



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.253 OF 2018**

**GRACE WATIRI MWATHI.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT, KAGONDO SECONDARY SCHOOL...RESPONDENT**

**JUDGEMENT**

The claimant is a female adult. The respondent is a public secondary school.

On 1<sup>st</sup> May, 1999 the claimant was employed by the respondent as a secretary until 31<sup>st</sup> December, 2017 when she retired while earning Ksh.51,000 which was below the Ksh.252,000 which she was entitled to as her gratuity having worked for 18 years for the respondent.

The claim is that there was no annual leave allocated or compensation thereof.

There was overtime work for period on Saturday and beyond 8 hours on weekdays.

By letter dated 22<sup>nd</sup> November, 2004 the respondent noted the claimant had worked from the year 1999. The respondent did not remit its share of the NSSF. The claimant was not paid hardship allowance, commuter and house allowances despite being entitled to the same.

The claim is also that the claimant was entitled to the minimum wage set by the government each year in line with civil servants wage guidelines as held in **Dadson Maina & 33 others versus Board of Management, Nyeri Primary School [2017] eKLR** the court held that employees employed by the Board of Management are public officers. There was underpayment which was irregular.

The claimant is seeking for a declaration that the respondent wilfully failed to implement wage guidelines in the payment of the due wage and be ordered to pay the owing amounts for underpayment all being Ksh.932,293; compensation for annual leave for 18 years at ksh.193,752.75; service/gratuity Ksh.201,865.30; hardship allowance Ksh.649,350; the respondent be ordered to pay the claimant dues owing in lieu of remitting NSSF remittances from the year 1999 to 2005; overtime arrears Ksh.809,169; a certificate of service; general damages for breach of contract; and costs.

The claimant testified that she worked diligently for the respond and before her retirement on 31<sup>st</sup> December, 2017 she took 2 months leave and was called for her dues and only paid a paltry ksh.51,000 which was too low. For 18 years she had worked without taking annual leave, with overtime, travelling allowance or hardship allowances being paid. In the years 1999 to 2005 the respondent did not remit statutory dues to the NSSF and seek the payment of service gratuity.

Defence

The defence is that the claimant worked for the respondent on temporary basis as per the letter of temporary appointment dated 12<sup>th</sup> May, 1999 and due to her low qualifications she could not secure another position. for her service the claimant was paid ksh.51,000 and is not entitled to Ksh.252,865 as claimed. The claimant took her annual leave and there was no overtime work allowed.

The defence is also that there was payment to the NSSF. The claims for hardship, house and commuter allowances were not due. the circular issued by the ministry did not apply to the claimant. The claims made are without basis and should be dismissed.

No witness was called.

The claimant filed written submissions.

The respondent has not attached any employment records with regard to the claimant.

The claimant filed various documents to confirm her employment with the respondent and part of this record is letter dated 22<sup>nd</sup> November, 2004 a general communication confirming employment with the respondent from 12th May, 1999 as a typist. There is also the letter of retirement issued by the respondent and dated 31st October, 2017 confirming end of employment on age grounds, retirement at 65 years. the claimant was also allowed terminal leave of 2 months.

The claimant's case is that for the duration of her employment she was not remunerated as per the wage guidelines and the due allowances and upon retirement she was not paid her terminal dues.

Without a contract of service, the claimant's employment with the respondent was governed under the Employment Act Cap 226, now repealed from May, 1999 to 2nd June, 2008 when the Employment Act, 2007 came into force. Without the contract of service, any collective agreement regulating the general terms and conditions of employment, the claimant remained an employee of the respondent and her wage regulated under the various wage orders and regulations issued annually by the Minister.

In the pleadings filed, the claimant has not set out her monthly earnings to assist the court with an analysis of the same vis-a-vis the applicable wage orders from the year 1999 to 2017. Save for the attachment of the bank statements for the period 2009 to June, 2013 and *Tower Sacco Society Limited* statements from March, 2013 to January, 2018 to support the claims and averments made, the Memorandum of Claim is devoid of any pleadings as to the alleged underpayments and payments which were contrary to the applicable wage orders.

While setting the record straight on the essence of parties being bound by their pleadings and that a court can only decide on issues that arise from the filed pleadings, the Court of Appeal in **Independent Electoral and Boundaries Commission & Anor. versus Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) versus Nigeria Breweries PLC SC 91/2002** that;

*'...It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....'*

*'It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.'*

In employment and labour relations claims, Rule 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow parties to file pleadings which include evidence and submissions. Such is to ensure a claimant is able to plead all facts, the law, policy and any matter that is necessary for the court to address in analysis the facts. See **Sinohydro Corporation Ltd versus George Kisivo Mulei [2018]eKLR**.

The claimant cannot thus introduce and particularise her claims in the written submissions. Such would be to deny the respondent the fair chance to reply to the same as such ought to have been addressed in her pleadings and Memorandum of Claim to allow the respondent apply the provisions of Rule 13 of the Court Rules appropriately.

Even where the court is to rely on the bank statements and Sacco statements to discern the paid wage, these only relates to a limited period of March, 2009 to January, 2018.

On 6th March, 2009 the wage paid is Ksh.6,780.00. Such wage paid to a typist at Kagondo in Nyahururu area;

By April, 2009 the claimant was being paid Ksh.6,780.00 per month;

By April, 2010 the claimant was paid ksh.7,420.00 and what was due was Ksh.6,935.00;

By April, 2011 the claimant was being paid Ksh.7,420 ad what was due was Ksh.7,811.00 thus less by Ksh.391.00 and which ought to have been pleaded;

By April, 2012 the claimant was earning staggered amounts of Ksh.7,420, 9,420, 8,420, 10,420, and what was paid consistently was ksh.9,420 each month. The due wage was Ksh.8,834.50;

In 2013 the claimant was paid Ksh.9,420 and what was due was Kshs. 10,071.00 and which is not pleaded;

**In the year 2014 the claimant was paid Ksh.9,920.00 and the minimum wage did not change;**

In the year 2015 the claimant was paid Ksh.9,740.00 the minimum wage was ksh.11,297.50 and which is not pleaded;

And as at December, 2017 the claimant was earning Ksh.10,690.00 and the minimum wage provided for Ksh.13,309.80 per months.

The analysis above done by the court ought to have arisen from the pleadings as the court cannot tailor the claims for the claimant. Without the same being pleaded, the respondent had no opportunity to respond.

Even where there was no witness called by the respondent, the facts as stated do not disclose any good case of any underpayments.

The claimant has also relied on the circulars issued by the Minister of Public Service, Youth and Gender Affairs and also relied on the case of **Dadson Maina & 33 others versus Board of Management, Nyeri Primary School [2017] eKLR** but the claimant was employed by the respondent cited as *Board of Management* and in my humble view, the circular of the Minister and that from Directorate of Personnel Management (DPM) does not apply to employees of the respondent, Board of Management.

The claimant is also seeking the payment of her annual leave for 18 years. in the letter of retirement, the claimant was allowed 2 months terminal leave. Section 28 of the Employment Act, 2007 allow the employee to take annual and not exceed such time by 18 months. See the Court of Appeal in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR**.

On the claim for service pay/gratuity, service pay for claims of unpaid statutory dues owing from the year 1999 to 2005 applicable under the law then, the Employment Act Cap 226 and being urged in a claim filed 4<sup>th</sup> October, 2018 is time barred.

In **Nyabuto Arambe Abusa versus Kenya Power & Lighting Company Limited [2017] eKLR** the Court of Appeal held that where a claimant has unreasonable delays in filing a given claim and which does not constitute a continuing injury, the same cannot be urged out of time. A claim which thus arose in the year 2005 and relating to alleged service pay which was not covered under the repealed legislation and only covered under section 35 of the Employment Act, 2007 is time barred.

Without a contract of agreement on a benefit of gratuity, the same is not due.

On the claim for the payment of a hardship allowance and house allowance, on the analysis for underpayments above, without any evidence as to how such dues arose, the claimant having been the employee of the respondent and the due wage regulated under the applicable wage orders, such claims lack a basis.

The claimant is also seeking pay for overtime work on Saturday and for long hours each day. The details with regard to work for long hours each day are left bare. No timeline, hours of reporting to work or the details as to how such long hours arose.

The claimant's work on Saturday without giving details of her work hours, the total covered means she had her rest day on Sunday. Section 27 of the Employment Act, 2007 allow the employee to take a rest day each week. With such allowance of a day off and without details as to the total number of hours worked each day, the court cannot award as claimed.

A certificate of service is due to every employee in accordance with section 51 of the Employment Act, 2007. Such should issue unconditionally.

On the claim for general damages for breach of contract this claim is without any material evidence. such is declined.

**Accordingly, save for the issuance of a Certificate of Service, the claims made are hereby found without merit and are dismissed. No orders to costs.**

**Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....