



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1305 OF 2017

CHARLES NYARINGO RIANGA.....CLAIMANT

VERSUS

HATARI SECURITY GUARDS LTD.....RESPONDENT

JUDGMENT

1. Charles Nyaringo Rianga (Claimant) was employed as a security guard by Hatari Security Guards Ltd (Respondent) in May 2012.
2. On or around 1 July 2016, the Claimant gave notice of resignation effective 30 July 2016. The Claimant asked the Respondent to process his terminal dues.
3. The Respondent did not process/pay the terminal dues and on 11 July 2017, the Claimant instituted the instant legal proceedings alleging breach of contract and underpayment of wages. The Claimant sought a total of Kshs 477,699/-.
4. In its *Reply to Statement of Claim*, the Respondent contended that the cause of action was time barred, the terminal dues owing to the Claimant were paid and that there was no breach of contract.
5. The Cause was heard on 2 October 2019. The Claimant testified while the Respondent did not call any witness but opted to rely on the record.
6. The Claimant filed his submissions on 16 October 2019 while the Respondent filed its submissions on ...
7. The Court has considered the pleadings, evidence and submissions.

Limitation

8. Section 90 of the Employment Act, 2007 prescribes a limitation of 3 years in causes of action arising out of a contract of employment.
9. Among the heads of the claim presented by the Claimant were underpayments, house allowance, and overtime for the years 2012 to 2016.
10. The Respondent asserted that since the Cause was filed in 2017, these heads of claim were caught up by the law of limitation.
11. In the view of the Court, underpayment of wages, failure to pay house allowance and overtime (including work during public holidays) comprise *continuing injury*, and the, therefore, limitation arises 12 months from the date the *continuing injury* ceased.
12. In the case at hand, the Claimant's resignation was effective 30 July 2016 and therefore he had up to 29 July 2017 to institute legal proceedings in respect to these heads of claim.
13. The present proceedings were commenced on 11 July 2017 and the Court consequently finds that these heads of claim were not caught up by the law of limitation as set out in section 90 of the Employment Act, 2007.

House allowance

- 14.. Initially, the Claimant's contract provided for payment of wages based on a daily rate. It was only on 19 January 2016 that the Claimant was issued with a contract providing for a monthly wage.
15. The various *Regulation of Wages Orders* in place provides that daily rates of wages are inclusive of house allowance.

16. The Court, therefore, finds that the Claimant's wage included house allowance up to January 2016.

17. The Court has looked at the contract of 19 January 2016, it did not provide for house allowance.

18. The Court would have in the circumstances allowed the claim for house allowance from that date save that the Claimant did not prove the appropriate formula for computing house allowance either in terms of practice or custom during the material time.

Underpayment of wages

19. Underpayments can arise because an employer pays below the prescribed minimum wages in the sector it operates in, or because the wages are below the contractually agreed rates.

20. In the pleadings and witness statements, the Claimant did not disclose whether his contention on underpayment of wages was anchored on any *Regulation of Wages Order* or the contract.

21. The Claimant did not equally advert to any particular *Regulation of Wages Order* during testimony. He only introduced the *Regulation of Wages Order* in the submissions.

22. A party alleging underpayment of wages below the prescribed rates must lay an evidential basis for the underpayments because the *Regulations* not only set different rates to specific areas but also set out different occupations.

23. In this regard, the Court finds that the Claimant did not prove to the required standard that he was underpaid.

Leave

24. Annual leave is a statutory entitlement.

25. The Claimant sought Kshs 7,673/- on account of leave for 2012 which he claims he was denied.

26. Assuming that failure to grant leave does not amount to *continuing injury*, section 28(4) of the Employment Act, 2007 circumscribes that the amount of annual leave which is not utilised during the leave year must be taken not later than 18 months from the end of the leave year.

27. If at all the Claimant was not granted leave in 2012, the leave became forfeited by end of June 2014.

Overtime pay

28. On account of overtime pay, the Claimant sought Kshs 315,671/-.

29. The Claimant testified that he worked 12 hour shifts without the testimony being rebutted.

30. The Respondent in addressing the overtime pay contended that it paid an all-inclusive wage to the Claimant as was agreed in the contract.

31. The *Regulation of Wages (Protective Security Services) Order* 1998 prescribed working hours within the private security sector. The Claimant worked beyond those hours.

32. The Court can also take judicial notice that it is a notorious fact that security guards in this country work 12 hour shifts including during public holidays.

33. The Court finds that the contract issued by the Respondent fell below the statutory terms and conditions and therefore the Claimant was entitled to overtime pay for overtime work.

34. The Court will allow this head of the claim.

Conclusion and Orders

35. From the foregoing, the Court finds and holds that the Respondent was in breach of contract/statute and awards the Claimant

(a) Overtime pay **Kshs 315,071/-**

36. The other heads of claim were not proved and the reliefs are declined.

37. The Claimant has only partially succeeded. He is awarded costs on half scale.

Delivered, dated and signed in Nairobi on this 1st day of November 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Nyabena instructed by Nyabena Alfred & Co. Advocates

For Respondent Mr Kahindi instructed by Mwaura, Muthoni, Mikhala, Faraji & Associates Advocates

Court Assistant Lindsey