred that the claimant is not entitled to any other claim for overtime pay.

7. The respondent admitted that it deducted the Kshs. 70,000 from the claimant's pay to cover the short falls on his sales between 2008 and 2010 contending that the deductions were justified. further it averred that the said claim for refund is statute barred.

Evidence

8. The suit proceeded for hearing on the 31st May, 2021 where the claimant testified as CW-1 and adopted his witness statement dated 15.5.2016 together with list of documents filed on even date. The documents were admitted as Exhibit 1-12. He testified that his claim is for payment of overtime from the year 2009 to 2nd June, 2015 together with a refund of Kshs 70,000 which was deducted made by the Respondent from his salary as shorts on sales. He also prays to be issued with a certificate of service.

9. Upon cross examination, he testified that he complained about the deduction of Kshs. 70,000 vide a letter of 5.8.2010 but the Respondent insisted that it was for payment of sales shortfalls. He further testified that the said money was deducted from his salary till his resignation and that is what forced him to resign.

10. On further cross examination, he testified that he worked from 8am to 9pm clocking 4 hours overtime each day but he was not paid for the same. He also testified that he filled forms indicating time in and time out each day which was signed by the supervisor and then fed into the system. However, he confirmed that many of the overtime forms produced were not approved.

11. He stated that the hours worked as overtime would be computed during the submissions and contended that he used a base rate of 4 hours per day to calculate the claim of Kshs 530,875.50 as the overtime pay owing. He confirmed that sometimes he was compensated for some overtime worked by being granted leave.

12. The Respondent called the Human Resource manager, Mr. Collins Peru as RW-1 and who adopted his written statement dated 25.5.2021 together with list of documents filed on 25.5.2021 as evidence. In brief, he testified that the overtime appearing under the claimant's terminal dues were calculated depending on the number of hours worked as overtime.

13. He testified that according to the C.B.A, overtime was calculated based on the basic pay which was Kshs 22,100. The claimant had clocked 397 hours as overtime as per the approved forms which summed up to Kshs. 80,864. He also testified that the Respondent deducted one-month salary in lieu of Notice from his terminal dues.

14. He further stated that the claimant worked at service counter Tee number 5 situated at the center of the golf course which operated between 10am and 5 pm.

15. With regard to the deduction, it was stated that each employee's short falls varies and nothing was produced to affirm the allegation that the Respondent deducted the said money till the time of resignation. With regard to certificate of service the witness affirmed that the same was available for picking but the claimant never picked it.

16. On cross examination, RW-1 testified that that it is the duty of the employee to fill in overtime forms and present it to the manager for approval and processing.

Submissions.

17. It was submitted for the claimant that, the claimant is entitled to overtime pay under part II (2) of the CBA between the Respondent and KUDHEIHA. It was further submitted that the evidence of the number of overtime hours worked has been adduced and therefore the claimant ought to be paid.

18. It was also submitted that section 19 of the Employment Act gives an employer authority to make salary deduction out of an employee wages based on a lawful cause but that the said deduction has to be communicated to the employee and his consent obtained. It was then argued that the Respondent deducted Kshs. 5,855 from the claimant each month without informing him of the reason for the said deduction and or seeking his consent. Therefore the deductions were illegal according to him and the same ought to be refunded.

19. The Respondent on the other hand submitted that, the overtime payable to the claimant was calculated as per the forms received by its manager and approved. It was then argued that the formula used in calculating the Claimant's overtime was illustrated under the CBA, which the Respondent used in ascertaining what was payable to the claimant, and duly paid him at the time of separation.

20. It was also submitted for the Respondent that, prior to entering the CBA, the claimant could be granted extra leave days as compensation for the overtime worked, a fact which was admitted by the claimant during trial, which practice is acceptable as was held in **Esther Wanjiku Nderitu V African Quest Safaris Limited [2014] eKLR**, where the Court held that; -

“The Employment Act, 2007 has not explicitly provided for what should happen in case an employee works during his rest days or public holidays. Section 10(3) of the Employment Act, 2007 appears to suggest the issue is left to parties' autonomy.20. The Court is aware that some employers would give off days in lieu of work done during public days and rest days. Some may opt to pay cash in lieu. As already stated the contract between the parties did not make any provision in this regard.21. The discussion therefore must turn to consider whether there are any other written laws which have addressed the issue. The Labour Institutions Act, 2007 came into force on 2 June 2008. The Act itself has not addressed the question but section 46 has given the Cabinet Secretary responsible for Labour the power to publish Wages Orders to prescribe/constitute minimum terms of conditions of employment within specific sectors of industry.22. The Regulation of Wages (General) Order has set out the hours of work and for payment of overtime and the formula for calculating the overtime. It has also provided for weekly rest days and for the deferment of the weekly rest days by mutual consent, and holidays with full pay.”

21. Accordingly, it was submitted that the claimant was duly compensated for the overtime earned and therefore does not deserve to be paid the overtime pay sought.

22. On whether the claimant should be refunded the Kshs. 70,000/- allegedly deducted from his salary, it was submitted for the respondent that there is no evidence that the said money was deducted from the claimant salary. However, it was argued that the claimant had recklessly conducted his duties leading to loss of Kshs. 5,000, which ought to have been deducted from his salary.

