



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 160 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER ATONGO OBAYE.....CLAIMANT

VERSUS

HIGHLAND PAPER MILLS LIMITED.....RESPONDENT

JUDGMENT

By memorandum of claim dated 19th and filed on 20th May 2015, the claimant avers that his employment was unfairly terminated by the respondent who further refused to pay his terminal dues. He further alleges that the respondent grossly underpaid him and did not pay for overtime for the period he was in its employment from 1980 to June 2014. He seeks the following remedies –

a) A declaration that the termination process as carried out by the respondent was unlawful and that during his employment with the respondent he was not remunerated as required by law.

b) Payment of the sums of money claimed below –

1. Date employed = 1980 to 1996 16 years

1998 – 2002 4 years

20 years

19 days x 20 years x basic/30 216,625.30

2. Overtime worked in June, 2014

January 2014 = 50 hours x 1.5 75.0 hours

February 2014 = 50 hours x 1.5 75.0 hours

March 2014 = 60 hours x 1.5 90.0 hours

April 2014 = 60.55 hours x 1.5 98.3 hours

May 2014 = 93.1 hours x 1.5 139.5 hours

13.5 x 2 75.0 hours

June 2014 = 60 hours x 1.5 90.0 hours

Total hours 595.8 hours

Overtime formula = employee basic pay x 12

2340

17,102 x 12 = 87.70 x 594.8 52,164.00

2340

Total claim **268,789.30**

c) Costs and interests

d) Any other relieve the court may deem fit to grant.

The respondent filed a response to the memorandum of claim on 30th October 2015 in which it denies the claimant's allegations in the memorandum of claim and avers that the claimant voluntarily resigned from its employment.

At the hearing the claimant testified on his behalf while the respondent called one witness MIKE PETER CLIFTON who acted as Manager from July 2012 to July 2014, the period material to his suit. The parties thereafter filed and exchange written submissions.

Determination

I have considered the pleadings together with documents filed therewith by

both parties, the evidence adduced in court and the written submissions.

The issues arising for determination are whether the claimant was unfairly terminated or resigned voluntarily, and whether he is entitled to any of the remedies sought.

Termination

According to the claimant's evidence, he was called into the office of the Manager on 2nd April 2014 and handed a pen and paper, and told he was not leaving the office until he had written his resignation. He however worked until 1st June 2014 when he was again coerced into writing another resignation letter.

For the respondent, RW1 who was acting Manager at the time of claimant's separation from the respondent, testified that the claimant submitted to him a letter of resignation on 2nd April 2014 but the respondent refused to accept the resignation. The claimant submitted another letter of resignation on 1st June 2014, which the company accepted. The claimant was paid his terminal dues consisting of leave due of Kshs.17,672 and ex-gratia payment of Kshs.15,000. He was further issued with a certificate of service.

Among the documents filed and relied upon by the respondent are the claimant's letter of resignation dated 2nd April 2014 (at page 8 of the respondent's bundle of documents) letter dated 8th April 2014 from the respondent in response to the letter of resignation dated 2nd April 2014 (at page 7) claimant's letter of resignation dated 1st June 2014 (page 6) and letter from the respondent accepting the resignation dated 12th June 2014 (page 5).

The claimant's evidence that he was forced to resign is not reflected in either the two letters of resignation or the respondent's response and or reaction to the same.

In the respondent's response to the claimant's letter of resignation dated 2nd April 2014, it states that –

“Your resignation letter dated 2nd April 2014 refers.

We find it strange that you have made no mention of the reason for your resignation but nevertheless request you to keep it on hold for at least two months.

We hope that the above is acceptable.”

The letter is signed by Mike Clifton, RW1.

It would appear that the claimant accepted the request by the respondent to hold on for at least two months, and submitted the second resignation letter on 1st June 2014, which the respondent then accepted.

I find that the claimant has not proved his allegation that he was coerced into resignation by the respondent. He was thus not either unlawfully or unfairly terminated from employment by the respondent, but voluntarily resigned, not once, but twice, after the 1st resignation

was declined by the respondent.

edies

The claimant prayed for what I presume is service pay but which is famed as –

“Date employed = 1980 to 1996 16 years

1998 – 2002 4 years

20 years

19 days x 20 years x basic/30 216,625.30”

The claimant is not entitled to the same as he was a member of NSSF as reflected in the NSSF statement filed at page 11 of his bundle of documents, as well as a member of the respondent’s contributory staff retirement benefits cheme domiciled at Kenindia Assurance Company Limited from which he was paid Kshs.340,080 by cheque no. 005747 dated 18th June 2015. The date on which the claimant was enrolled into the scheme as reflected in the details at page 12 of the respondent’s bundle is 1st May 1999 while the date of exit is reflected as 30th June 2014.

The claimant is under Section 35(6) of the Employment Act excluded from payment of service pay.

The claimant further prayed for overtime of 594.8 hours being overtime worked from January to June 2014. RW1 testified that according to the policy of the respondent it gave time off in lieu of overtime. In the respondent’s bundle of documents from page 13 which comprises overtime sheets, there is a breakdown of overtime hours worked by employees as indicated therein, among them the claimant.

The claimant has particularised his overtime as 50 hours for the month of January, 50 hours for February, 60 hours for March, 65.55 hours for April, 93.1 hours for May and 60 hours for June 2014.

In his testimony, he stated that he worked from 8 am and left at varying hours between 5 pm and 9 pm depending on the issues arising for his attention. He however did not give a breakdown of how he arrived at the number of hours claimed as overtimes.

The claimant stated under cross-examination that the amount paid as overtime was less than what was due to him without elaborating.

I find that the claimant has not proved that he worked overtime which he was paid for.

The claimant further prayed for underpayments.

The claim for underpayments was not included in the memorandum of claim and in any event was not proved.

Conclusion

In the end, I find that the claimant has not proved that his resignation was as a result of coercion by the respondent or that he was owed any terminal benefits by the respondent. The claim thus fails and is accordingly dismissed.

Each party shall bear its costs.

DATED AND SIGNED AT NAIROBI ON THIS 24TH DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 20TH DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE