



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 891 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

NICHOLAS KINYILL.....CLAIMANT

-Versus-

MOCCA LOUNGE AND BISTRO.....RESPONDENT

JUDGMENT

By memorandum of claim dated 28th May 2014, the claimant avers that he was employed by the respondent on 1st October 2011 and worked until 1st October 2013 when he voluntarily resigned. Following his resignation the respondent failed to pay his terminal dues which he has set out as follows –

- a) General damages
- b) Terminal dues in the sum of Kshs.288,000/=.
- c) Costs of this claim and interest thereon and on (a) and (b) above at court rates from the date of filing hereof until payment in full and final satisfaction of the decree.
- d) Any other relief the court may deem fit and just to grant.

The respondent entered appearance through S. W. Ndegwa and Company Advocates on 30th June 2014 and filed a statement of defence on 2nd July 2014 in which it avers that the claimant was a casual employee and the claimant's prayers have no basis in law. The respondent denies the other averments in the memorandum of claim.

The respondent was invited for fixing of hearing dates severally but did not attend the registry. It was served with hearing notices for 10th June 2014, 1st October 2014, 24th April 2017 and 1st February 2018 when the respondent did not attend court for the hearing. On 1st February 2018 the case was heard in the absence of the respondent.

The claimant testified that he was employed by the respondent as Accountant/Human Resource Manager. He relied on the letter of appointment annexed to the memorandum of claim as annexure (a). He resigned by letter dated 26th September 2013. The resignation was to take effect on 1st October 2013. He offered to forfeit his annual leave in lieu of notice. He testified that he worked for 20 public holidays being –

- (i) In 2011, he worked on Moi day – 10th October 2011, Mashujaa day – 20th October 2011, Jamhuri day – 12th December 2011 and Christmas Day and Boxing Day 2011.
- (ii) In 2012, he worked on New Year, Good Friday and Easter Monday, Labour Day, Madaraka Day, Moi Day, Mashujaa Day, Jamhuri Day, Christmas day and Boxing Day.
- (iii) In 2013, he worked on New Year's Day, Good Friday and Easter Monday, 1st May, Labour Day and 1st June. Madaraka Day.

He testified that from 1st January 2013 he worked from 6 am to 9.30 pm being 7.5 hours overtime for which the respondent agreed to pay him at Kshs.125 per hour. For the 2160 hours worked in 9 months, he prayed for Kshs.219,375. He further testified that he was not paid

salary for September 2013 at Kshs.30,000 and house allowance of Kshs.5,000.

He testified that the respondent failed to pay his terminal benefits even after receiving a demand letter from his lawyers. He prayed for judgment as prayed.

Determination

There is no dispute that the claimant was employed by the respondent as reflected in his letter of appointment, or that he resigned as reflected in the letter of resignation, both of which are annexed to the claimant's bundle and admitted in the memorandum of defence. The only issue for determination is therefore the terminal benefits payable to the claimant and the prayers in the claim.

There having been no rebuttal of the claimant's evidence, the court has no option but to believe the claimant's testimony.

I therefore find that the claimant is entitled to salary and house allowance for September 2013, which is admitted in the respondent's reply to the claimant's demand letter. I further find that the claimant is entitled to overtime and public holidays as prayed.

I have awarded Kshs.40,000 for the 20 public holidays worked by the claimant as public holidays are by law payable at double the minimum rate of pay. This is based on Section 26 of the Employment Act, which provides that the terms in the Act are the minimum terms and on Section 48(1) of the Labour Institutions Act as read with Rule 6 of the Regulation of Wages and Conditions of Employment Act. Section 48(1) of the Labour Institutions Act provides that –

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

Rule 6 of the Regulation of Wages and Conditions of Employment (General) Order provides for overtime pay as follows –

6. Overtime.

(1) Overtime shall be payable at the following rates -

(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;

(b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.

(2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee's basic minimum monthly wage.

(3) Notwithstanding subparagraphs (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks -

(a) one hundred and forty-four hours for employees engaged in night work;

(b) one hundred and sixteen hours for all other adult employees.

The claimant is however not entitled to general damages as there is no basis for the same as he resigned from employment voluntarily. Damages are only payable in the form of compensation where termination of employment is found to be unfair. He is further not entitled to annual leave for 2012 as he forfeited the same in lieu of notice in his letter of resignation.

Orders

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

1. Salary for September 2013 Kshs.35,000

2. Overtime Kshs.219,000

3. Public holidays Kshs.40,000

TOTAL KSHS.294,000

4. Interest on 1, 2 and 3 from date of filing suit

5. The respondent shall pay claimant's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE