



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1410 OF 2012

JAMES KARIUKI KABIRA.....CLAIMANT

VERSUS

AUTOLITHO LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 16.8.2012 seeking the following terminal dues form the respondent:

- (a) 45 leave days @ Kshs.37,000 per month.....55,500.00
- (b) Service gratuity @15 days x 3.3 years x Kshs.37,000.....61,667.00
- (c) Travelling allowance @Kshs.3,500 per year x 4 years...14,000.00
- (d) Overtime worked 169 days x 6 hours x Kshs.291
per hour.....295,074.00

Total Kshs.425,741.00

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2. The suit was heard on 12.6.2018 and 27.9.2018 when the claimant testified as Cw1 and the respondents Accountant, Mr. Moses Mugo Njuguna testified as Rw1. Thereafter both parties filed written submissions which I have carefully considered together with the evidence tendered.

Claimant's Case

3. Cw1 testified that he commenced working for the respondent on 18.11.2008 and resigned on 5.5.2011. His salary was Kshs.40,000 per month and he was entitled to 28 leave days per year. However, for the entire period he served he only went on leave for 9 days only during the burial of his late father.

4. Cw1 further testified that as at the time of his resignation, he had 75 leave days outstanding and as such, he forfeited 30 leave days in lieu of notice leaving 45 leave days still outstanding.

5. He also prayed for Kshs.3,500 for leave allowed per year as per the respondent's policy. Cw1 further stated that he worked for the respondent for 3 years and 3 months and prayed for service for the period calculated at Kshs.61,667. He further stated that although the company policy was for employees to work from Monday to Friday, he was force to work extra 6 hours every Saturday due to the nature of his work. He therefore prayed for the overtime contending that he used clock in card while attending work and as such, the respondent has the records of the claimed overtime worked.

6. On cross examination Cw1 contended that he was employed as an Estimator and his duty was to estimate value of products. He

contended that he never went for leave and he was never paid in lieu of the leave. That his employer kept telling him to wait until there was time to go. He also contended that he was entitled to leave travelling allowance like the other employees who were paid whenever they went for their leave. He however admitted that his letter appointment never provided for leave travelling allowance. He contended that there was no procedure for written application for leave and as such, he used to apply orally. He further admitted that he resigned without prior notice because of family issues. Finally, he admitted that the employer was contributing NSSF for him.

Defence Case

7. Rw1 testified that the client was employed by the respondent as an Estimator but he resigned. He further stated that after the resignation, the claimant was not paid any benefits because he was not entitled to any except salary which he had already taken. He contended that service was not payable to him because he resigned.

8. He however admitted that the claimant never went for his leave and after resignation without prior notice he remained with 45 leave days valued at Kshs.55,000. He denied the claim for leave travelling allowance contending that claimant was in the Management and as such he could not get the leave allowance negotiated by the union for the unionizable staff. On the same grounds, Rw1 contended that the claimant was not entitled to overtime. He further contended that all the respondent's management staff work on Saturdays.

9. On cross examination Rw1 admitted that the claimant's appointment letter never stated that he was a management staff. He contended that the respondent's company policy is that Management staff are not entitled to overtime like unionizable staff who are paid for overtime under the collective Bargaining Agreement (CBA). He admitted that the claimant had 75 leave days but forfeited 30 days because he resigned without prior notice.

Analysis and determination

10. There is no dispute that the claimant was employed by the respondent until he resigned voluntarily. The issue for determination herein is whether he is entitled to the reliefs sought.

Accrued leave

11. The claimant claim for 45 leave days equalling Kshs.55,500 and the same was admitted by the Rw1 and the submissions by defence counsel. I therefore allow the same as prayed.

Service gratuity

12. The claimant prayed for service gratuity at the rate of 15 days pay per year for 3 ¼ years served. The claim is opposed by the respondent. Gratuity is either a gift or an agreed term of the contract of service or a statutory right. I have perused the claimant's appointment letter and I did not see any stipulation for gratuity and no statutory provision was cited to justify the claim for gratuity. Consequently, I dismiss that prayer because the claimant is not entitled to gratuity as a matter of right.

Travelling Allowance

13. Travelling or transport allowance is not provided in our laws and as such employees must bargain for the same. Rw1 contended that the claimant cannot benefit from the said allowance because it was negotiated for the unionizable staff by the union. Without any contractual backing, I return that the claim for travelling allowance lacks merits and it is dismissed.

Overtime

14. This claim is also not backed by any contract or any cited law.

Consequently, I find that the evidence by Rw1 that the claimant was a management staff who was duly bound to work on Saturdays without any overtime pay as unrebutted.

Conclusion and Disposition

15. I have found that the claim for accrued leave is admitted. I have however found that the claim for gratuity, travelling allowance and overtime to be unsupported by the contract of service. Consequently, I enter judgement for the claimant in the sum of Kshs.55,500 plus costs and interest at court rates from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS

N.

MAKAU

JUDGE