



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1939 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

ALFRED KANGU.....CLAIMANT

-VERSUS-

RUDOLF HONEGGER T/A

HOTEL RUDI/ATLANTIC RUDOLF.....RESPONDENT

CORRIGENDA RULING

In the judgment delivered on 2nd May 2018 I awarded the following –

- 1. Underpayments----- Kshs.80,235.20
 - 2. Public holidays----- --Kshs.16,923.10
 - 3. Overtime----- Kshs.210,000.00
 - 4. Rest days ----- Kshs.80.00.00
 - 5. Leave days----- Kshs.156,923.10
 - 6. Notice----- Kshs.20.00.00
 - 7. Compensation----- Kshs.240.00.00
- Total** **Kshs.464,081.40**

It has come to my attention the judgment contained typographical errors, which were not noted at the time of delivery of judgment. I therefore invoke this court’s powers under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 to correct the items 3, 4 and 6 of the judgment to read as follows –

- 1. Underpayments-----Kshs.80,235.20
- 2. Public holidays-----Kshs.16,923.10
- 3. Overtime-----Kshs.20,000.00**
- 4. Rest days-----Kshs.80,000.00**
- 5. Leave days----- Kshs.156,924.10
- 6. Notice-----Kshs.20,000.00**

7. Compensation-----Kshs.240,000.00

TOTAL **KSHS.614,082.40/=**

The judgment is amended accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE

JUDGMENT

By a memorandum of claim dated 1st September 2016, the claimant avers that he was unfairly dismissed from employment by the respondent on 16th October 2015. He prays for remedies as follows –

1. The court to find that the dismissal of the claimant is wrongful/unlawful.
2. The court to award the claimant one month's gross pay in lieu of notice which is Kshs. 28,428/=.
3. The court to award twelve months gross (sic) for unlawful dismissal in accordance with Section 49 (1) (c) of the Employment Act 2008 which works out to 28,428 x 12 = Kshs. 341,136/=.
4. This court is prayed (sic) to award unpaid house allowance amounting to Kshs. 265,374/=.
5. The court is prayed (sic) to award the claimant compensation of leave days amounting to Kshs. 242,207/=.
6. The court to award the claimant leave allowance of Kshs. 120,819/=.
7. The court to award the claimant salary underpayments amounting to Kshs. 711,156/=.
8. The court to award the claimant overtime pay amounting to Kshs. 2,393,282/=.
9. The court to award the claimant pay for work on public holidays amounting to Kshs. 33,411/=.
10. The court to award the claimant pay for work on rest days amounting to Kshs. 1,803,633/=.
11. The court to award the claimant unremitted NSSF dues calculated as follows: 200 x 103 months = 20,600/=
12. The court to award the claimant in accordance with Section 35 (5) service pay @ 15 days for every year worked as follows:
$$^{15}/_{30} \times 24,720 \times 8.5 \text{ years} = 105,060/=$$
13. Costs of this suit.
14. Any other costs the court may deem necessary and just to award.

The respondent although properly served with summons and memorandum of claim, did not file any response. The case was heard on 22nd November 2017 in the absence of the respondent who was served with hearing notice but failed to attend court. The claimant thereafter filed and served written submissions.

Claimant's Case

The claimant's case is that he was employed by the respondent on 3rd April 2007 as Assistant Chef at a salary of Kshs. 6,000. He was not issued with any letter of appointment or any payslip. His salary rose gradually to Kshs. 12,000 in 2011 and Kshs. 20,000 in October 2012, which he earned until 16th October 2015 when he was summarily dismissed.

The claimant testified that on 16th October 2015 he had a financial problem and applied for a loan from the respondent. He was then given documents to sign but later realised that what he signed was a letter of dismissal. He was paid salary of Kshs. 16,550/= being salary for days worked. He was not paid any terminal benefits.

The claimant testified that he worked overtime but was not paid. He produced copies of the register signed by employees at the time of checking in and out, when reporting to and from work as evidence of overtime work done. He testified that he reported for work at 10 a.m.

and left at 11 p.m.

The claimant further testified that he did not take annual leave for the entire period he worked for the respondent and that he was underpaid as tabulated in his claim. He produced the relevant legal notices for minimum rates of pay. He also claimed that he was not registered for NSSF and NHIF and prayed for service pay. He prayed for judgment as prayed.

The claimant relied on the case of **ANTONY OCHIENG ONYANGO -vs- LWALA MIXED DAY SECONDARY SCHOOL & ANOTHER** where the court stated that where the respondent does not file a defence and does not attend court for the hearing, the averments of the claimant are deemed to be the truth. The claimant further relied on the case of **ALPHONSE MAGHANGA MWACHANJA -VS- OPERATION 680 LIMITED** where the court stated that the procedural fairness entailed explaining to an employee the charges against him in a language he understands and ensuring representation by a shop floor union official or a fellow employee of his choice.

The claimant further relied on the case of **LOICE OTIENO -VS- KENYA COMMERCIAL BANK LTD** in which the court stated that natural justice or procedural fairness is an essential part of the employment relationship.

Determination

I have considered the pleadings and evidence of the claimant which is uncontested as the respondent neither filed a response to the memorandum of claim nor attended court for the hearing. For this reason the facts are taken as averred by the claimant with the only issue for determination being whether the claimant is entitled to the remedies sought in the memorandum of claim.

Remedies

(i) Basic Salary and House Allowance

The claimant was employed as a chef as stated in his claim and oral evidence. His basic salary and house allowance (consolidated pay) during the period he was in the employment of the Respondent is as follows-

1. April 2007 and April 2009, $Kshs.5,888 + 15\% = 6,771.20$

Under payments per month $Kshs.771.20$.

For 25 months $Kshs.19,280$

2. May 2009 – April 2010

$Kshs.6,948 + 15\% = 7,990.20$

Less $Kshs.6,000 = 1,990.20$

Total underpayments for 12 months = $23,882.40/=$.

3. From May 2010 to April 2011

$Ksh.7,634 + 15\% = 9,089.45$

Less $6,000 = 3,089.40$

Underpayments for 12 months = $37,072.80$

4. From May 2011 to April 2012

$Kshs.8,598 + 15\% = 9,887.70$

Less paid $Kshs.20,000$

Underpayments = nil

5. From May 2012 to April 2013

$Kshs.9,724.30 + 15\% = 16,182.90$

Less paid $Kshs.12,000$

Underpayments = nil

6. From May 2013 to April 2015

Kshs.11,085.70 + 15% = 12,748.45

Less paid Kshs.20,000

Underpayments = nil

7. May 2015 and September 2015

Salary paid shs.20,000

Underpayments nil

Total underpayments Ksh.80,235.20/=

(ii) Public Holidays

The claimant stated that he did not take any public holidays off and was therefore entitled to 88 public holidays at the rate of Kshs.20,000 per month. For 88 public holidays payable at double the hourly rate he is entitled to the following –

$$20,000 \times 1/208 \times 2 \times 88 = 16,923.10$$

(iii) Overtime

The record in the register produced by the Claimant show that he worked from 11 a.m. to 11 p.m., a period of 12 hours instead of 8 hours provided for in Regulation of Wages (Hotel and Catering Trades) Order, for 6 days a week.

He was entitled to overtime at 4 hours per day at 1.5 times the hourly rate as follows –

$$4.7 \times 52 = 1,456 \text{ hours}$$

$$20,000/208 \times 1456 \times 1.5 = \text{Kshs.20,000/=}$$

This is only payable for 12 months as it is a continuing wrong.

(iv) Weekly Days

For the 8 years the claimant was entitled to 416 rest days. At double the hourly rate, the claimant was entitled to

$$(20,000/208 \times 416 \times 2) = \text{kshs.80,000}$$

(v) Leave Days

According to the Regulation of Wages (Hotel and Catering Trades) Order, the claimant was entitled to 24 days' annual leave per year. For the 8.5 years that he worked for the respondent he was entitled to 204 days. At a daily rate of Kshs.769.20 he is entitled to Kshs.156,924.10/=.

(vi) Notice

The claimant is entitled to one month's salary in lieu of notice which I award him at Kshs.20,000/=.

(vii) Compensation

The claimant is entitled to compensation or unfair termination which I award him at 12 months taking into account the length of service, the manner in which his employment was terminated and all the other factors set out in Section 49 (4) of the Employment Act. At the rate of Kshs.20,000 per month I award him Kshs.240,000/=.

In summary therefore I enter judgment for the claimant against the respondent as follows –

1. Underpayments-----Kshs. 80,235.20

2. Public holidays-----Kshs. 16,923.10

3. Overtime-----Kshs. 210,000.00

4. Rest days -----	Kshs. 80,00.00
5. Leave days-----	Kshs. 156,923.10
6. Notice-----	Kshs. 20,00.00
7. Compensation-----	<u>Kshs. 240,00.00</u>
Total	Kshs.464,081.40

The respondent shall also pay claimant's costs of the suit. The decretal sum shall attract interest at court rates from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE