



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2012 OF 2017**

**CASTO GITONGAH MWAL.....CLAIMANT**

**VERSUS**

**BROOKSIDE DAIRY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claim herein is for:

- a) A refund of Ksh.33,191.37 that was erroneously deducted.**
- b) Kshs. 1,431,581.10 being the overtime pay not paid.**
- c) Certificate of Service**
- d) Fine for Kshs. 100,000.00 against the respondent**
- e) Interests on (a),(b) and (d)**
- f) Any other relief that the court may deem appropriate to grant.**

2. The salient facts of the case are that the claimant was employed by the respondent as a security guard. He started on causal basis in September 2008 but later he became permanent after being given the appointment letter dated 23.3.2010. By the letter dated 5.1.2011, he was promoted to the position of Security Supervisor effective from 1.1.2011. His starting salary Ksh.7161 but later it was reviewed annually until 1.4.2016 to as high as Kshs.5 9,778.97 per month in recognition of his diligent performance of his duties in the company.

3. On 1.1.2017 the claimant served the respondent with two months retirement notice from 1.1.2017 to the end of February 2017. The notice was accepted by the respondent by the letter dated 16.1.2017 but by a further letter dated 7.2.2017, the respondent calculated the claimants terminal dues including one month salary in lieu of notice since the claimant was made to exit before the expiry of his notice period. The net dues payable after stationery deductions were Kshs. 83,191.37 out of which he was paid Kshs. 50000 and the balance of Ksh. 33191.50 was paid to the Brookside SACCO to settle loans for defaulters he had guaranteed.

4. The claimant contended that the payment of the Kshs. 33191.50 was erroneous because there was no such loan obligation owing to the SACCO after his shares totaling to Kshs. 266103 were applied to clear the total debt of Kshs. 264177 including the loans for defaulters. He contends further that he did not authorize the respondent to deduct and pay the Kshs. 33191.50 to the SACCO and the law did not permit her to do the same. He therefore prays for refund of the said sum by the respondent. In addition he prays for overtime worked at the rate of 4 hours per day for 6 days a week. He contends that he used to work from 6 a.m. to 6 p.m. daily except one day per week when he rested He stated that he was only paid overtime for working on public holidays. He further prays for certificate of service and a fine of Kshs. 100000 against the respondent. Finally he prays for costs and interest.

5. The respondent admits that the claimant was her employee until he retired as pleaded in his claim. She further admits that she paid Kshs. 33191.50 out of the claimants terminal dues to the Brookside SACCO society to off set outstanding loan pursuant to the commitment between the claimant, the SACCO and the respondent. She therefore contends that if the claimant had any claim for refund he should direct it to the SACCO.

6. As regards the claim for certificate of service, the respondent contends that the same has always been ready for collection by the claimant at the office. In addition she denies the claim for overtime contending that the claimant's working hours were from 8.00 a.m to 5.00 p.m. daily with one rest day per week. She contends that she paid the claimant for all the public holidays, he worked as overtime, and denied receiving any letter from him demanding payment of overtime during his period of service. She therefore prayed for the suit to be dismissed

with costs.

## **Evidence**

7. The claimant basically reiterated the averments in his claim and his written statement filed on 9.10.2017. He further produced 8 documents as exhibits to support this case.

8. Upon cross-examination he maintained that he was working for 12 hours for 6 days a week. He further contended that he used to sign Attendance Register which is in the custody of the employer. However, he admitted that his contract never provided for payment of overtime. He further admitted that he was paid at double rate for all the public holidays worked and clarified that the claim for overtime excludes the public holidays. He also admitted that since 2010 he never complained to the employer about overtime.

9. He contended that the employer had no authority from him or the law to deduct Kshs. 33191.50 for his terminal dues and pay to the SACCO. He further contended that the employer was not privy to the loan agreement and further stated that the SACCO should have pursued him under the Loan Guarantee Agreement for payment without deducting his dues.

10. Finally, the claimant admitted receipt of his certificate of service via email and admitted that the issue of the certificate is now settled.

11. M/s. Grace Wambui Manugu, the respondent's Human Resource Manager testified as RW1. She also reiterated the averments in the defence and produced 5 documents to support the defence. She denied the claim for overtime and contended that the claimant was working from 8.00 a.m to 5.00 p.m. and he had one off day per week. She further contested that the claimant was paid as overtime all the public holidays he worked.

12. RW1 admitted that Kshs. 33,191.37 was deducted from his terminal dues and the same was paid to the SACCO to pay loans for 4 defaulters who were guaranteed by the claimant. She contended that the claimant was a member and the respondent used check off system for deductions from payroll. She contended that the SACCO used to give a schedule to the employer by 20th day of every month and employees pay was deducted and in case of any complaint, the employee was referred to the SACCO. She contended that when the claimant complained about the deduction of the Kshs. 33,191.50, she referred him to the SACCO.

13. Upon cross-examination RW1 admitted that the appointment letter and the promotion letter did not state the working hours for the claimant. She further admitted that the email dated 9.3.2017 asked that Kshs. 33191.50 deducted from the claimant's dues be refunded to him. However, RW1 clarified that the author of the email was not involved with the SACCO and payroll preparation in the company. Finally she admitted that she had no written authority from the claimant authorizing the employer to deduct his salary to pay the loan he had guaranteed.

## **Issues for determination**

14. There is no dispute that the claimant was employed by the respondent from 2008 to 2017. There is further no dispute that after the retirement the claimant was entitled to payment of Kshs. 83,191.50 but only Kshs. 50000 was paid to him while Kshs. 33191.50 was paid to the Brookside SACCO to settle loans owned by defaulters who the claimant had guaranteed. There is also no dispute that the claimant was issued with a certificate of service after filing this suit. The issues for determination are:

- (a) Whether there was an outstanding loan of Kshs. 33,191.50/- owing to the SACCO from defaulters guaranteed by the claimant as at the date of his retirement.
- (b) If the answer to (a) above is Yes, whether the respondent had authority from the claimant or the law to deduct the said Kshs. 33,191.50 from the claimant's terminal due and pay to the SACCO.
- (c) If the answer to (a) and (b) above are No who should pay the Kshs. 33,191.50 to the claimant.
- (d) Whether the claimant is entitled to the reliefs sought.

### **(a) Whether there was outstanding loan of Kshs. 33191.50**

15. Respondent contended that there was loan of Kshs. 33191.50 owing from defaulters to the SACCO guaranteed by the claimant. She relied on statement from the SACCO prepared by the Assistant SACCO officer Mr. Victor in January 2017.

16. The claimant did not dispute that he guaranteed loans to the defaulters. However he relied on the clearance form signed on 27.2.2017 which indicated that he had cleared Kshs. 264,177/- loan plus interest using his share contribution of Kshs. 266,103/- and left Nil loan balance. He therefore blames the employer of deducting Kshs. 33,191.50 from his terminal dues without his authority.

17. I have carefully considered the loan statement from the claimant's SACCO account as at January 2017 and the clearance form done by Mr. Victor from the SACCO. It is clear from the said statement that the claimant had a loan of Kshs. 200,000 plus interest of Kshs. 31,981/- totaling to Kshs. 231,981/-. In addition to the said loan the claimant had guaranteed the said four (4) defaulters a total of Kshs. 32,151/- making the total loan owing to be Kshs. 264,135/-.

18. Subsequent to the said statement Mr. Victor from the SACCO signed the claimant's clearance form on 27.2.2017 indicating that the claimant's loan of Kshs. 264,177/- had been cleared using his share contribution of Kshs. 266,103/- leaving Nil loan balance. The question

that arises is what was the purpose of the clearance form in relation to payment of terminal dues. In my view the answer is obvious. It was meant to inform the employer whether or not the employee had debts with the company and/or the SACCO so that the same could be factored when calculating the employees terminal dues.

19. In this case the employer ignored the advice by the SACCO officer that as at 27.2.2017, the claimant had cleared all his SACCO loans. I therefore, return that the claimant has proved on a balance of probability that he had no loan obligation to the SACCO in sum of Kshs. 33,191.50/- or at all as at the time his terminal dues were calculated.

**Whether the respondent had authority to deduct Kshs. 33191.31 from the claimant's terminal dues and pay to the SACCO**

20. RW1 admitted that the respondent had no written authority from the claimant to deduct Kshs. 33,191.50/- from his salary and pay the SACCO for loans guaranteed by him. I agree with the claimant that without a written authority from him, the employer had no right to deduct his salary and pay the SACCO for loans he had guaranteed to other SACCO members. In any event, I have already found that the said deduction and payment of the Kshs. 33,191.50/- from claimant's terminal dues was without authority, unjustified and contrary to the advice by the SACCO endorsed in the clearance form on 27.2.2017.

**(c) Who should pay the said Kshs. 33191.50 to the claimant**

21. The Claimant never authorized the respondent to deduct the Kshs. 33,191.50/- from his terminal dues. Likewise the SACCO never advised the respondent that the claimant had any loan balances with her but rather informed the employer that the claimant had more shares than the loan owned to the SACCO as at 27.2.2017 and as such the loan balance was zero. In my view, the wrong doer in the circumstances is the respondent because she wrongfully deducted the claimant's terminal dues without any justification and paid to the SACCO. I therefore, find and hold that the respondent is the right person to pay the claimant the Kshs. 33,191.50 which she deducted as per the payslips for February, 2017.

**(d) Reliefs sought – Kshs. 33,191.50/-**

22. In view of the foregoing finding, I award the claimant Kshs. 33,191.50/- as prayed.

**(ii) Overtime**

23. The Claimant admitted that from 2010, he never complained about overtime until he retired. He further admitted that he used to be paid overtime whenever he worked during public holidays. I have carefully considered the evidence and especially the payslips produced and formed the opinion that the claimant did not work overtime and if he did so, it was on voluntarily basis because he never complained when the same was not added to the overtime pay for the public holidays worked. He did not produce any written evidence or call any witness to prove that he was dutifully required to work from 6 a.m. to 6 p.m. Without such evidence, I must return that he has not proved on a balance of probability that he worked overtime and the claim for overtime therefore falls on its face.

**(iii) Fine for Kshs. 100,000/-**

24. No evidence was adduced to support the claim for the fine and no particulars were given for the claim for the fine of Kshs. 100,000/- Consequently that claim is dismissed.

In conclusion, I enter judgment for the claimant against the respondent, in the sum of Kshs. 33,191.50/- plus costs and interest at court rates from the date of filing the suit.

**Dated, signed and delivered in open court at Nairobi this 31st day of January, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**