



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 62 OF 2018**

**KENNEDY OGWENO OTIENO.....CLAIMANT**

**-VERSUS-**

**BEDROCK HOLDINGS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant through M/s. Magatta & Njogu Advocates filed this claim vide a Memorandum of Claim dated 22<sup>nd</sup> February, 2018, claiming payment of his terminal dues upon his resignation and seeks the following reliefs :-

**a) Annual leave plus prorate leave of Kshs 45,756.10.**

**b) Leave travelling allowance of Kshs 1,053.00.**

**c) Refund of uniform fee of Kshs. 2,250**

**d) Soap allowance of Kshs. 6,750.**

**e) Rest days of Kshs. 156, 878.30**

**f) Public holidays of Kshs. 33,118.70.**

**g) Underpayment of wages of Kshs. 161,221.70.**

**h) Housing allowances of Kshs. 69,753.10.**

2. The summary of the Claimant's case is that, he was employed by the Respondent in June, 2012 as a night guard at a monthly salary of Kshs. 5,600 which was increased to Kshs. 6700 per month.

3. The Claimant avers that he worked 12 hours every day of the week without any rest day or compensation thereof for the overtime. Further that the Claimant also worked during public holiday without payment on the double rate basis.

4. On 4<sup>th</sup> April, 2016 the Claimant resigned from the Respondent's employ however that he was not paid his terminal dues during the resignation forcing him to issue a demand letter through its advocate which demand did not elicit any response.

5. In February, 2018 the Claimant was summoned by the Respondent in their Nakuru offices and issued with a cheque of Kshs 22,350 which cheques bounced upon being presented to the bank.

6. The Respondent entered appearance on the 28<sup>th</sup> March, 2018 and filed a response to the Memorandum of claim merely denying all the averments of the claim and putting the Claimant to strict prove thereof.

7. This cause proceeded for hearing on the 4<sup>th</sup> November, 2021 and the Respondents case on the 15<sup>th</sup> November, 2021.

8. The Claimant testified as CW-1 and adopted his witness statement dated 7.9.2017 together with the documents filed therein.

9. On cross examination the Claimant testified that he resigned from the Respondent due to the meager salary among others. He testified further that he worked overtime and public holidays however that there is no evidence to back up the same.

10. The Respondent called one witness, Anita Karuhi Busaka, the Respondent's general manager as RW-1. The witness adopted her witness statement dated 3<sup>rd</sup> April, 2018 which in summary stated that the Claimant resigned from the Respondent's employ on 5<sup>th</sup> April, 2016 without notice and his terminal dues was calculated and paid via a cheque which unfortunately was dishonored by the bank. However that the Respondent tried replacing the said cheques but the Claimant refused to follow direction as to the replacement.

11. Upon cross examination, RW-1 testified that the Claimant never raised any discrepancies during its employment. Also that the Kshs.22,350 which was to be paid to the Claimant was to go towards unutilized leave days.

#### **Claimant's Submissions.**

12. The Claimant submitted from the onset that he was paid Kshs 6700 at the time of his resignation while working as a night guard which money was less than the sum provided for under the statutory minimum wage of 2012,2013 and 2015 therefore this Court ought to order the Respondent to pay him for the underpayments. The Claimant in support of their argument cited the case of **Simeon Omariba Orangi V Robinson Investment Limited [2019] eKLR** where the Court held that in as much as the employee may accept a salary that is lower than what is provided in the minimum wage, the employer is mandated with paying in accordance with the law and to pay otherwise would amount to underpayment.

13. The Claimant then submitted that in addition to the underpayments, the Court to order the Respondent to pay all the other claim as pleaded in the claim.

#### **Respondent's Submissions.**

14. The Respondent submitted from the onset that the claim by the Respondent is time barred as per section 90 of the Employment Act in that the Claimant filed this suit on 23.2.2018 seeking for payments of dues that allegedly accrued from 2012. It was argued that the only valid claim if any is the one accrued from 21<sup>st</sup> January, 2015 to the date of filing of this suit.

15. The Respondent submitted further that the Claimant claimed to have been underpaid when he has not furnish this Court with any evidence to show how much he received. According to the Respondent the Claimant was tasked with the burden of proving the underpayments in accordance with section 107 and 108 of the Evidence Act.

16. The Respondent also submitted that salary payable to the Claimant are special damages which must be specifically pleaded and proved and cited the case of **Ryce Motors Ltd & Another V Elias Mukoki [1996] eKLR** and the case of **Macharia Waiguru V Muranga Municipal Council & Another [2014] eKLR**.

17. The Respondent in conclusion submitted that the Claimant has failed to prove his claim in all the heads of the claim herein and therefore the claim ought to be dismissed with costs to the Respondent.

18. I have examined all evidence and submissions of the parties herein. The claim by the Claimant is for payment of his terminal dues which falls in 3 categories, underpayment and leave pay and house allowance not paid.

19. The claim was filed on 23/2/2018 and therefore the only claim payable and not time barred is for dues which accrued from 22/2/2015.

20. In the circumstances of this case, the underpayment of the Claimant sought prior to 2015 is not payable.

21. I award Claimant underpayment as per legal notice No. 117 of 2015 which amounts to **Kshs.50,931.10/=** as pleaded.

22. I also award the Claimant house allowance not paid within the same period = **Kshs.18,694.60/=** as pleaded.

23. The Claimant is also entitled to leave payable during the period of **Kshs.11,765.80/=**.

24. The total the Claimant is entitled to is **Kshs.81,391.50** less statutory deduction plus costs and interest at court rates with effect from the date of this Judgment.

**DATED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF MARCH, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Njogu for Claimant – present

Onsongo for Respondent – present

