



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.484 OF 2016

BENJAMIN GITHOME MAINGI.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 15th December, 2016 and served the respondent who entered appearance on 20th January, 2017 and filed defence on 7th April, 2017 to which the claimant filed a response on 29th August, 2017.

The List of Agreed issued was filed on 21st September, 2017 to which the respondent agreed and signed.

The matter was scheduled severally for hearing, on 16th July, 2018, 5th December, 2018 and 11th March, 2019 when the respondent was served but opted to be absent. On file are Affidavits of Service to confirm service of hearing notices to the respondent.

Claim

The claimant was employed by the defunct Municipal Council of Nakuru on 26th October, 1992 as a watchman grade M6 at a wage of Ksh.1,500.00 per month. The salary was apportioned to ksh.1,200.00 as basic pay and Ksh.300.00 as house allowance.

The claimant worked up to the date of his retirement in October, 2014. At the time he was earning ksh.34,350.00 as basic pay and ksh.15,000.00 in house allowance and ksh.2,000.00 commuter allowance all being ksh.51,350.00 per month.

During his employment, the claimant was working overtime which was regulated under the CBA between the respondent and the claimant's trade union. Such overtime was accumulate and carried forward for payment when appropriate. The respondent was to make good for the overtime by allocation of off days or payment in cash. The claimant got some day off in the year 2012 from 18th June, 2012 to 31st December, 2014 and he enjoyed the off days until 30th October, 2014 and remained with two (2) months of day offs for November and December, 2014. Such were 624 off days approved tabulated as per the approved overtime sheets daily overtime report.

The union had agreed under the CBA to have overtime paid upon approval by the head of department. The claimant's overtime was duly approved by the respondent. before taking the approved 624 off days all the sections head had approved. The total overtime hours all added to 9666 hours being 1812 days. By taking 624 days off there was a balance of 1188 days + 1812 all being 3000 days.

The claimant has pursued the payment of his overtime paid based on the approved returns and on 13th June, 2012 the finance department approved but there has been no payment.

The claimant is seeking for the payment of his terminal dues by converting the 1244 days carried forward as per signed approved overtime paid in accordance with the CBA clause 12(b)(i) and the payment be based on the last basic wage at ksh.34,350.00 all being Ksh.3,943.380.00 with interest and costs.

The claimant testified in support of his claim and also relied on his filed witness statement.

Defence

In defence employment of the claimant is admitted but denies being a party to the alleged CBA and is not owing the claimant any dues as alleged. Upon retirement the claimant was paid all his terminal dues which were legally due to him. any leave days owing at the time of retirement were forfeited where not converted to leave days.

There was no witness for the respondent.

Determination

It is not in dispute that the respondent took over from the defunct Nakuru Municipal Council and under The Transition to Devolved Government Act local authorities (now defunct) staff became officers of the County public service employees. Such provisions must also be read together with the County Government Act and the Urban Areas and Cities Act, 2011. See **(Interim) County Secretary, County Government of Kakamega versus Republic Ex parte Ali Adam & another [2017] eKLR.**

Effectively the claimant as an employee of the respondent and being unionised and or unionisable under the Kenya Local Government Workers Union, the respondent cannot extricate itself from proceedings herein and the application of the effective Collective Agreements (CBA) which covered the claimant while in its employment.

The claimant retired from his employment with the respondent in 30th October, 2014 and by which time he was on converted off days following overtime conversion into such off days approved to run from 18th June, 2012 to 31st December, 2014. There was retirement on 30th October, 2014 before claimant completed the allocated 624 days.

In total, the respondent approved 1188 off days. The claimant was granted 624 days off but by the date of retirement, 42 days had not been spent leaving the balance of 1,230 off days unspent.

By letter dated 9th May, 2016 the respondent Director of human resource replied to the claimant by asserting that under CBA clause 22(m) where leave is postponed the same cannot be commuted into cash. That the claimant did not apply for leave or his off days and at the end of his employment this was deemed forfeited.

Under the CBA, clause 12 addressed the tabulation and commutation of overtime;

12 (b) overtime shall be calculated by dividing the basic monthly wage, exclusive of housing and other allowances:-

(i) In the case of watchman by 260 hours.

(ii) ...

The defence is that under clause 29(m) of the CBA the owing leave or off days where not applied for would stand forfeited.

Save for the work records filed by the claimant, the respondent did not file any evidence, records or attend at the hearing to testify to the position taken in the pleadings. The court was left with the evidence and records by the claimant. The referenced CBA under Clause 29(m) was not attached. The CBA relied upon by the claimant has clause 29 which does not address matters as set out by the respondent with regard to any employee forfeiting his leave or off days which are legitimately earned and due.

Section 27 and 28 of the Employment Act, 2007 give every employee a right to take a rest day and to go

on annual leave. The duty is upon every employer to ensure that every employee has taken the due rest day or annual leave when due. Payment is due in lieu of taking such rest day or annual leave.

27. Hours of work

(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

It is the duty of the employer to regulate working hours.

In **Rajab Barasa & 4 others versus Kenya Meat Commission [2016] eKLR**, the court held that;

...Taking of annual leave is a legal requirement under the provisions of section 18 [section 28] of the Employment Act. The employer is required to ensure that in every 12 months an employee takes their annual leave and this should not extend to beyond 18 months. The purpose is to ensure that each employee takes a paid break and the rationale is that rest cannot be postponed. To fail to give an employee a rest or break is to start eating on their energy which lead into burnout and reduction in productivity. Therefore, taking of annual leave is not punishment and in any case the duty is upon the employer to ensure each employee takes their annual leave when due. There is therefore nothing like 'forced leave' where an employee has earned such leave.

In this case, where the claimant had 1188 leave days approved by the employer following owing overtime converted hours into days and only enjoyed 624 days only, there is a balance of such approved days being 1230 days.

In his claim the claimant has set out the owing days at 1244 broken down into hours all at 14,928. However, the tabulation of the owing overtime hours into off days and resulting annual leave was to enable the claimant enjoy the rest which ordinarily should have arisen after working overtime and no rest days was allocated and as a result accumulated into months and then years. The respondent in an effort to reduce such overtime worked hours put them into rest days and allowed 624 days off but retirement arose and such time was not spent as envisaged.

At the end the claimant had 1230 days unspent for his rest. Such days result into 41 months. Based on clause 12 of the CBA such rest days based on the basic wage amount to Ksh.1,408,350.00 as due and owing to the claimant. The tabulation of such time into hours multiplied by two as set out by the claimant and in view of the conversion of the overtime hours into rest days should not apply. With the conversion of overtime hours into rest days and such all being 41 months, the payment dues is Ksh.1,408,350.00.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of the due overtime pay not taken all amounting to Ksh.1,408,350.00 which shall be paid with interest from the time of filing the claim until payment in full. costs to the claimant.

Delivered in open court at Nakuru this 29th day of April, 2019.

M. MBARU

JUDGE

In the presence of:

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