



REPUBLIC OF ENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.172 OF 2016

BERNARD KHAEMBA MALABA.....CLAIMANT

VERSUS

BOARD OF TRUSTEES MOUNT KENYA UNIVERSITY...RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent in November, 2010 as a Security Guard or Night Watchman at a wage of Kshs.10, 000.00 per month. He was issued with a letter of appointment. On 21st November, 2011 the claimant was issued with another letter of appointment and his position remained that of security Guard. The appointment converted the employment into 2 years fixed term contracts whereas the initial appointment was open.
 2. On the new terms, the claimant wage was set at kshs.7,200.00 gross per month being Kshs.5,720.00 basic pay and Kshs.5,280.00 as house allowance, Kshs.1,000.00 travelling allowance all being Ksh.12,000.00 per month.
 3. On 26th September, 2013 the respondent reviewed the claimant's contract with a pay rise of Kshs.7,800.00 as basic pay, Kshs.1,500.00 as house allowance, an overtime pay at Kshs.4,700.00, Kshs.1,000.00 medical allowance per month.
 4. In the contract period covering the year 2011 to 2012 the respondent introduced a payment of gratuity where the claimant was paid Kshs.13, 000.00 in 2011 and Kshs.18, 000.00 in 2012. There was no information as to how such gratuity was arrived at.
 5. The claim is that there the respondent was paying gratuity after the expiry of contrast, kshs.13,000.00 then covered the period of 21st November, 2011 to 1st November, 2013 and Kshs.18,000.00 covered the period of 2012 to 2013. In this case the period covering September, 2013 to September, 2014 and up to September, 2015 is not paid for.
 6. On 26th January, 2016 the claimant's employment with the respondent was terminated on the grounds that his contract expired. A certificate of service was issued. The claimant was paid Kshs.35, 644.00.
 7. The claim is that when the claimant was employed by the respondent, he was allocated general duties. In 2011 the paid wage of Kshs.7, 200.00 was below the Wage Orders. A Night Watchman was entitled to Kshs.6,974.00 as basic wage plus 15% house allowance all being kshs.8,620.10 per month. The appointment letter giving the claimant a wage of kshs.10, 000.00 per month was a payment below the minimum wage and there was an underpayment. By letter of 21st November, 2011 where the claimant was paid Kshs.5, 720.00 and gross wage at kshs.12, 000.00 the applicable wage orders; there was an underpayment on the minimum basic wage.
- On the contract dated 26th September, 2013 when the claimant's terms were renewed and he was paid a basic wage of Kshs.7, 280.00 there was an underpayment based on the applicable wage orders. For the period covering 26th September, 2013 to 2nd February, 2016 where the claimant worked for 28 months he was underpaid.
8. The claim is that when the claimant's wages were reduced without his consultation or consent, such was in violation of section 10 of the Employment Act. In March, 2013 the claimant wrote to the respondent complaining of malpractices and underpayments and challenges he was facing at his place of work and for these reasons, he was edged out of his employment.
 9. The claimant is seeking for orders that he was being underpaid and the same be calculated and paid, overtime work, work during public holidays were not paid, and for the unfair termination of employment compensation be paid. The claims are that;

(a) Underpayment Kshs.172,323.55;

(b) Money deducted from salary Kshs.98,280.00;

(c) Overtime claims Kshs.155,283.00

(d) Costs.

10. The claimant testified to support his claims. upon employment the claimant was issued with various letters and contract of employment setting out his terms. In 2011 he had a contract of 2 years and the wage increased to kshs.10, 000.00 per month contrary to wage orders. In the next contract the wage was reduced to kshs.7, 280.00 and there were unlawful deductions. In the next contract, the claimant was paid kshs.12, 000.00 which had a basic wage below the wage orders

11. The claimant also testified that the respondent had an overtime policy and he extra work hours were to be paid upon approval by the supervisor and to be paid immediately but this was not done for him. during National elections the claimant remained at work and was not paid overtime work hours. When the claimant complained about underpayments and failure to be paid his dues, his contract was not renewed. Due leave was not taken or paid for. the last leave taken was on 1st January, 2016 for 21 days.

Defence

12. The respondent entered appearance on 21st June, 2016 through the firm of **Ndung'u Mwaura & Co Advocates**. a defence was filed by *Okoth & Co Advocates* on 1st July, 2016. The respondents advocate filed defence on 5th July, 2016. As appearance for the respondent is by the firm of **Ndung'u Mwaura & Co Advocates**, the proper defence for the records is the one filed on 5th July, 2016.

13. The defence is that the claimant was an employee of the respondent as a security guard from 2011 and he executed a contract of employment for two years and the respective wage orders applied and appropriate salaries paid. The contract expire din October, 2015 and was issued with letter of renewal and which ended and terminal dues paid amounting to kshs.35, 644.00. there was no underpayment.

14. The defence is also that there claimant did not work overtime and the claims made are without justification or merit and should be dismissed.

15. In evidence, the respondent called Russell Ouma the Administrator and Lecturer as the witness and who testified that he knew the claimant well who was employed by the respondent as a general worker and then as a Security Guard. He started at a gross wage of kshs.7, 200.00 per month; he was issued with a new contract in 2011 for a period of 2 years. The claimant was paid all his dues under this contract. When the minimum wage was increased the pay was also increased to kshs.10, 000.00 per month. The deductions effected related to statutory payments and therefore justified.

16. Mr Ouma also testified that at the end of 2011 the claimant was issued with a new contract at a wage of Kshs.12, 000.00 per month and applicable statutory deductions were made.

17. The respondent has an overtime policy where the supervisor must approve and the same is paid immediately upon incurring the same. When the claimant worked overtime during the 2013 national elections, he was immediately paid for overtime hours. Where the claimant had any complaints on his pay, embayment or any terms such were to be received by his supervisor and then to the witness office. The letters alleged to be complaints by the claimant were never received by the respondent.

18. The claimant's contract with the respondent ended and he was paid a good send off. The claims made are without merit and should be dismissed.

19. Both parties closed each case and on 2nd July, 2018 agreed to file written submissions and to confirm the same on 16th July, 2018. On due date no written submissions had been filed.

Determination

Whether the claimant was underpaid;

Whether the claimant worked overtime and was unpaid;

Whether the remedies set out are due

20. On the records filed by the claimant are; Letter dated 20th January, 2011 on review of terms and conditions of service and where the claimant was employed as a Security Guard and paid kshs.10,000.00 gross pay; Letter dated 21st November, 2011 being appointment and contract for 2 years with effect from 1st November, 2011 and where the claimant was a Security Guard and paid Kshs.12,000.00 gross wage; and Letter dated 26th September, 2013 a contract renewal as Security Guard and for a period of 2 years with effect from 1st November, 2013 and setting out a gross wage of Kshs.15, 000.00 and which wage included a basic pay, house allowance, overtime pay and a travelling allowance.

21. on 2nd January, 2016 the claimant was issued with a Certificate of Service and confirming he was in the employment of the respondent from November, 2011 to January, 2016.

22. The Memorandum of Claim herein was filed on 23rd May, 2016 and where the claimant seeking order that he is entitled to underpayments, overtime payments, work during public holidays and costs.

23. Employment under a fixed term contract is a lawful and legitimate mode of employment as set out under section 10(3) of the Employment Act, 2007 as follows;

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—

(a) any terms and conditions relating to any of the following—

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

(ii) ...

(iii) ...

(b) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;

(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end.

24. where parties in an employment relationship agree to be bound by a fixed term contract setting out the period for which such contract is expected to cover, and then on the agreed end date, such contract of employment comes to an end. the option to elect not to renew exists in a case of fixed term contract as held in the case of **Margaret A Achieng versus National Water Conservation & Pipeline Corporation [2014] eKLR**. on this basis, the employer is not obligated to renew the expired contracts as held in the case of **Bernard Wanjohi Muriuku versus Kirinyaga Water & Sanitation Co. Limited & Another [2012] eKLR**. The rationale is that each fixed term contract must end on its terms and conditions.

25. In this case, where the claimant was under a fixed term contract for the duration of his employment and has any claim(s) arising thereto, such claims ought to be addressed in accordance with the provisions of section 90 of the Employment Act, 2007. Where the Memorandum of Claim was filed on 23rd May, 2016 only claims relating to the period covering 3 years are legitimate. Such can only accommodate the period of May, 2013 to the date of filing the Memorandum of Claim. Effectively, only claims arising out of his last contract renewed and dated 26th September, 2013 arise. See Court of Appeal judgement in the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** and in **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR** with the findings that that;

... claims outside three (3) years are statute barred under Section 90 of the Employment Act ... that it is in public interest that this Court should consider and determine the issues raised to guide and prevent the Employment & Labour Relations Court from considering matters of which it has no jurisdiction;

26, Therefore guided, to address claims outside the fixed term contract covering the subject period and application of section 90 of the Act, would be to address matters outside this court jurisdiction. Such would not be in the public interest.

27. On the claims that the claimant was underpaid, not paid for his overtime, public holidays and that such payment are due. in the contract dated 26th September, 2013 the parties agreed that the terms to be applied would apply as set out in the letter of appointment dated 21st November, 2011. The claimant was however paid a different gross wage of kshs.15, 000.00 and broken down as;

a) Basic pay Kshs.7, 800.00;

b) House allowance Kshs.1, 500.00;

c) Overtime Kshs.4, 700.00;

d) Travelling allowance Kshs.1, 000.00.

28. The claims are that for the period of September, 2013 to 30th April, 2015 the wage orders had a wage provision for Kshs.10,116.50 basic pay and 15% house allowance all being Kshs.11,633.55 per month. That the claimant was paid a basic wage of Kshs.7, 800.00 and Kshs.1, 500.00 house allowance being Kshs.9, 300.00 less Kshs.2, 333.55 and for 20 months there was an underpayment of Kshs.46, 671.00 due.

29. From 1st May, 2015 to 31st January, 2016 for a period of 9 months the basic wage payable to the claimant was kshs.11,330.10 and house allowance at 15% all being Kshs.13,029.60 per month. The claimant was paid Kshs.7,800.00 basic wage and Kshs.1,500.00 house allowance

with an underpayment of kshs.3,729.60 per month all being Kshs.33,566.00.

30. As set out above, the Wage orders applicable to the position held by the claimant as Security Guard making provision for a minimum wage, to go below such minimum was unlawful and the underpayment is due. even where the respondent was generous and made provision for a travelling allowance, a basic wage is set through published wage orders and subject of compliance by all employers. Despite the gross wage being generous and above, the set basic wage computation was below the set amount. For the subject period, the claimant is entitled to kshs.80,237.00.

31. On the claims for underpayments, for the subject period the claimant is seeking a total claim for Kshs.34,072.30 in 2013 and Kshs.77,692.00 for the period year, 2014. Nothing arises for the period 2015 and 2016. In total the claimants for overtime where justified ought to be Kshs.111, 764.00. however, such computation of overtime work hours is premised on the evidence that the claimant was working for 12 hours a day.

32. Under the Wage orders applicable for the period 2013 to 2016, a Security Guard work hours are 60 spread over the week. The claimant was at work for 6 days a week all being 72 hours and therefore where there was overtime work; such amounted to 12 hours per week and in a month a total of 48 hours.

33. Under the contract, a provision for overtime pay was made at kshs.4,500.00 and for the two years term, the claimant received Kshs.54, 000.00. on this basis the due overtime pay should be paid less the received amount and all being kshs.57,64.00.

34. On the claims for money deducted from the salary, all payments due to an employee are subject to statutory deductions. Such monies are subject to remittance to the relevant statutory bodies and not payable to the employees.

35. As the respondent did not submit any work records to controvert the claims for underpayments, overtime claims as required under section 10(7) of the Employment Act, 2007 the dues owing to the claimant thus analysed are payable. On this account the court is also cognisant of the provisions of section 45(5) (c) of the Act and the recognition that to a great extent the respondent as the employer has complied with statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 35, and rights under part Four (IV) of the Act.

36. As set out above, the claims by the claimant being specific and addressed above, the employment relationship having ended on its terms, only the orders set out below issues.

Accordingly judgement for the claimant for the payment of due unpaid wages in underpayment at kshs.80, 237.00 and overtime pay Kshs.57, 764.00. as set out above, the claimant received a generous wage save for the dues awarded. Each party shall bear own costs.

Delivered in open court at Nakuru this 31st day of July, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant.....

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