



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 782 OF 2015

BETWEEN

BENARD ORINYO ALAKTARI.....CLAIMANT

VERSUS

OMAR CLEANING SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mburu Nyamboye & Company Advocates for the Claimant

Christine Kipsang & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 19th October 2015. He was employed by the Respondent as a Cleaner, in April 2012. His contract was terminated by the Respondent on 21st May 2015. He avers he was not given any reason. He was throughout paid a salary of Kshs. 7,500 per month, which he states was below the minimum wage. He claims he ought to have been paid, Kshs. 23,521 monthly. There is one Respondent in the Claim, but the Claimant prays, strangely, for orders against the 'Respondents, jointly and severally.' The orders sought are as follows:-

- a. Underpayment of salary at Kshs. 123,840.
- b. House allowance at Kshs. 59,076.
- c. Public holidays at Kshs. 25,200.
- d. Overtime worked at Kshs. 131,040.
- e. Annual leave allowances at Kshs. 32,820.
- f. Compensation for unfair termination at Kshs. 131,280

Total... Kshs. 514,196.

- g. Punitive damages.
- h. Any other suitable order.

2. The Respondent filed its Statement of Response on 1st December 2015. The Statement of Response takes the form of a general denial.

There is however on record, a Witness Statement filed by Omar Kamau, Respondent's Director which gives details of the circumstances surrounding Claimant's termination of employment. It is explained that the Claimant was required to transfer from Mombasa to Lamu, to work for Respondent's Client Gulf Bank. He was selected to work there because he was the most experienced and skilled, of Respondent's existing Cleaners. His terms of service were to be reviewed when he reported to Lamu. The Respondent had in the past assigned another Cleaner to Gulf Bank in Lamu. The said Cleaner was involved in theft at the Bank. This time round the Bank needed an experienced, skilled and trusted Cleaner. The Respondent discussed transfer with the Claimant. On 22nd May 2015, the Claimant wrote to the Respondent, informing the Respondent he had resigned on medical grounds. The Respondent thought the Claimant was being untruthful, as the Claimant was not known to suffer any ailment. He disappeared from the workplace. He did not communicate with the Respondent again, until the Respondent received a demand letter from the Claimant's Advocates, alleging his contract was unfairly terminated. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. Parties recorded partial consent in Court on 10th February 2017. It was agreed the Claimant is paid by the Respondent Kshs. 107,831 being salary and house allowance in arrears. It was agreed also that the Claimant abandons the prayers for public holidays [iii], compensation for unfair termination [v], and punitive damages [vi].

4. The remaining prayers for the Court to determine are overtime, annual leave, and costs. It was agreed these are considered and determined on the strength of the record. Parties confirmed the filing of their Submissions on 23rd October 2017.

5. The Claimant submits he normally reported to work at 7.00 a.m. and could work up to 6.00 p.m. and even up to 7.30 p.m. He cleaned outdoors while Pupils were in their Classrooms at Aga Khan Primary School, Mombasa.

6. The Respondent submits cleaning at the School is conducted as per the learning timetable, so as not to interrupt learning. It is not continuous, but done at intervals. The School is closed on Sundays and half day on Saturday.

The Court Finds:-

7. The Claimant did not work any excess hours, and in any event, did not show he was authorized by his Employer to work excess hours. His statement that he worked from 7.00 a.m. to 6.00 a.m. and even up to 7.30 p.m. indicates uncertainty in the mind of the Claimant, on his hours of work. Cleaning in any institution, cannot be expected to be nonstop. This is more so, in a learning institution, where cleaning must not be allowed to interfere with learning. Even in hospitals, with very high standards on cleanliness, the exercise is not nonstop. There are intervals. The Claimant did not give Submissions on the mode of calculating overtime, backed by a wage instrument, to allow him overtime of Kshs. 131,040. He only thought about overtime pay, after he resigned on 22nd May 2015. He makes a blanket prayer for overtime for the entire period of service. The Court agrees with the Respondent, that as concluded in *Scholar Katuve Mulei v. Maria Zermmlin [2016] e-KLR*, a Claimant must show he worked overtime, and that such overtime work was approved, and necessary, to be granted a prayer for overtime pay. The prayer for overtime pay is rejected.

8. The Claimant was assigned cleaning duties at Aga Khan School. The School was in recess in the months of April, August and December. The Claimant did not clean during these months. He ought to have utilized his annual leave entitlement during these months. His claim for annual leave pay is declined.

9. Lastly the Court is of the view that Parties should bear their costs of the Claim.

IN SUM, IT IS ORDERED:-

[a] Paragraphs 1 and 2 of the Consent filed on 8th February 2017 is adopted as the Full and Final Judgment of the Court.

[b] Parties shall meet their costs of the Claim.

Dated and delivered at Mombasa this 9th day of February, 2018

James Rika

Judge