



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO. 500 OF 2014

ENOCK MARANGACLAIMANT

VERSUS

B.O.G. CHEPTOROI SECONDARY SCHOOLRESPONDENT

JUDGEMENT

The claimant was employed by the respondent school as a Watchman and Night Guard for the year 2000 on causal labour terms of service and the same converted to fulltime employment in the year 2002.

The claimant was not paid his dues from the years 2002 to the year 2005. The claimant is seeking the payment of;

- a) Unpaid overtime hours1, 255,296.00;
- b) Paternity leave allowance for three (3) children;
- c) Leave Ksh.267, 120.00;
- d) Leave allowance;
- e) Holiday and Sundays Ksh.94, 390.15;
- f) Underpayments Ksh.1, 673,280.00; and
- g) Costs of the suit.

The claimant testified that he is an employee of the respondent as night watchman and works with Mr Raymond Langat in alternate shifts. The work hours are 12 per day for the full week without taking a break, off day or rest. He was only allowed 30 days off with an allowance of ksh.500.00. to While working for the respondent he had had 3 children and was not allowed paternity leave or payment in lieu thereof.

To compensate for overtime work the respondent has an allowance of Ksh.700.00 per month.

Defence

The respondent's case is that the claimant was paid an overtime allowance of Ksh.700.00 per month, a leave allowance of Ksh.500.00 per month and he never applied for paternity leave and could therefore not be paid for the same. The leave allowance was paid as and when it was due and the claims made in this regard are misleading.

The defence is that there was no underpayment and he was severally required to produce his school certificate for CPE in order to facilitate a salary review for employees which he has failed to do. The respondent revised salary for all employees including that of the claimant in the year 2002 and 2008 and the claims made should be dismissed.

Ms Emily Rop testified that as the Head Teacher of the respondent school and the secretary tot eh Board of Management is aware of the claims made. The claimant was employed by the respondent as a watchman on temporary basis on 1st October, 2001 and on permanent basis on 1st January, 2002. The respondent has two watchmen to alternate duty.

Ms Rop also testified that the claims made have been addressed by the respondent; there was a salary review for all employees in the years 2002, 2008 and 2009. The claimant was reminded several times to submit his CPE certificate to facilities salary reviews but he failed to

adhered to date.

The claimant has taken extended leave with extra allowance of Ksh.500.00 and Ksh.700.00 overtime pay. In the year 2014 the claimant was earning ksh.8, 020.00 per month and upon several increments is now earning ksh.13, 090.00 per month. The claimant went on leave and was paid an allowance. Any work during public holidays was compensated. All overtime is paid monthly.

The claimant did not inform the respondent of the delivery of any children or made an application for paternity leave.

The claimant is paid full allowances for housing, medical, NSSF and NHIF. When the claimant was required to submit his school certificates for a salary review, he failed to submit one and the claims made are without merit.

Both parties filed written submissions.

The claimant submits that he was made to work overtime without compensation.

Such pay is due for a total of 4 hours overtime per day for the 14 years of service.

Paternity leave pay is due for the 3 times the claimant had a child. On a wage of ksh.9, 960.00 he was entitled to 42 off days all at ksh.13, 944.00.

The claimant was entitled to leave from the year 2002 to 2005 and compensation is due. Pay for holidays and public holidays worked should be paid for the duration of employment.

The respondent submits that the claimant is still in the employment of the respondent as a watchman. The claims for underpayment are general without stating the job group yet there were constant salary reviews over time and when the claimant was required to submit his school certificate to facilitate the same he failed to oblige. The claims made in this regard are time barred by application of section 90 of the Employment Act, 2007.

On the claims for overtime pay the claimant has been compensated with a monthly allowance in this regard. There was no application for paternity leave to justify the claims made. The claimant took his annual leave and was on full pay and an allowance. The claims made for the years 2002 to 2005 are out of time.

The claimant has based his claims for unpaid overtime on the facts that from the years 2002 to 2005 such dues were not paid. Such claims fall under the provisions of the Employment Act Cap 226, now repealed and where due ought to have been addressed within such legislation.

Even where such claims may still be alive, due and owing, the records filed by the respondent as the employer and in pursuant to the provisions of section 10(6) and (7) of the Employment Act, 2007 give a schedule of overtime pay each month. Where the claimant took annual leave, time off, was allowed sick off and had a monthly provision for an overtime pay, such has adequately addressed any over hours worked.

On the claims for paternity leave for 3 children born to the claimant during his employment with the respondent, such leave is a right under the provisions of section 29(8) of the Act;

(8) A male employee shall be entitled to two weeks paternity leave with full pay

Such leave, like in maternity leave is due upon application and notice to the employer in advance or within a reasonable period noting the circumstances of each case and such notice must be in writing. The production of the certificate of birth for the child/children born during such leave period would be an important support document for a male employee seeking or allowed paternity leave. This is not the case for the claimant. He never applied nor submits any certification of birth for any child born to him.

the right under section 29(8) of the Act cannot be claimed in an empty space. There must exist a birth and such must relate to the subject employee.

The claimant testified that he went on leave for 30 days per year. Such is allowed under section 28 of the Act at 21 days a year. The taking of 30 days with full pay is a generous allocation of annual leave. The additional pay of Ksh.500.00 during the taking of such leave is not a legal requirement. No additional pay unless address in a collective agreement is due. no such agreement has been produced.

The leave claimed for 5 years, 2000 to 2005 is out of time based on the applicable law and as set out above, such leave where taken at 30 days in subsequent years instead of the legal provision for 21 days computed with full pay has fully addressed such claims.

The claim for work during holidays and Sundays for 14 years is general. The claimant as a night guard for the respondent, being in subsisting employment testified that he alternates his work duty with Raymond Langat. With the payment of a monthly overtime without stoppage when on leave or away due to any other matter, to claim for work over public holidays and Sundays as a separate item is to seek unjust enrichment where such is not justified.

On the claim for underpayment, the work records filed by the respondent, a random pick for November, 2014 indicate the following payments to the claimant;

Ksh.700.00 overtime pay per month;

Ksh.9, 420.00 basic pay;

Ksh.1, 500.00 house allowance;

Ksh.357.00 medical allowance;

Ksh.720.00 NSSF 5%

Gross wage Ksh.12, 715

The payments noted above and the applicable Wage orders for the position held by the claimant are a generous payment taking into account he was also with the benefit of NSSF and NHIF contributions to his advantage. Such well compensates the claimant for the position held with the respondent.

On this basis the claims made are found without merit. Costs should follow but the parties are still in an employment relationship and to penalise the claimant in costs shall put him in a hardship that he may not be able to bear. To ensure responsibility, he shall meet the costs for the respondent's witness at Ksh.10, 000.00.

Accordingly, the claim is hereby dismissed with costs to the respondent assessed at Ksh.10, 000.00.

Delivered at Nakuru this 7th day of February, 2019.

M. MBARU JUDGE

In the presence of:.....