



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1374 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MARGARET WAITHIRA NJUGUNA.....CLAIMANT

VERSUS

NAS AIRPORT SERVICES LIMITED.....RESPONDENT

JUDGMENT

Vide her Memorandum of claim dated and filed in Court on 7th August, 2015, the claimant herein avers that the Respondent, failed and/or ignored and/or neglected to pay her overtime dues at the time of her separation with the respondent.

Her case is that she was employed by the respondent in January 1996 as the Senior Sales Lady earning a monthly salary of Kshs.35,101. That she performed her duties diligently, faithfully and to the Respondent's satisfaction until 7th August, 2012 when she tendered her resignation which was duly accepted by the Respondent. The Claimant further contends that upon her resignation she received her terminal dues from the Respondent on 22nd November 2015 save for accumulated overtime for the period 2009 to 31st July 2012 which she claims amounts to Kshs.87,415.

The Claimant urges this Court to allow her Claim as prayed. In her Claim she seeks the following reliefs:

1. An Order that the Respondent to pay the Claimant overtime pay amounting to Kshs.87,415.
2. An Order that the Respondent to pay costs of this suit.

The Respondent in its Response dated 15th March, 2016 and filed in Court on 17th March, 2016 admits that it engaged the Claimant from 2nd January 1996 but as a Restaurant Waitress Grade 3 and not Senior Sales Lady as alleged in the claim.

The Respondent avers that the Claimant's contract was subject to the Collective Bargaining Agreement in force from time to time. It admits the Claimant was entitled to overtime payment subject to her filing the requisite overtime claim form and presenting the same to her unit manager for approval.

The Respondent contends that the Claimant made the requisite payment for overtime in the year 2008 and 2009, which was duly verified and the due amount paid to her. That upon resignation she was paid all her dues and issued with a certificate of service.

It is the Respondent's position that the Claim for overtime payments for the year 2009 to 2012 is therefore an afterthought and a bid to receive payments which she is not entitled to.

The Respondent urges the Court to dismiss the Claim in its entirety with costs.

Evidence

The case was heard on 6th November 2019. The Claimant testified on her own behalf and the Respondent called one witness who testified on its behalf.

Claimant's Case

The claimant adopted her witness statement dated and filed on 7th August 2015 as her evidence in chief. She further relied on her

Memorandum of Claim and List and Bundle of documents on 7th August 2015 as her evidence. In her statement she reiterates the averments made in her Memorandum of Claim.

The claimant maintained that she was entitled to automatic overtime having worked in excess of 208 hours a week. She admitted the existence of Overtime Claim forms which she stated that she duly filed and handed over to her supervisor, one Mr. Nicholas Misango but did not receive any payment in respect thereof.

On cross examination, the claimant confirmed that she was in possession of the Claim forms for overtime as she did not submit the same for approval by her supervisor. She confirmed having received payment of overtime for the period 2008/2009 together with her terminal dues.

Respondent's Case

RW1, SAMUEL GATHOGO, the Assistant Human Resource Manager for the Respondent adopted his witness statement dated 10th September, 2019 and filed in Court on 13th September, 2019 as his evidence in chief. In his statement RW1 reiterates the averments made in the Respondent's Response.

RW1 testified that the Claimant was duly paid for overtime accrued in the year 2008/2009 to the tune of 183 hours which amount was consolidated with her terminal dues. He therefore maintained that the Claimant has no Claim against the Respondent and urged the Court to dismiss the same with costs.

Submissions by the Parties

The Claimant submitted that she is entitled to the reliefs sought in her Memorandum of Claim having proved her case on a balance of probabilities. She cited and relied on the case of **Wycliffe Okoth & Another v H. Young Company Limited (2019) eKLR** where the Court held that it was satisfied on the strength of oral and documentary evidence that the Claimant had worked overtime and proceeded to allow the Claim for overtime.

There are no submissions on record filed on behalf of the Respondent.

Analysis and Determination

I have considered the pleadings, the evidence adduced by the claimant and the respondent's witness and the written submissions filed by the Claimant. The only issue arising for determination is whether the claimant is entitled to the remedies sought in her Memorandum of Claim.

The Claim is for payment of overtime worked from 2009 up to 31st July, 2012 accumulated at 259 hours.

The Claimant confirmed having received payment for overtime totalling to Kshs.61,764.30 that was consolidated and paid together with her terminal dues.

The Respondent on the other hand confirmed that the Claimant was duly paid for the overtime worked and that the instant claim is an afterthought which should be dismissed.

Noting that the Claimant's separation was by mutual agreement she had the opportunity to present all her claims for payment prior to separation. The Claimant did make a claim for overtime payment which was tabulated at Kshs.61,764.60 and duly paid out to her.

The Claimant did accept payment of her terminal dues totalling to Kshs.464,039.60 as evidenced in Appendix 7 of the Respondent's Response. Having accepted payment, the Claimant is estopped from claiming any further payment of her terminal dues.

In the circumstances the Claim fails in its entirety and is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE