



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1096 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 26th September, 2018)

JOHN MUNGUTI NZIOKA.....CLAIMANT

VERSUS

M & S LOGISTICS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 2.7.2014 through the firm of King'oo-Wanjau & Company Advocates alleging non-payment of his terminal dues.
2. The Claimant's case is that he was employed by the Respondent on 1.5.2009 till 31.7.2013 when he resigned from employment after tendering to the Respondent a one month written notice to resign.
3. The Claimant exhibited the resignation letter dated 27.6.2013 as his evidence.
4. He stated that upon resignation, the Respondent paid him 30,206/= as his termination dues which he refutes. He avers that he worked overtime hours 10 hours instead of 8 hours and therefore the Respondent owes him overtime of 228 hours being Kshs.178,795/=.
5. He also prays that he be paid service pay for the period he worked. He contends that the Respondent deducted from his salary his NSSF dues but never remitted them as expected. He therefore also seeks payment of the unremitted dues deducted but not remitted to NSSF.
6. The Claimant also exhibited his vehicle movement showing date, kilometers done and time started and time ended to show, he worked overtime.
7. The Claimant gave his oral evidence in Court. In cross-examination, he indicated that he used to have a book indicating the times of work, which he wrote himself. He denies cooking up the said evidence. He avers that even the Transport Manager used to check his register.
8. The Respondent filed their Memorandum of Response in this case on 21.10.2014 through the firm of M/s Ranja and Company Advocates. They denied the Claimant's case. They aver that they paid the Claimant all his dues and he signed a statement of final dues prepared by the Respondent and therefore any claims in this suit are an afterthought.
9. They also deny that the Claimant worked overtime and is entitled to any overtime pay. The Respondent admit owing the Claimant his July 2013 salary. They also deny that Claimant is entitled to payment of service pay in accordance with Section 35(6)(d) of Employment Act 2007.
10. The Respondent also called one witness who indicated that they do not owe the Claimant any overtime. He indicated that every vehicle had its own time sheet.
11. In cross-examination, the RW1 told Court that the Claimant was reporting to work early to clean his car and leave after the last delivery. He denies the Claimant worked overtime.
12. I have examined evidence on record. The issues before Court relate to payment of Claimant's terminal dues. The Respondent have admitted that they had employed the Claimant and he resigned from employment after due notice. They admit owing him his July 2013 salary which I put at Kshs.21,483 as per their full and final settlement statement.

13. The Claimant did not tabulate what his dues were in the Memorandum of Claim. However, he seeks payment of service pay.

14. Under Section 35(6) (d) of Employment Act, service pay is not payable to employees who are members of NSSF. That prayer is therefore not viable.

15. On issue of NSSF dues deducted and not remitted, the Claimant did not provide his NSSF statement to show what was not remitted. It is therefore my finding that this head is not proved.

16. What remains is the prayer for overtime. The Claimant provided documents showing movement of the vehicle indicating the times he reported and times he left. The Respondent denied the record as being corrected. They provided their own sheets but which sheets are only delivery notes. The delivery notes do not show the vehicle movement, logbook, as is usually the norm. It is also not signed by the Claimant as the vehicle user.

17. The Respondent had an obligation to keep their own records showing how the Claimant used the vehicle indicating the time he reported and left. They have not produced the said records.

18. In the absence of any documents to the contrary by the Respondent I will rely fully on Claimant's documents and find for him in terms of overtime as pleaded and award him Kshs.178,795/= plus costs and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 26th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabena for the Claimant – Present

Respondents – Absent