



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 37 OF 2014

(Before D. K. N. Marete)

JOAN NDUTA WANJIKU.....CLAIMANT

VERSUS

SHRIKESH RUPAREL T/A TRADE ROOTS LTD.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Statement of Claim dated 3rd December, 2013. The background information is therein cited as;

1. *The Claimant avers that she worked for the Respondent for 5 years but she was not paid her dues as is provided for by law.*
2. *The Claimant further avers that she did give the necessary notice before she left employment.*
3. *The issues in dispute is the unpaid dues that are provided for under the Employment Act for which the Claimant is entitled to.*

The respondent in a Statement of Reply dated 7th April, 2014 denies the claim and prays that it be dismissed with costs.

The claimant's case is that she worked for the respondent from 4th August, 2008 as a Merchandiser and rose through the ranks to be a manager after three years of employment. She retained this position until she left employment by tendering a two months notice of resignation.

The claimant's further case is that she was a permanent employee of the respondent and entitled to remuneration as provided by the Employment Act, 2007. This notwithstanding, the respondent failed to pay her due dues. This is pleaded as follows;

9. *That Claimant avers that during her time in employment the Respondent failed and or refused to pay her the following:-*
 - a. *Overtime (Before she became manager)*
 - b. *House allowance*
 - c. *Leave allowance*

Her other case is that she put in overtime and even worked on Saturdays but this was discounted and never paid for despite request for such payment. Her salary at the time of resignation was Kshs.30,000.00.

The claimant's other case is that she was open to conciliation and suggested this to the respondent but her proposal was rebuffed.

She claims as follows;

- a. *Unpaid NSSF Contributions (5 Months) – August 2008 – Kshs.1,000/=*
- b. *Unpaid NSSF Contributions (5 Months) – Jan 200 – May 2009 – Kshs.1,000/=*

c. Unpaid overtime 2.5 hours per days (2009 – 2013)	- Kshs.325,000
d. Unpaid overtime on Saturdays	-Kshs.182,000/=
e. House Allowance	-Kshs.150,000/=
f. Service for 5 years worked	- Kshs.75,000/=
g. Leave Allowance (15 days) (2013)	-Kshs.15,000/=
TOTAL	749,000/=

She prays thus;

a. Unpaid NSSF Contributions (5 Months) – August 2008	– Kshs.1,000/=
b. Unpaid NSSF Contributions (5 Months) – Jan 200 – May 2009	– Kshs.1,000/=
c. Unpaid overtime 2.5 hours per days (2009 – 2013)	- Kshs.325,000
d. Unpaid overtime on Saturdays	-Kshs.182,000/=
e. House Allowance	-Kshs.150,000/=
f. Service for 5 years worked	– Kshs.75,000/=
g. Leave Allowance (15 days) (2013)	-Kshs.15,000/=
TOTAL	749,000/=

The respondent's case is introduced as follows;

DISPUTE

The Respondent takes issue with the claim in its totality and avers it has no merit in law and does not disclose any reasonable cause of action against the Respondent.

The Claimant and the Respondent enjoyed a cordial and good working relationship for the 5 years she was an employee therein. She stated as a merchandiser and rose through the ranks to Manager before she left employment. Their relationship was governed by an oral contract made by the parties on the first day she started employment, 4th August, 2008. The terms of the contract were varied through the years depending on the position the Claimant held and her subsequent job description from the same.

The Respondent was shocked, staggered and equally flabbergasted by the Statement of Claim filed by the Claimant and subsequently served on them to compensate the Claimant of some underserved, unwarranted and malicious claims. Among them was house allowance which was included in her consolidated salary, overtime which she never put in, NSSF payments which were remitted by the Respondent, service pay which she is legally entitled to and leave allowance which is the most shocking of all.

The respondent's case is that the claimant was paid all her dues and is not owed a farthing. A synopsis of the respondent's case comes out thus;

5. In response to paragraph 6 and 8 of the Statement of Claim the Respondent avers that the Claimant entered employment in the Respondent Company in August 2008 as a merchandiser working on a day to day basis wherein she was being paid at the end of every working day and rose to the post of Assistant Manager then eventually to the post of Manager which is evidenced by the salary vouchers she has attached.

8. The Respondent denies paragraph 9 of the Statement of Claim to the effect that before the Claimant became a Manager, she was being paid at the end of every day and she never worked overtime at anytime and hence she is put to strict proof thereof. The Claim for House allowance and leave allowance are also denied.

10. The Respondent vehemently denies all the allegations by the Claimant in Paragraphs 11 and 12 and states that at the beginning of employment the parties agreed by oral contract that working days would run from Monday to Saturday and the position did not change even when the Claimant was promoted to become Manager. The Claimant was required to work 6 (six) days in a week.

12. The Respondent shall respond to paragraph 15 as hereunder;

- a) Paragraph 15 (a) and (b) of the Statement of Claim is denied and the Respondent observes that it has been remitting the Claimant's NSSF contributions.
- b) Paragraph 15(c) of the Statement of Claim is denied. The Claimant never worked overtime at any time while employed by the Respondent and the Respondent does not understand how the calculations have been made.
- c) Paragraph 15(d) of the Statement of Claim is denied on the basis that Saturday used to be normal working day and no overtime was ever accrued by the Claimant.
- d) Paragraph 15 (e) of the Statement of Claim is denied on the basis that the Claimant used to be used to be paid a consolidated salary inclusive of House allowance.
- e) The Claimant is not entitled to payment of service for 5 years as she is a member of NSSF which was duly remitted.
- f) The Claimant is not entitled to the leave allowance as she exhausted all her leave days.

The respondent deems the claim undeserving and vexatious. It is her case that this is not only frivolous and vexatious but a waste of the court's time.

The issues for determination therefore are;

1. Whether the claimant is entitled to the relief sought?
2. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant is entitled to the relief sought. Unusually, no issue of termination of employment arises in this case. This is because by a letter dated 3rd June, 2013 the claimant resigned from employment on her own volition.

The claimant in support of the claim annexes various salary vouchers as evidence of salary payments during her employment. In the Claimant's Supplementary List of Documents dated 2nd December, 2016 she further enlists the following documents in support of her case.

1. Master Roll
2. National Social Security Fund
3. Petty Cash Voucher
4. Salary Voucher

The claimant does not file written submissions in support of her case. This is despite open facilities to this extent.

The respondent in her written submissions dated 29th October, 2018 disputes and denies the claim in entirety. She does this by raising and answering the following sub-issues for determination;

1. Whether the Respondent remitted NSSF contributions on behalf of the Claimant between August 2008 to December 2008 and between January 2009 to May 2009;
2. Whether the Claimant is entitled to Service pay;
3. Whether the Respondent compensated the Claimant for over time on work done?
4. Whether the Respondent paid Claimant's dues for house allowance in full?
5. Whether the Respondent owes the Claimant any leave allowance?

These are all answered out of the claimant's favour. This is as follows;

- NSSF contributions were made to the last month of the claimant's employment.
- She is not entitled to the service pay, having been a member and contributor to the NSSF.
- She has not adduced evidence of extra hours (overtime) done at her place of work.
- The claimant was paid a consolidated salary (inclusive of house allowance) in satiation of the employment contract. She was always privy to this.

The respondent buttresses her case by relying on the authority of section 107 of the Evidence Act, Chapter 80, Laws of Kenya which places the burden of proof as follows;

“107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

She further amplifies this by relying on the authority of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & Others [2014] eKLR** where the court observed as follows;

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. ... The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”

I agree with the respondent. This claim lacks merit and is aimed at extorting the respondent. The claimant has not in any way led any evidence in support of the claim, or at all. It all appears, sounds and carries all the ingredients of an afterthought. The whimpers of a disgruntled former employee. I therefore find that the claimant is not in the least entitled to the relief sought. And this answers the 1st issue for determination.

The 2nd issue for determination is who bears the costs of the claim. This should be a burden of the claimant. What with bringing out such a frivolous claim and hanging it on the respondent for the last tending to five years. I, however, choose to forgive the claimant. *Your sins are forgiven.*

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Nyaberi holding brief for Mrs. Njagi instructed by Jackline Njagi & Company Advocate for the claimant.
2. Mr. Ndhiwa instructed by Gikera & Vadgama Advocates for the respondent.