



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 524 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

STANLEY NGUGI GACHERU.....CLAIMANT

VERSUS

DR. EUNICE BROOKMAN AMISSAH.....RESPONDENT

JUDGMENT

The Claimant initially filed his Memorandum of Claim on 28th March 2012. He filed an Amended Memorandum of Claim on 27th February 2013. The Claimant seeks the following reliefs:

1. Terminal dues – Kshs.1,154,728.80
2. Certificate of Service
3. Costs of the Suit
4. Interest on the above items from date of termination to date of payment in full.
5. Any other relief deemed fit to grant by this Honourable Court.

The Respondent filed its Response to the Amended Memorandum of Claim on 14th March 2013 denying the allegations therein.

Claimant's Case

The Claimant, Stanley Ngugi Gacheru, testified that he worked for the Respondent as a Chauffeur from 2003 to February 2012. It is his case that he was required to work from 8.30 am to 6.00 pm and on weekends and public holidays. His starting salary was Kshs.16,000 and his last salary was Kshs.25,000/.

According to him the Respondent would work until 7 p.m. and thereafter go to the gym. He used to leave work at around midnight or even work the whole day and night. He testified that he never went on leave for the 9 years that he worked. He left work because he was not happy. He resigned by letter dated 3rd February 2012 but worked for a further two weeks.

In cross-examination the claimant stated that he did not have a good relationship with the respondent, that he was mistreated many times and denied sick-off. However stated that he never reported any of the mistreatment to a labour officer.

He stated that the Respondent travelled out of the country and during those instances she left him work to do as she had many visitors whom he had to take around.

He testified lodged a complaint at the labour office but the Respondent did not appear. He further testified that he was not aware that the Union wrote to the Respondent stating that he was not entitled to leave and overtime.

The claimant in his written submissions states that he was not paid his salary for the three months he had been on leave. He further submitted that the Respondent did not keep a clear record of the alleged leave taken and that the Respondent in her testimony confirmed that the

claimant was working overtime.

Respondent's Case

RW1, Dr. Eunice Brookman Amissah testified that she is an obstetrician and gynaecologist by profession and was working for an international organisation IPAS as its Vice President at the time material to this suit.

She testified that the Claimant was employed as a driver to work for her. It was her case that she was away from the country half of the time in a year being on average 120 days. She testified that though the Claimant's agreement was that he was entitled to 30 days leave their agreement was that he was to structure his leave around RW1's travel time. RW1 was to give him enough notice for him to organise.

It was her case that the Claimant did not raise any issue with the way she was treating him. She stated that she sent him thank you cards and would give him a bonus and a Christmas hamper. She testified that she had given the Claimant 3 months leave when he stated that he had been accused of not being with his wife.

She testified that she was not available on 23rd February 2012 for the meeting at the labour office but was represented by the finance officer and the HR Associate from her office. She stated that the Union communicated on the issue of leave, holidays and overtime and that the only legitimate claim was severance pay.

In cross-examination she stated that the Claimant did not apply for any leave as he was aware that he would be on leave when RW1 was on leave. She was willing to pay severance pay but was not given the opportunity to pay as the claimant moved to Court. She further stated that she did not have any visitors during the period she was away.

RW2, Jackson Chesire Kipkoech, testified that he used to work as a Finance Associate at IPAS Africa Alliance where the respondent worked.

He testified that the Respondent requested Wanjiru who was in the Finance Department and himself to meet the Union to discuss the claimant's demands. He stated that the issues discussed included holiday allowance, leave, overtime and severance pay. They agreed that given the circumstances the claims for the overtime, leave and holiday allowance could not be sustained because the Claimant got compensated much more than he was claiming. The only claim left was for severance pay.

He further testified that they requested the Union for the authority for severance pay but they stated but before the union could respond the claimant filed this suit.

It was his evidence that the reason for agreeing on leave and holiday allowance was because the Respondent spent more than half a year out of the country when the Claimant took leave, the Claimant was not required to go to work when the Respondent was away.

The Respondent in its written submissions states that the only issue for determination is whether the Claimant is entitled to any of the reliefs sought. Relying on Section 90 of the Employment Act the Respondent submitted that all the claims for dues that accrued before the 27th of February 2010 are time barred for the reason that the amended claim was filed on 27th February 2013.

In respect of the unpaid leave days the Respondent submitted that the Claimant confirmed that the Respondent indeed travelled a lot. The Respondent relied on the case of **BROOKHOUSE SCHOOLS LIMITED -V- DORCAS NJERI GICHUHI [2016] eKLR** where the Court held;

“Even adopting the Respondent's testimony that a teacher would be asked to be in school during the holidays for a total of 3 weeks per year, that would leave approximately 50 days available for annual leave. The Court therefore finds that the Respondent exhausted her leave entitlement and the counterclaim for leave pay therefore fails and is dismissed...Lack of leave records cannot therefore be used as evidence that an employee is entitled to leave pay.”

On unpaid overtime the Respondent submitted that she had the duty to allocate work and time to the Claimant and that working late was not synonymous to having worked overtime. She relied on the case of **Kenya union of Commercial Food and Allied Workers v Nairobi Bottlers Limited [2015] eKLR** where the Court stated that an employer has a right to regulate working hours as provided under Section 27 of the Employment Act.

The Respondent submitted that the claim for public holidays should fail as there was no evidence to support the claim and that the Claimant was on leave for many days as indicated in the Respondent's travel schedule.

The Respondent submitted that the Claimant is entitled to severance for only 8 years as opposed the 9 years, this being the period between 26th May 2003 and 3rd February 2011 when he resigned. The Respondent's calculation for the severance pay is thus $15/30 \times 25,000 \times 8 = 100,000$. She relies on the formula stated in **Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited** and **John Mwangi Kuria & 165 Others v Attorney General**.

Determination

The claimant having resigned from employment, the only issue for determination is his terminal benefits.

The claimant's letter of appointment sets out the terms of employment which would be the basis upon which the terminal dues payable to him would be tabulated. He prayed for leave allowance, severance pay, overtime and holidays.

Unpaid Leave

The Claimant in his Amended Memorandum of Claim avers that he is entitled to unpaid leave amounting to Kshs.225,000. In his testimony the Claimant stated that he never went on leave for the 9 years he worked and never filled any leave forms. During cross-examination, the Claimant confirmed that the Respondent travelled out of the country a lot but stated that during those instances the Respondent assigned him duties including taking around the Respondent's visitors. The allegation for these assigned duties were not adequately proved.

The Respondent testified that her work required much travelling. Therefore, she was away 70% of the time. The Respondent stated that the Claimant never applied for leave since he understood that he was to be on leave when she was away.

The Claimant's Letter of Appointment states:

1. "Work hours shall depend on the requirements of Dr. Brookman Amissah's schedule but shall generally go between 8.30 am to 6.00 pm and you shall be required to work weekends and bank holidays.

2.

3. You will be entitled to thirty days leave structured to fit in with Dr. Brookman-Amissah's schedule."

The Claimant's letter of appointment is clear that he was entitled to 30 days leave which was expected to conform to the Respondent's schedule. The Respondent produced her travel documentation and travel schedule which shows that the Respondent was away for the following number of days in each of the following years:

2012 – 8

2011 – 126

2010 – 114

2009 – 118

2008 – 119

The letter from Kenya Union of Commercial, Food and Allied Workers dated 20th March 2012 addressed to the Respondent confirmed that the issues of leave, off duty and overtime had been agreed. This was further confirmed by RW2 who testified that he attended the meeting as a representative of the Respondent.

From the evidence on record the Claimant was on leave on more days in a year beyond those stipulated in his Letter of Appointment and under Section 28 of the Employment Act. The Respondent cited the Case of **Brookhouse Schools Limited v Dorcas Njeri Gichuhi [2016] eKLR** where Ndolo J. stated that an employee whose schedule of work provided for more days available for leave cannot claim leave days. This was also the decision in **Edward W. Obuya v M.M. Shah & M.V. Shah Academy & another [2016] eKLR**. The Claimant's service can be equated to a programmed schedule as held in these two cases and he would therefore not be entitled to additional leave days having been on leave in some instances for almost half a year.

Severance Pay

The Claimant stated that he was entitled to a sum of Kshs.112,495.50. *Stricto sensu*, the claimant is not entitled to severance pay at all as he was not declared redundant. However the Respondent in her testimony stated that she was agreeable to paying the Claimant severance pay prior to him filing the suit. The Respondent in her testimony and written submissions states that the Claimant is only entitled to severance pay amounting to Kshs.100,000.

The Claimant worked for the Respondent from 26th May 2003 to 3rd February 2011. This is a span of 8 years as opposed to 9 years claimed by the Claimant.

The Claimant is therefore entitled to severance pay for the 8 years worked.

This prayer is therefore granted on the admission of the respondent.

Overtime Worked

The Claimant contends that he worked for longer hours and is entitled to overtime. The Claimant's Letter of Appointment states that his working hours would depend on the Respondent's schedule but would be between 8.30 am and 6.00 p.m. Section 27 of the Employment Act provides:

(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

In **Esther Wanjiku Nderitu v African Quest Safaris Limited [2014] eKLR**, Radido J. held:

“The Employment Act, 2007 has not explicitly provided for what should happen in case an employee works during his rest days or public holidays. Section 10(3) of the Employment Act, 2007 appears to suggest the issue is left to parties’ autonomy.

The Court is aware that some employers would give off days in lieu of work done during public days and rest days. Some may opt to pay cash in lieu. As already stated the contract between the parties did not make any provision in this regard...Therefore at a contractual level, it was permitted for the Respondent to require the Claimant to work on Sundays, beyond the set times and on public holidays... The Regulation of Wages (General) Order has set out the hours of work and for payment of overtime and the formula for calculating the overtime. It has also provided for weekly rest days and for the deferment of the weekly rest days by mutual consent, and holidays with full pay.”

The Regulation of Wages (General) Order which sets out the payment for overtime applies to the applicant. Nonetheless, the Claimant has not stated the exact hours he worked overtime. He only gave a generalized statement that he worked during public holidays and weekends and would leave at midnight. He did not adduce sufficient evidence that he was at work on any specific days or the number of overtime hours he worked. Be that as it may, the Claimant’s letter of appointment allowed the parties to agree on the hours of work according to the respondent’s schedule. This prayer cannot be sustained and is accordingly dismissed.

Public Holidays

The Claimant’s Letter of Appointment states that he may be required to work on public holidays. He was therefore aware that he was expected to work on these holidays. Though the Claimant would be entitled to payment for the hours worked on public holidays this Claim was not sufficiently proved and the Claimant did not produce any evidence of work done on public holidays for the entire 8 years of service.

I find that this prayer has not been proved and accordingly dismiss the same.

Certificate of Service

This prayer has been resolved as the Respondent in her testimony stated she was willing to give the Claimant his Certificate of Service. She is therefore directed to issue a certificate of service to the claimant within 30 days of the judgment.

Costs and Interest

The claimant’s claim having been unsuccessful save for certificate of service and severance pay both of which were admitted by the respondent, I order that each party bears its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE