



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 2275 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 16th January, 2019)

GOERGE OKUMU ORRIDOW.....APPLICANT

VERSUS

CARE INTERNATIONAL IN KENYA.....RESPONDENT

JUDGEMENT

1. The Claimant, George Okumu Oriddo, instituted this claim on 19/12/2014 vide a Memorandum of Claim dated 17/12/2014 and which was later amended on 16/10/2017 seeking payment of his remaining terminal dues against the Respondent, Care International in Kenya.

2. He avers that he was employed as a Driver by the Respondent in the Dadaab Refugee Camp on 14th May 1993 under a contract dated 12/05/1993 and at all times offered his services with due diligence and selfless dedication. That on 18/12/2012 the Respondent issued him with a letter of termination on grounds of redundancy which effectively terminated his employment on 18/01/2013 but that the termination letter did not offer the terminal dues he is legally entitled to. That despite him issuing demand and notice of intention to sue to the Respondent, it has ignored or negligently failed to pay him the said dues.

3. He avers that his termination of employment was unlawful, unfair and caused him great financial loss, mental and economic strain and which is the reason he seeks the intervention of this court. He prays for judgment against the Respondent for:-

a) Terminal dues of Kshs. 2,517,840/= particularised as (i) Overtime payment of Kshs. 2,228,400.00 and (ii) Hardship allowances of Kshs. 289,440.00

b) Costs of this suit.

c) Interest on (a) and (b) above at court rates.

d) Any other or further relief that this Court may deem fit and just.

4. In his amended Witness Statement dated 04/10/2017 and filed on 11/10/2017, he avers that he went on annual leave and often used to work for overtime which he was not paid for and that from 1993, the Respondent has also never paid him hardship allowance which was to be paid with his salary.

5. He further lists the days he worked overtime for the Respondent and states that where he worked on Sundays and Holidays, he was supposed to be paid twice the number of hours worked. That he worked on loan at the UNHCR from 1995 to 2002 but the terms of his employment were still under the Respondent who used to pay all his dues except for overtime and hardship allowances and that he went back to the Respondent from 2002.

6. The Respondent filed a Memorandum of Defence dated 18/02/2015 on 24/02/2015 confirming it employed and terminated the Claimant as averred in the Claim but denies that the Claimant was diligent in his work. That the Notice of Termination dated 01/12/2012 clearly indicated the dues the Claimant was entitled to and that they were all paid.

7. Further, that it does not pay hardship allowance but instead offers compensatory time off including a compensating allowance of Kshs. 1,340/= per month for all employees in areas designated as compensatory areas such as the Dadaab Refugee Camp. That the Claimant enjoyed this benefit during his time of employment and that his claim for overtime payment is not payable and that it fully complied with **Section 40 of the Employment Act** in terminating the Claimant's employment.

8. The Respondent filed a Witness Statement dated 17/01/2018 by its Human Resource Manager, Kenneth Njama stating that the Labour Officer was also notified accordingly in writing and that at the time of termination, the Claimant's basic salary was Kshs. 46,503/= together with a CTO monthly allowance of Kshs. 1,340/=. That the Respondent paid the Claimant's pension and terminal dues computed as follows:-

(a) Salary up to 18/01/2012.....	Kshs. 27,001.75
(b) CTO Allowance.....	Kshs. 778.06
(c) Earned Annual Leave of 11 days.....	Kshs. 24,358.71
(d) Redundancy Pay.....	Kshs. 8,872.00
(e) Leave allowance prorated.....	Kshs. 562.54
Less deductions.....	Kshs. (12,602.55)
Total Payable.....	Kshs. 21,190.00
(f) Severance Pay.....	Kshs. 178,437.00

9. That the overtime payment is not based on excess hours worked for each day as erroneously claimed by the Claimant but based on excess hours worked per week and that such overtime was to be approved by the Supervisor in Overtime Form Appendix O then captured in the payroll or leave summary before it can be compensated. He explains or demonstrates how the overtime documents are forgeries in paragraph 21 (a) – (k) of his witness statement.

Evidence

10. The Claimant testified in cross examination confirming that they used to be given compensatory leave and be paid to go home. In re-examinations, he stated that compensatory allowance is different from CTO allowance and that CTO is to remove you from camp; it is like transport home.

11. RW1 who works for the Respondent as the Human Resource Manager adopting his Witness Statement testified that the Respondent's workers worked on Saturdays and not on Sundays as the Claimant's forms had indicated and which dates had been altered. In cross-examination, he stated that the Labour Officer was copied in the termination letter and that while all payslips indicated payment for compensatory allowance, the same are not before court. He also confirmed that they did not have records of all employees before court including the 15 who were declared redundant.

Claimant's Submissions

12. The Claimant submits that the Respondent's actions did not conform to the standards set for fair labour practice contrary to **Article 41(1) as read with Article 47 of the Constitution of Kenya** and that **Section 2 of the Employment Act** and **Section 2 of the Labour Relations Act** define *redundancy* as:-

"the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment".

13. He cites the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where Githinji JA rendered himself as follows:-

"As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy - that is that the services of the employee have been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment".

14. Further, that **Section 40(1) of the Employment Act** provides that *'an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-*

a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill,

ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.'

15. That **Section 40(1) (a) and (b)** above are clear that the reasons and notice period should be spelt out and that while his employment was terminated in 2012, the pension payments were made on 22/04/2013 and further, the Respondent did not adduce any evidence that the company's performance was dwindling as alleged. That it also failed to avail a record of all employees declared redundant for the Court to appreciate that the said statutory provision was complied with.

16. That the Respondent therefore breached the mandatory requirements of section 40 by failing to follow the laid down procedure and rendering the termination of his employment unfair and he relies in **Mombasa Elrc Cause Number 236 of 2013, Ignas Karingo Mghona & 4 Others -Vs- Star of Hope International Foundation** where the court at para 29 thereof stated that:-

“Importantly, Section 40 states an Employer shall not terminate the Employee's contract of employment, unless the Employer has complied with the conditions outlined under Section 40. The payments of severance pay, notice pay, and outstanding annual leave days, must be made before termination. The refrain under Section 40 is that the Employer 'has paid.' The law does not state that the Employer 'shall pay.' The Employer shall not terminate the Employee's contract of employment, unless all the conditions under Section 40 have been met. Redundancy dues must be paid before termination. What most Employers do, as did the Respondent herein, is tabulate redundancy dues, terminate and advise Employees when to collect their dues at a later date. Redundancy dues must be paid before termination. Failure to meet any of the conditions under Section 40, which includes payment of all terminal dues before termination, would result in an unfair and unlawful termination.”

17. It is submitted by the Claimant that he started complaining about payments for overtime a long time ago and that RW1 even admitted in testimony that he signed a document pushing overtime payment for him as evidenced at page 4 of his bundle of documents. That he was in job grade C and therefore entitled to overtime as per the Respondent's manual on page 8 of his bundle of documents and states that the hardship allowance is not overrated considering the Daadab area where he used to work being a risky place.

18. That the Respondent breached **Section 43 of the Employment Act** since there was no proof of reasons for termination of employment and also breached **Section 51 of the Employment Act** by failing to issue him with a Certificate of Service. That having demonstrated that his termination of employment was unfair/ unlawful, he should be awarded compensation of 12 months' salary together with the reliefs he seeks in his Statement of Claim.

Respondent's Submissions

19. The Respondent submits that the Claimant being bound by his pleadings should not seek to introduce the issue of wrongful declaration of redundancy as it is legally untenable and that his claim is only limited to overtime and hardship allowance. It cites the case of **Dakianga Distributors (K) Limited -vs- Kenya Seed Company Limited (2015) eKLR** in which the court opined that the Appellant therein was bound by the defence pleadings which was not amended to allow the judge consider issues that the appellant's witness was introducing through evidence in Court.

20. It also submits that the documentation for overtime payment had material alterations to the dates and years, overtime payment was not specifically proven and that the Claimant's claim having been based on a contract is statute barred by dint of **Section 4(1) (a) of the Limitations of Actions Act**.

21. That the Claimant is therefore left with the period between 2009 and 2012 to prove his claim after maliciously filing his claim 2 years after termination of his employment and that if indeed he was owed the said allowances, he would have claimed them immediately. It urges the Court to find that the claim for overtime is tainted with falsity and fails accordingly.

22. It is submitted by the Respondent that the claim for hardship allowance is also statute barred for the period preceding the date of termination of employment by redundancy and that the same has not been proven by the Claimant.

23. That the Claimant was governed by his employment contract and the Respondent's Human Resource Policies which had no provision for payment of hardship allowance and that he confirmed the same in his testimony that he had never been paid the same from the onset. It urges the court to find that this claim also fails and that the Court should be dismissed with costs to the Respondent.

24. I have considered the averments of summations of both parties. From the Pleadings of the Claimant, his claim relates to payment of overtime and hardship allowance. The Claimant has however attempted in his evidence to bring out the issue of unlawful redundancy thereby shifting from his Pleadings and introducing a new prayer.

25. Parties are however bound by their Pleadings. I will therefore restrict myself to determining whether the Claimant is entitled to payment of hardship and overtime allowance as prayed. In determining whether the Claimant was entitled to payment of hardship and overtime allowance, reference is made to the claimant's appointment letter dated 12.5.1993. The letter is silent on the issue of hardship and overtime allowance. The Claimant submitted that he was a grade C employee and he was entitled to the payment under the Respondent's Overtime Policy.

26. The Policy states as follows:-

“Overtime payments :-

1) Employees in Grade A-c are entitled to overtime payment for official work outside of established working times and in excess of the established number of working hours and or holidays.

.....

6) For all employees, overtime must be approved. An employee that is required to work overtime must complete the Overtime Form Application O and obtain supervisor approval for each time that overtime is worked. At the end of the month, the Manager will approve.....

8) In the event that there is no budgetary provision to pay overtime, excess hours/days worked can be compensated by granting equivalent time off”.

27. From this provision, overtime pay was payable to the Claimant. However, the same had to be approved by his supervisor. Claimant referred to documents at pages 4 to 6, 11-89, 94 to 108 of his documents being overtime forms and vehicle log sheets as evidence of his overtime. He also referred Court to pages 90 to 93 of his bundles to show that the overtime was approved.

28. Pages 4 to 6, 11-89, 94 to 108 of the Claimants documents are vehicle log sheets indicating the times the vehicle was driven and overtime sheets filed by the Claimant.

29. At page 90 to 93 are overtime forms filed by the claimant and approved by his supervisor David Njuguna. Total hours approved on these sheets are 146 hours. There is no indication that any other overtime hours were approved for payment on account of the Claimant.

30. RW1 gave evidence in Court and even indicated that he even signed the document at page 4 of Claimant's documents asking that the Claimant be paid overtime.

31. In this case then I find the Claimant is entitled to the prayer for overtime sought upto 146 hours only which was approved by his supervisor.

32. As for payments of hardship allowance, there is no indication that the Claimant was entitled to this. The claimant's own appointment letter does not mention payment of this allowance. The Claimant was never paid this allowance from the time he was employed and he never sought for this at any time.

33. I therefore find the claim for hardship allowance foreign to this contract and therefore not tenable.

34. The upshot is that I find for Claimant in terms of overtime work for 146 hours only and this translates to = $40,843 / 30 \text{ days} = 1594.8 \text{ per day} = 199.3 \text{ per hour} \times 146 = 29,098.8 \times 2 = 58,195.6/=$.

35. The Respondent will pay costs of this suit plus interest at Court rate with effect from the date of this judgement.

Dated and delivered in open Court this 17th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

No appetite for Parties