



**REPUBLIC OF KENYA**

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

**CAUSE NO.55 OF 2018**

**ISACK KHAGULI MASWA.....CLAIMANT**

**VERSUS**

**LEONARD GITHAIGA**

**T/A MID-RIFT HOTEL**

**FORMERLY GITUAMBA PUB (2000) LIMITED..... RESPONDENT**

**JUDGEMENT**

The claim is that on 29<sup>th</sup> February, 2004 the claimant was employed by the respondent as a bouncer.

The claimant was paid Ksh.1,500 per month from March, 2004 to May, 2007; From June, 2007 to April, 2009 the claimant was paid ksh.2,500 per month; May 2009 to April, 2010 the claimant was paid ksh.4,500 per month; May 2010 to April, 2011 the claimant was paid ksh.6,000 per month; May 2011 to April, 2012 the claimant was paid ksh.7,000 per month; May 2012 to April, 2013 the claimant was paid ksh.9,000 per month; and May 2013 to October, 2016 he was paid ksh.12,600 per month.

There was underpayment of wages.

The work hours were 6pm to 8am and overtime was not paid.

On public holidays he claimant would be at work without compensation. The claimant worked for 12 years without taking annual leave.

On 3<sup>rd</sup> October, 2016 the claimant reported on duty and was informed that his employment had been terminated. He was paid Ksh.24,695 only.

The claim is for;

- a) underpayments from May, 2005 to October, 2016 all at 689,539.25;
- b) Public holidays Ksh.84,015.45;
- c) Notice pay ksh.12,600;
- d) Overtime Ksh.213,153.60;
- e) Leave ksh.6,699.75; and
- f) Compensation.

The claimant testified that he worked for the respondent until 3<sup>rd</sup> October, 2016 when he reported to work and the manager dismissed him from his employment without notice or a hearing.

The claimant also testified that a customer had been at the respondent as booked a room. Another customer got inside and then left. The claimant did not see the customer getting out. When asked about the customer who had left, the claimant did not have details. The next day he was called and made to sign documents and sent away.

He only took annual leave on 4 occasions. The respondent also paid for NSSF and NHIF. He was not aware public holidays were paid for. He was not aware that in some months there was a double payment.

The claimant also testified that he did not desert duty as alleged in defence. The payment of ksh.24,000 was part payment of terminal dues and the demand from Maragia Advocates was done.

Defence

The defence comprise of denials of the claims made and that the respondent employees work in shift of day and night running from 8am to 5pm and night shift from 6am to 3am when the club officially closes as per the licence. There was no overtime work.

The claimant took his annual leave each year.

The claimant deserted duty without notice. He was paid his terminal dues at ksh.24,000 and he accepted the payment in settlement. This was paid through his advocate.

The claims made are without merit and should be dismissed.

Teresia Kabucho testified that the claimant was employed as a bouncer at the club to man customers inside the club from 8pm to 3am when business closed per the issued licence.

The claimant deserted duty and his advocates made demand for his terminal dues which were paid via cheque all at Ksh.24,695.

The claims that there was termination of employment by verbal notice is not true as the claimant deserted duty.

The claimant would be issued with pay slips noting his wages. April, 2015 he was paid ksh.11,000 in accordance with the minimum wage orders at the time which was ksh.10,024 and thus there was no underpayment.

When the claimant worked on public holidays he would be paid double. This is noted in the pay slips;

April, 2015 he was paid ksh.734;

May, 2015 he was paid Ksh.3671

June 2015 he was paid ksh.367

These were to cover Easter, Jamuhuri day, and other public holidays were treated in the same manner.

On Sundays he would be paid double and allowed 26 days of annual leave.

Ms Kabucho also testified that the respondent does not keep work records for its employees. Even in her case there is no work record kept.

At the close of the hearing, both parties filed written submissions.

The claimant was not clear on the exact reason(s) leading to termination of his employment by the respondent. On the one hand he pleaded that on 3<sup>rd</sup> October, 2016 he was called by the manager and verbally sent away. In his evidence he testified that there was a customer who booked a room, another one went inside and then came out but he did not see the customer getting out. He was called by the manager the next days and dismissed.

The account of events is hazy and does not build clarity on the events.

On the other hand the respondent's case is that the claimant deserted duty. That the respondent is of the practice not to keep work records.

This evidence by the respondent and Ms Kabucho is incriminating. Section 10 of the Employment Act, 2007 requires the employer to keep all work records for every employee and to keep custody of such records for a period of not less than 5 years upon termination of employment. Also upon an employee filing proceedings with the court, the duty is upon the employer to file such work records in court.

In the absence of work record, the court should believe the testimony of the employee.

In this case, the claimant not clear on the events leading to his employment termination, to assess the same for a finding that there was unfair termination of employment would be to visit injustice on the other party.

This position is further given credence by the letter of demand sent to the respondent by the advocate for the claimant *Maragia Ogara & Co. Advocates* dated 16<sup>th</sup> February, 2017 noting that employment had terminated and *it was agreed between yourselves and our client that his terminal benefits be paid on a later date*. His advocate proceeded to make demands for payments of

1. Underpayments;
2. Overtime
3. Gratuity.

By letter from *Ombati & Ombati Co. Advocates* dated 17<sup>th</sup> February, 2017 advocates for the respondent making reference to the letter of demand dated the day before on 16<sup>th</sup> February, 2017 the issues are addressed noting the claimant had absconded duty and his dues were paid instantly at ksh.24,695.

The subject payment was by cheque which has since been encashed.

The issue of unfair termination does not arise.

With regard to underpayments, the respondent as the employer having failed to keep work records, the court is left with the word of the claimant against that of the respondent. The court must believe the claimant as the employee as the respondent has failed in its legal duty to keep work records as required under section 10 and 74 of the Employment Act, 2007.

The underpayment of wages from the year 2004 to September, 2016 shall be referred to the County Labour Officer for assessment and tabulation based on the applicable Wage Orders. There shall be a report to the court. This shall take into account what was paid, what is pleaded and the payment statements filed for April to June, 2015.

With regard to claims for overtime pay, the defence that the respondent was running shifts with night shift covering 6pm to 3am based on the nature of business licence issued is not challenged by the claimant in any material way.

Where the claimant was forced to remain at work after his shift ended at 3am to a time after 8am, this ought to have been addressed appropriately. To claim overtime when his shift ended at 3am having started at 6pm would be to claim where it is not deserved.

The claims made for overtime are also grossly exaggerated. The claimant testified that on 4 occasions he took his annual leave. However in claiming for overtime pay he has applied a multiplier of 12 months for every year. This is to fail to take into account the correct time worked overtime. These claims lack merit.

From the field payment statements for April to June, 2015 the respondent confirmed the formula applied in addressing work on Sundays and public holidays. This was not challenged. The claimant did not challenge the fact that in April, 2015 he was paid ksh.734 to cover work for public holidays;

In May, 2015 he was paid Ksh.367 to cover the public holidays and June, 2015 he was paid ksh.367 to cover the due public holiday.

On this basis, for the claimant to argue that he never noticed that his wages were paid with a double payment to cover work during public holidays is to be dishonest and thus to seek unjust enrichment.

On the claim for leave for 12 years and where the claimant only took 4 years of leave, the years of leave taken are not set out. Section 28 of the Employment Act, 2007 requires every employee to take his annual leave within a period of 18 months. To accumulate such leave days turns to a continuing injury only recoverable within the meaning of section 90 of the Act and without stating when the claimant last took his annual leave, such claim are lost. See the Court of Appeal in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR**.

**Accordingly, the matter is hereby referred to the County Labour Officer, Nakuru who shall tabulate the underpayments due to the claimant from February, 2004 to September, 2016 as a general labourer. A report shall be filed within 45 days. Each party shall bear own costs.**

**Delivered at Nakuru this 6<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....