

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 840 OF 2015

ERNEST MSAFIRI MORRIS.....CLAIMANT

- VERSUS -

ATTA (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 19.11.2015 through M/S Njiru & Company Advocates. The claimant was employed by the respondent in 1977 on permanent basis and as at retirement on 31.12.2013 he earned Kshs. 57, 000.00 per month in the position of a Shift Miller. He was paid a sum of Kshs. 366, 641.00 and he signed a discharge voucher for settlement of final dues or claims. He claims that he was not given three months' retirement notice as required by law. He also claims overtime over the period worked for 863 hours at Kshs. 863 x 1.5 x 99, 125 making Kshs.128, 317.00. His testimony was that by practice retiring staff were given 3 months' notice and he was given only 11 days' notice. Further, he testified that he reported at work at 7.00am to 7.00pm being 12 hours instead of the statutory 12 hours. He testified and claimed that over the period worked he worked on public holidays but he was not paid for 36 hours amounting to Kshs.34, 297.00 and totalling Kshs. 162, 614.00. He prayed for judgment against the respondent for:

- a) Three months' salary in lieu of notice.
- b) Overtime Kshs. 128, 317.00.
- c) Public holidays Kshs.162, 614.00.
- d) Costs of the suit.
- e) Any other relief that the Court may deem just and expedient to grant.

The respondent filed the response to memorandum of claim on 22.03.2016 through Eric Ntobo & Company Advocates. The respondent admitted that it employed the claimant as pleaded for the claimant. The respondent stated that the claimant was retired and was paid full retirement benefits and terminal dues. Further the claimant signed a discharge voucher for settlement of final claims. The suit is an abuse of court process and it should be dismissed with costs.

Despite service of a hearing notice the respondent did not attend at the hearing. Final submissions were filed for the claimant. The Court has considered all the material on record.

The only issue for determination is whether the claimant is entitled to the remedies as prayed for.

The Court finds that the claims for the overtime and work on public holidays were continuing injuries running throughout the years of service and ceased to run on the retirement date being 31.12.2013. The suit being filed on 19.11.2015, the Court finds that the claims were time barred under section 90 of the Employment Act, 2007 which provides for 12 months from cessation of the continuing injury as the time of limitation. On notice pay, the Court finds that the claimant has not established the alleged practice of three months' notice for retiring employees as no evidence of such employees who received three months' notice was provided. The Court considers that the respondent failed to participate in the hearing and final submissions and each party to bear own costs of the suit.

In conclusion judgment is entered for the respondent against the claimant for dismissal of the claimant's memorandum of claim with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE