



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2368 OF 2012**

**(Before Hon. Justice Mathews N. Nduma)**

**DICKSON KIMATHI NKONGE.....CLAIMANT**

**=VERSUS=**

**KAKUZI LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant is still an employee of the Respondent. The Claimant was employed by the Respondent as a security guard. The Claimant was later promoted to be a lead guard and received changes of terms and conditions of service. The Claimant previously worked 57 hours per week and was to be paid overtime calculated at 1.5 times of the basic salary for the additional hours worked. The Claimant avers that he worked a standard 2-5 hours overtime daily and that he was not paid up to the time of filing suit on 17/9/2012 totaling 10,630 hours. The overtime is calculated at Kshs. 76.23 per hour totaling **Kshs. 871,6506.56/=**.

2. Subsequently, the Claimant filed an amended statement of claim on 24/6/2014. The Claimant added additional 1,200 hours worked up to that date making the total hours claimed to be 11,830 hours. In other words, since the Claimant is still at work, he seeks repayment of overtime of 2-5 hours per day calculated at Kshs. 76.23 per hour until the suit is heard and determined and thereafter provided he remains at the employ of the Respondent.

3. The Claimant testified under oath in support of the claim and filed written submissions thereafter.

**Response**

4. The Respondent filed a memorandum of reply dated 6/5/2013 and filed on 7/5/2013 denying the claim for overtime in its totality. The Respondent filed supporting documents and called RW, Jonathan Musau, Administrator Assistant in charge of payroll administrator who testified under oath in support of the Respondent's case.

5. The Respondent states that the claims by the Claimant are false and farfetched. That the Claimant was paid all the dues for the overtime hours worked at the company's prescribed rates for the period between September 1997 and 17/9/2012 in accordance with the Claimant's contract of employment. That the Claimant did not raise any complaint all along and is estopped from making claims of overtime at different rates as purported in the Amended Statement of Claim.

6. Respondent admits that the Claimant was employed as a security guard on 1/9/1997. He was promoted to lead guard, a position he holds to date, and had his terms and conditions of employment varied per the letter dated 1/8/2004. His responsibility maternally remained the same.

7. Under Clauses 9 and 10 of the contract, the normal working hours was 57 hours per week spread over 6 days of the week. The Claimant would be called upon from time to time at any time of the day or night if need arose. He would be paid overtime to the Respondent's scale of authorized overtime, including any forfeited rest day or public holiday.

8. According to RW1, between the year 1997 and 2006, the Claimant's salary including his pay for 11 normal working hours plus the overtime was computed and paid to him as consolidated salary. The payslips at page 10-101 of the Respondent's Reply to the memorandum of claim illustrate this pay.

9. RW 1 added that sometimes in 2006, following a management decision and to smoothen the operations and shifts system of the guards, the Respondent increased the working hours of its watchmen from 57 hours to 72 hours per week. This was an additional 2.5 hours per day. Revised contract was offered to the Claimant immediately but the Claimant only signed it on 12/8/2015.

10. In terms thereof, the claimant's salary was expressed to be Kshs. 12,552 to be paid monthly in arrears. The basic salary was inclusive of **Payment for standard daily overtime of 2.5 hours per day**. This payment was in compliance with applicable wage orders for the Agricultural sector and Respondent's protocol for control and monitoring the recruitment of workers attached to the Respondent's Reply at pages 4-9.

11. It is the Respondent's case therefore that at all material times, including the present period, the Claimant has been paid and is still being paid for all the overtime worked at the applicable rates determined by law at 1.5 times of the basic salary to the hours worked.

12. The applicable wage order in the sector is the Regulation of wage (Agricultural Industry) (Amendment) order, 2010. In terms thereof, the basic salary payable to a watchman is Kshs. 3,805. In the year 2010, the Claimant's basic salary was Kshs. 9,100 well above its minimum wage. The Claimant received in addition payment in respect of overtime worked as is evidenced by the attachments at pages 22-43 of the Respondent's Reply.

13. In other words, upto the time of filing suit, the Respondent was compliant with the minimum wage rates and all overtime worked.

14. The Regulation of wage (Agricultural industry) at amendment order, 2010 provides regulation 5 (1) that the hours of work for watchmen shall be 60 hours spread over six days of the week. Initially Claimant worked 57 hours below the set hours. The rest was paid as overtime. When the hours were changed in 2006 to 72 hours, the Claimant worked a mandatory 9-5 hours a day and 2-5 hours overtime totaling to 12 hours a day. The only difference is that September 2006, overtime was paid separately, but from 2006, it is consolidated with the basic pay. RW1 explained that, this is source of misunderstanding by the Claimant. RW1 added that the union abandoned this claim and the Claimant is pushing it on his own.

15. RW1 added that a decision to pay otherwise would affect the businessmen across the board gravely and the court should be hesitant to do so.

### **Determination**

16. The issues for determination are:

- a. Whether the Claimant was paid his overtime dues.
- b. Whether the Claim made from 1997 is time barred, the suit having been filed in 2012

17. The court will deal with both issues at the same time. The claim spread from 1997 to date since the claimant is still working for the Respondent. The suit was filed in 2012, and therefore the law applicable on limitation is **Section 90 of the Employment Act, 2007**.

**“(90)Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.**

18. The Court of Appeal in the case of **G4S Security Services (K) Limited Vs Joseph Kamau & 468 others [2018] eKLR** stated that the court has to determine the cessation date of the injury and then determine if twelve months have lapsed since the date of cessation. In the present case, the Claimant is still working for the Respondent and alleges that he continues not to be paid the claimed overtime. This is a continuous injury within the meaning of section 90 of the Employment Act. The claim is therefore not time barred. However this Act would only cover the claims from year 2008 when the Act became operative.

19. The claims from 1997 upto 2008, made more than six (6) years from the date the cause of action arose are time barred by dint of limitation of Action, Act, Cap 22 laws of Kenya which applies to that part of the claim. The court will therefore only determine the validity of the claim for overtime from 2008 to date.

### **Merit**

20. With regard to whether the overtime claims are meritorious the court relies on the case of **National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd and Another (2001) KLR** in which the Court of Appeal held:

**“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless ..... fraud or undue influence are pleaded and proved.”**

21. It is not in dispute that the employment contract of the Claimant was revised in the year 2006 in which the normal working hours of the watchman including the claimant was revised from 57 hours to 72 hours per week which meant an additional 2-5 hours every day. The Claimant signed the revised contract on 12/8/2015 even though its terms were implemented immediately from the year 2006. The Claimant's basic salary in terms of the new contract was revised to Kshs. 12,552 paid monthly in arrears. This basic salary was inclusive of payment for standard daily overtime of 2-5 hours per day. These amounts have been paid since the year 2006. It is the said payment of 2-5 extra hours worked by the Claimant which he seeks to be paid separately in this suit. This is the crux of the continuous dispute between the parties.

22. The contract dated 1/9/2006 stated at clause 1;

**“You shall receive a basic salary of 7,900 per month. Basic salary herein shown it is inclusive of pay for standard daily overtime of 2-5 hours per day.”**

Clause 9 reads;

**“Normal working hours, (inclusive of 2-5 Hours daily overtime) are 72 per week spread over 6 days of the week.”**

23. The respondent produced payslips for the year 2012 which indeed reflect basic salary of Kshs. 11,411. Some of the payslips reflect payment for overtime. The payslips for 2013, reflect basic pay of Kshs. 12,552 and different separate payment of overtime for extra hours worked. This basic salary is reflected in 2014 and 2015 payslips. In November 2015, the basic salary rose to 13,839. The Claimant is paid overtime reflected in these payslips for different number of hours. RW1 explained that the overtime is covered under clause 10 of the contract, which reads;

**“In addition to the set hours of duty, as decided by the company from time to time you will report to work at any time of the day or night when called upon to do so. You will be paid for any time in excess of normal hours in 9 above, according to the Company’s scale for authorized overtime, including any forfeited resting day or public holiday.”**

24. It is the court’s considered conclusion that the basic pay reflected in the Claimant’s payslips from the year 2006 is inclusive of the 2-5 hours standard daily overtime. It is also my considered conclusion that the differing overtime reflected in payslips for different years and months from the year 2006 is in respect of the additional hours worked **“in excess of Normal Hours”** as per Clause 9 of the contract.

25. The Claimant has not discharged the onus of proof to the standard required on balance of probabilities in terms of Sections 107, 108 and 109 of the Evidence Act, Cap 80 of the laws of Kenya.

26. In **Thomas Kibe and 114 Others vs Kenya Ports Authority [2011] eKLR**, the court stated:

**“Extrinsic evidence cannot contradict a written contract... In this regard the Plaintiff’s argument that what they worked was extra hours and not overtime as correctly argued by the defence is an attempt to introduce extrinsic evidence to alter a written document.”**

27. This finding applies mutatis mutandi in the case. The Claimant cannot be heard to say that the 2-5 extra hours worked per day were not part of the agreed standard daily overtime which was paid for and reflected as part of the basic pay as from the year 2006 to date.

28. The entire claim has not been proved to the standard required by law and is dismissed.

29. The Claimant is still a loyal employee of the Respondent and is entitled to raise grievances with the employer. It is in the interest of justice and fair play that each party bears its own costs of the suit.

30. It is so ordered.

Dated and Signed in Kisumu this 20TH day of JULY 2018.

Mathews N. Nduma

**Judge**

**Delivered and Signed in Nairobi this 10<sup>th</sup> day of August, 2018**

**Maureen Onyango**

**Judge**

**Appearances:**

**Mr. Mokumi for Claimant**

**Mr. Njeru for Respondent**

**Anne Njung’e: Court Clerk**