Analysis and determination.

23. I have carefully considered the pleadings, evidence adduced and the rival submissions by the parties. The issues for consideration are;

a) Whether the claim for overtime is merited.

b) Whether the claimant should be refunded the Kshs. 70,000 deducted by the Respondent.

Overtime.

24. Section 27 of the Employment Act enacts that ;-

“27. Hours of work

(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven.”

25. Accordingly, any hours worked in excess of what is provided in the law must be compensated for. The Regulation of Wages (General) Order provides for the formula for overtime calculation as provided for under Rule 6 which provides as follows:-

“6. (1) Overtime shall be payable at the following rates.

(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;

(b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.

(2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee’s basic minimum monthly wage.

(3) Notwithstanding subparagraphs (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks -

(a) one hundred and forty-four hours for employees engaged in night work;

(b) one hundred and sixteen hours for all other adult employees.”

26. Clause 2 of Part II of the Collective Bargaining Agreement signed between the Respondent and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) dated 28th May, 2015 , provides as follows;

“Overtime shall be payable for hours worked in excess of the normal hourly rate.

i. for hours worked on normal working days at double the normal hourly rate or time off on another working day.

ii. For hours worked on normal rest days and gazetted public holidays at twice the normal hourly rate or time off on another working day.

iii. For purposes of calculating overtime, the normal hourly rate shall be taken as one hundred and ninety-nine (1/199) of an employee’s monthly basic wage (outdoor staff)

iv. For purposes of calculating payment of overtime for the indoor staff the normal hourly rate shall be taken as (1/217th) of an employee’s monthly basic wage (Indoor staff)”

27. In view of the forgoing, the issue in dispute is whether the claim for overtime as from 2nd June, 2009 to 2nd June, 2015 is tenable.

28. The Respondent submitted that it paid the claimant all his overtime of an aggregate of 397 Hours and that the hours considered were as per the overtime forms filled by the claimant and forwarded to the Respondent. It further contended that the claim is time barred.

29. The claimant on the other hand, submitted that he was never paid overtime from 2nd June, 2009 till 2nd June, 2015 and denied that the claim is time barred.

30. As to whether the claim of overtime pay is time barred, it agreed that the claimant resigned from employment on the 2nd June, 2015 and he filed this Suit on the 17th may. 2016.

31. Limitation of action with regard to employment causes has been aptly captured under section 90 of the Employment Act which provides as follows;

“90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

32. The claim for overtime in my opinion is a continuous wrong contemplated under Section 90 of the Employment Act which claim must be made within 12 months of cessation thereof. This position was reinforced in the case of **Charles Ogola & 2 others v Mansion Hart Kenya Limited [2019] eKLR** where Onyango J. held thus –

“overtime is a continuing wrong while underpayments is a right. It is therefore only overtime that would be statute barred after 12 months as provided under Section 90 of the Employment Act. Underpayments would however accrue like all other terminal benefits so long as the claim is filed within 3 years from the date of accrual of cause of action.”

33. In my opinion, the claimant rightfully filed this claim within 12 months from the time of resignation which is the time the wrong ceased. I will therefore consider the same on merits.

34. The burden of proof is upon him to demonstrate through pleadings and evidence the exact overtime worked and how he arrived at the sum claimed. However, he has not demonstrated how he arrived at the figure of Kshs. 530,875.58 pleaded in his claim. He testified that the computation was to be provided during submissions but clarified that the claim is based on a flat rate of 4 hours per day from 2nd June 2009 to 2nd June 2015.

35. In view of the foregoing gaps in the pleadings where, the claimant has failed to plead the particulars and provide evidence to prove the claim for overtime worked and not paid, he will have to contend with 397 hours of overtime computed and paid to him by the employer after the resignation.

Unlawful deductions

36. As regards the claim for refund of the Kshs. 70,000 which was deducted from his salary by the Respondent, the claimant submitted that the said monies were deducted from his salary without his consent and explanation. The claimant complained about the said deduction vide his handwritten letter dated 5th August, 2010. The respondent admitted in its pleadings that the deduction was made and maintained that the same was to cover shortfalls on the claimant's sales. It further contended that the claim for the refund is time barred because the deductions were done between 2008 and 2010.

37. The claimant acknowledged that there were shortfalls on his sales but blamed it on his colleague who fraudulent used his business card to steal. That matter was never pursued until the claimant resigned 5 years thereafter.

38. Section 17 of the Employment Act implores upon all employer to pay employees all their wages payable but section 19 gives instances when deduction can be made from an employee's salary, thus: -

“(1) (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the custody of the employer occasioned by the willful default of the employee.”

39. In view of the foregoing provision, it is my considered opinion that the impugned deduction by Respondent was lawful and justified. I am further satisfied that the claim for refund is time barred by dint of section 90 of the said Act because it was filed in this court after the lapse of 3 years from the time when the deductions ended.

40. In the end and on the basis of the findings and observations made herein above, I dismiss the suit with no costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JANUARY 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE