



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.359 OF 2014

BEATRICE KERUBO OMBAYE [Suing on behalf of

PHILIP NYACHOTI ONGUBO]..... CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGEMENT

Background – Philip Nyachoti Ogumbo, now deceased filed the Memorandum of Claim on 7th August, 2014 and then died on 22nd January, 2015. His wife Beatrice Kerubo Ombaye obtained Letters of Administration Letters *ad litem* under High Court Succession Cause No.201 of 2015, Nakuru limited for the purpose of attending suit herein for and on behalf of the deceased, and the claimant. By application dated 1st November, 2018 Beatrice Kerubo Ombaye moved the court seeking to attend herein for and on behalf of the deceased estate and by ruling delivered on 29th November, 2018 the court allowed the attendance.

Claim

The claim is that the claimant, Philip Nyachoti Ogumbo was employed by the respondent in November, 2010 as a general worker at a wage of ksh.1, 008 per day during the day shift and on Saturday and Sunday ksh.595 per day and Monday to Friday on night shift paid ksh.111 each day while weekend night shift he was paid ksh.918 per night.

The claimant would report to work at 8am to 6pm non day shift or 6pm to 8am on night shift.

The claim is that the claimant worked from Monday to Sunday without taking a rest day and contrary to section 27 of the Employment Act. She claims pay for work overtime and for pay for not taking a rest day.

In February, 2014 the claimant fell sick around 5.30pm while on duty and requested to be allowed to seek treatment through the workers committee and was allowed. He was taken home by an officer of the respondent. The following day he went to Nakuru General Hospital and examined to have *brucellin*. He was paced under medication for 21 days and then cleared to return to work. Upon reporting back to the respondent he was barred without any explanation.

On 6th March, 2017 the claimant was called to attend before the production department, he worked on that day but on 7th, 8th and 9th March 2017 he was not allowed back at work.

On 10th March, 2017 one of the workers committee members, Peter communicated to the claimant that the personnel had instructed him not to be allowed at work. The claimant reported the matter to the county labour office and who invited the respondent for a meeting but the respondent only offered to pay Ksh.2, 995 for leave days accrued for January, 2014.

The claimant was forced to file suit noting his employment was terminated unfairly without notice or any reasons being given and is seeking to be paid;

a. Notice pay Kshs. 23,634

b. Overtime pay Ksh.227,449.10

c. Off duty Ksh.252,721.20

d. Public holidays Ksh.54,565.50

e. Compensation Ksh.283, 608.

Beatrice Kerubo testified in support of the claimant's case and that he would be at work from 6am to 6pm during day shift and vice versa in night shift for 7 days each week. He then fell sick and was taken to hospital for 3 weeks and upon return to work on 6th March, 2014 he was sent away the next days and was not allowed back. Ms Kerubo then reiterated the claims made as terminal due owing to his estate.

Defence

The defence is that the claimant was employed by the respondent on irregular casual terms from November, 2010 and January, 2014 and was paid a daily wage based on the minimum wage Orders. On 24th January, 2014 the claimant was earning Ksh.432 per day and by nature of his duties he was allocated duty as and when work was available and his last working day was 24th January, 2014.

The defence is also that when the claimant worked for an extra day on a normal working day, rest day or public holiday this was compensated as under the General Wage Orders being at the rate of 1.5 of normal pay and double for public holidays and rest days. An off day was allowed when the claimant worked continuously for 6 days.

The defence is also that for the entire duration of employment the claimant worked as follows;

The year 2010 – records not available;

2011 worked for 29 days;

2012 worked for 125 days;

2013 worked for 130 days; and

2014 worked for 21 days.

The allegations made are without merit and should be dismissed,

Evans Omweri testified that he is the human resource officer of the respondent and that from the records the claimant was a casual employee of the respondent when work was available and was paid daily and there was no dismissal. On 23rd January, 2014 the claimant was at work and left until 7th March, 2014 when he returned and later reported a dispute to the labour officer and where the respondent noted the claimant had been a casual employee due to the nature of business the respondent was running it could not keep him on full time employment and for days at work he was paid in accordance with the wage orders. All overtime worked was fully paid.

Mr Omweri also testified that the respondent's policy is to allow a sick employee to attend treatment and be allowed time off. There was no record of the claimant being sick at work and where he got sick he ought to have informed the respondent. The respondent paid all employee for leave days not taken and the claimant accepted the payment for his owing leave days upon report to the labour officer. Nothing owes.

At the close of the hearing both parties filed written submissions.

The respondent has also filed the work records with regard to the claimant.

On the work schedule for *casual wages for the week from 13th January to 17th January, 2014* at the respondent's Nakuru refinery the respondent has a long list of employee set out in a chronological order and the claimant is noted as ID No.20673947 and who attend work on 11th and was paid ksh.1, 88.00 less NSSF and NHIF and he signed for the pay in acceptance.

For the week of 11th to 17th January, 2014 the claimant attended work for 3 day, he was Ksh.1,188, 1,080 and 918 paid less the NHIF dues.

On the week of 18th to 24th January, 2014 the claimant attended work for 3 day and paid Ksh.594, Ksh.594 and Ksh.918 consecutively.

These records were not challenged by the claimant.

What is apparent to the court, the claimant was not at work full time. In a given week he was either not at work or on average for 3 days. There is a daily wage allocated for each day at work.

Based on the applicable Wage orders and taking an example of work attendance the week of 11th to 17th January, 2014 the claimant attended work once and was paid ksh.1,188 on the first day, Ksh.1,080 on the second day and ksh.918 on the third day. A casual employee working in Nakuru in January, 2014 the applicable wage orders, Regulation of Wages (General) (Amendment) Order, 2013 and shall be deemed to have come into operation on 1st May, 2013 the claimant was entitled to a daily wage of Ksh.432.40.

On the paid wage of Ksh.1,188.00 or Ksh.1,080.00 or Ksh.918.00 there must be a rationale and which is given context by the defence that the claimant was paid for overtime hours worked and all owing dues at the end of each day. The only explanation to the apparent double and triple payments can only be to compensate for the entire time worked.

In addressing the claims made, section 34(1) places the duty on the employer to ensure a sick or unwell employee is able to attend for medical attention while section 30 of the Employment Act, 2007 allow the employee to go on sick leave. Such absence from work is justified and a good basis to be away from work. However such absence from work is conditional as the employee must cause the employer to be informed immediately of his indisposition and also upon return submit a medical certificate certifying the indisposition.

Section 34 of the Employment Act, 2007 also requires the employer to ensure the employee is covered in the even of need for medical attention. The practice in our jurisdiction is to pay for NHIF which the claimant was covered and part of his daily dues was a deduction paid to the NHIF.

In the memorandum of claim, the claimant does not attach a certificate contemplated under section 34 of the Employment Act, 2007. Save to state that another employee of the respondent was directed to take him home when he fell sick while at work in February, 2014 no report is stated as having been placed with the respondent upon admission to Nakuru provincial hospital. See **Dorothy Ndungu versus Machakos University [2016] eKLR** and in **Ronalo Hamisi versus Orascom Construction Company Cause No.1477 of 2015** that;

In employment and labour relations, an employee who is sick and absent from work due to illness is required under section 30 and 34 to take medical leave and seek medical attention. Where the employee is sick or ill, the employer must be notified of the same and upon return, the employee is legally bound to produce a medical certificate from a medical practitioner from a recognised medical facility. The facility the claimant attended after issuance of the P3 form is not one such recognised medical facility in terms of section 34 of the Act.

And in **Anne Wairimu Kimani versus Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR** the court held that;

Further to the above, section 34 of the Employment Act, 2007 requires that where an employee is unable to attend work due to illness, sickness or any medical condition, such should be brought to the attention of the employer within a reasonable time. The law gives the condition that the employee should also submit a medical certificate from a medical practitioner. See **Dorothy Ndungu versus Machakos University & others [2016] eKLR**.

Where the claimant was therefore ailing and attended hospital, the law required him to address and cause the employer to be informed and upon return to produce the requisite certificate. This is not addressed. Even where the claimant is since deceased, upon discharge from hospital he made effort to return to work but failed to address the mandatory provisions of section 34 of the Employment Act, 2007. He reported the matter to the Labour Officer and as a legal requirement that was not sufficient to remove him from the requirement to address his absence from work.

The claim made for notice pay, compensation are not due.

On the claims made for overtime pay, off days and work during public holidays the same based on the entire period of work and noting the work records produced where work was on given days and each day was fully paid for at a rate found to be commensurate with due compensation for hours worked, the claims made are without justification.

The claimant has since been paid for owing leave days earned and not paid for in January, 2014.

Accordingly, the claims made are found without merit and are hereby dismissed. Each party shall pay own costs.

Delivered at Nakuru this 11th day of December, 2019.

M. MBAR?

JUDGE

In the presence of: