



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

AT NAIROBI

CAUSE NUMBER 84 OF 2016

RAPHAEL OMBAYE OBURE.....CLAIMANT

VERSUS

MT SINAI HOSPITAL LIMITED....RESPONDENT

JUDGEMENT

1. The claimant averred that on or about 22nd January 2012, the respondent employed him as a Medical Clinical Officer at a monthly salary of Kshs 36,000/= per month and later increased it to Kshs 54,050/= per month. He further alleged that the agreed working hours were 52 hours per week yet the respondent made him work for 24 hours per day for 5 days in a week.
2. The claimant further pleaded that it was mutually agreed that he would be entitled to 30 days annual leave. The claimant further averred that he was not granted paternity leave when his wife delivered on 26th May, 2013. The claimant therefore sought compensation in the sum of Kshs 4,019,969/= details of which are set out in the memorandum of claim.
3. The respondent denied the claimant's claim and averred it was impossible for the claimant to work for twenty four hours a day and averred that the claimant worked from 8 am to 9 pm Monday to Friday except for any emergencies that may have arisen. The respondent further averred that the claimant was paid Kshs 13,846.15 on 4th January, 2016 as paternity leave.
4. In his oral evidence in court, the claimant further stated that he was never issued with a letter of appointment. It was further his evidence that he was the only clinical officer then and that he used to live next to the hospital and that he could be called anytime. It was his evidence that the other officer was a Medical Officer who used to come for locum or caesarian operations. He further stated that he could go away during public holidays and that he went on leave but whenever he did not go and worked, he would be paid. The claimant further stated that he resigned because he could not have time of his own. It was also his evidence that his NHIF and NSSF was paid for and further that he asked for paternity leave but was declined. A cheque for kshs 13,000/= was later deposited in his account but he did not know what it was for.
5. In cross-examination, the claimant admitted that it was not possible to work 24 hours a day but stated that he could only rest when there was no patient. The claimant further stated that he did not raise any complaint about the work in his resignation letter and further that he did not make any claim for overtime. It was further his evidence that he did not know that the cheque which was paid into his account was for paternity leave. The claimant further stated that he claimed severally about his work situation and that his union was aware of his working conditions and that he held several meetings with the matron over the matter. In re-examination he stated that he worked over 16 hours a day.
6. The respondent's witness Ms Fatuma Njenga stated that she was the hospital administrator. She further stated that the claimant used to work from 8 am to 6 pm but would be called if needed. Ms Njenga further stated that the claimant never raised any complaint about working hours. She further stated that the claimant was paid both annual and paternity leave. The witness also stated that the overtime claim came for the first time in December 2015 through A. O. Jacob Labour consultants.
7. In cross-examination she stated that there was no log system for working hours and further that she had no document in court to show the claimant worked for only eight hours. She further stated that by the time the claimant left only his salary had been paid. She further stated that the claimant was the only clinical officer but there was a doctor on call. She further stated that the hospital was not very busy and that the claimant could be called once in a while but not all the time.
8. The claimant herein resigned from employment by giving one month's notice through a letter dated 20th June, 2015. The resignation letter cited unavoidable circumstances. He went ahead to request for the tabulation of his terminal benefits prior to that date. By a letter dated 2nd September, 2015, the claimant's union wrote to the respondent seeking a joint meeting to discuss the claimant's case. The subject of the intended meeting was claimant's terminal dues.

9. The respondent set a meeting for 6th October, 2015 through their letter to the claimant's union dated 22nd September, 2015. It is not clear if the meeting took place but by a letter dated 19th November, 2015 the claimant's union complained about the length of time it was taking to resolve the issue and issued a demand for payment of claimant's dues within seven days failure to which the union said they would escalate the matter to the next level. In their letter of demand, the union set out the claimant's terminal dues as service gratuity for three years, pro-rata leave for six months and paternity leave for two weeks.

10. Neither the claimant's resignation letter nor the letter from his union raised the issue of overtime. Besides, it might well be that the claimant worked overtime but the court equally doubts if anyone can possibly work for twenty four hours without rest. During the trial, the claimant changed his story and stated that he used to work for approximately sixteen hours per day. This inconsistency on the part of the claimant lends credence to the respondent's evidence that the claimant used to reside near the hospital and would be called once in a while at night when there was an emergency. It is the responsibility of any party seeking any order from the court to prove what they seek. The contradiction between the claimant's pleadings and his evidence in court coupled by the fact that in his resignation letter and the letter from his union he never raised the issue of overtime makes this claim not proved and an afterthought,

11. Concerning claim for paternity leave, the claimant in his evidence admitted that he received some Kshs 13,000/= in his account from the respondent but did not know what it was for. The claimant did not say he bothered to find out what the money was for but he presumably used it. This therefore makes truthful the evidence by the respondent's witness that the payment was for two weeks paternity leave which the claimant once more claimed.

12. The respondent did not allege or show that the claimant was registered with NSSF and further the respondent conceded that by the time the claimant left they did not pay him in lieu of leave accrued.

13. In conclusion, the court will only enter judgement for service gratuity for three years and pro-rata leave. That is to say

a. Leave for seven months (13 days x 54,050 ÷30) 22,070

b. Service gratuity for 3 years at the rate of 15 days pay for each completed year of service 81,074

103,144

c. Costs of the suit.

14. It is so ordered.

Dated at Nairobi this 6th day of July, 2018

Abuodha J. N.

Judge

Delivered this 6th of July, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the claimant

..... for the Respondent