



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 219 OF 2018

WILSON MAINA NGUNJE.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

MAHIGA GIRLS SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent and averred that he was employed as a watchman and that he was involved in an accident. As a result he opted to resign from his employment with the Respondent on 31st July 2016. He averred that at the time of leaving the Respondent's employment he was earning Kshs.10,300/- a month. He averred that at the time of leaving the Respondent he was owed Kshs. 2,148,204/- made up of leave dues – Kshs. 1,639.50 in respect of 2014, Kshs. 11,476.50 for 2015; overtime for 36 months – Kshs. 2,046,096/-, underpayment from 2015 to 2016 – Kshs. 15,450/-, gratuity Kshs. 67,980/- and house allowance – Kshs. 5,562/-. He averred that he was also entitled to a certificate of service and costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant always went for his off days and took leave and that there was no single year he did not take leave. The Respondent averred that the suit herein was taken out in contravention of the mandatory provisions of the Government Proceedings Act and that a preliminary objection would be taken on the same to have the suit dismissed with costs. The Respondent averred that there was no demand nor notice of intention to sue issued or served upon it.

3. The Claimant testified as did the Respondent's witness Francisca Wahome. The Claimant stated that he worked for the Respondent from March 2008 till 25th July 2016. He stated that he had a tabulation of dues of Kshs. 486,680.80 and that the Respondent ought not be excused from paying overtime. He testified that he worked for 6 days and rested for 1 day and that he worked for 12 hours a days. He stated that he was entitled to annual leave and he therefore was claiming for the leave days not taken. He stated that from the book produced in evidence it was clear he worked for over 12 hours on some days and only had one rest day. He thus sought payment per his amended statement of claim.

4. He was cross-examined and stated that he was hospitalized at the hospital and was off for 4 months after the accident. He stated that he was hospitalized for 1 month and as he was unwell, he left the Respondent's employment. He stated that he received his last pay on 31st July 2016. He said that he was not paid when he was recuperating and stated that he was never late for work. He testified that the last leave he went for was in 2014. He stated that he applied for 21 days leave in 2015 and that he never complained about payment of salary. He stated that he did not file any payslip and that NSSF dues were paid.

5. The Respondent's witness testified that the documents the Respondent had presented showed the hours worked per day and that the sign-in and sign-out register showed the days the Claimant reported to the School. She stated that per the records she had, the Claimant signed in at 8.00pm and signed off at 8.10am in some instances and that to the best of her knowledge the Claimant was paid for the overtime worked. She was cross-examined and stated that the Claimant took leave and on being questioned about leave in 2016 indicated that the forms before court were for all the leaves the Claimant took. She testified that in 2014 the Claimant took 18 days, 20 days in 2015 and there was no record filed for 2016. She stated that the attendance register showed the Claimant worked between 6.00pm and 6.20am and between 8.00pm and 8.10am from the record of a few days sampled. She stated that a day off compensated the Claimant for the extra hours worked. In re-exam she confirmed that the Claimant had sought by letter of 20th July to retire and that when schools are closed no employees work.

6. The Claimant submitted that the off days the Respondent asserts were compensation for overtime worked were the mandatory rest days provided for by Section 27(2) of the Employment Act. The Claimant submitted that was neither a favour nor was it compensation for overtime. He submitted that the Respondent had conceded that the Claimant only went for 18 days leave in 2014, 20 days in 2015 and none in 2016 and that he was therefore entitled to be compensated for the leave not taken nor paid for. The Claimant submitted that there was proof of underpayment since he was paid Kshs. 10,300/- instead of Kshs. 11,330 which was the statutory minimum wage in 2015 and that the Claimant was entitled to the difference between his salary and the statutory minimum for the 36 months. He submitted that he was not issued

with a certificate of service as required by law and he sought grant of the orders sought as well as costs. The Respondent did not file any submissions.

7. The Claimant was no doubt an employee of the Respondent and resigned from his employ with the Respondent. He therefore was not claiming unfair dismissal but the payment of his dues. He showed that he was underpaid in terms of the Regulation of Wages Order and that he did not receive compensation for the overtime worked. The Respondent was unable to demonstrate that the Claimant was paid for overtime as required not was his rest day a substitute for the overtime worked. In the final analysis the Claimant proved his case on a balance of probabilities and is entitled to receive the following relief:

- a. Kshs. 13,316/- being unpaid leave dues
- b. Kshs. 127,857/- for overtime due
- c. Kshs. 15,450/- being underpayment of wages in 2015
- d. Gratuity – Kshs. 67,980
- e. Costs of the suit
- f. Certificate of service
- g. Interest on a), b), c) and d) at court rates from the date of judgment till payment in full.

8. This decision was rendered in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50 and is stayed for 14 days automatically to permit the parties take any requisite steps towards either review, appeal or taxation and the like.

It is so ordered.

Dated and delivered at Nyeri this 28th day of May 2020

Nzioki wa Makau

JUDGE