



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1981 OF 2014**

***(Before D. K. N. Marete)***

**JOSEPH P. RONGOMA MWAKESI.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT**

**NGARA GIRLS HIGH SCHOOL.....1ST RESPONDENT**

**THE PRINCIPAL**

**NGARA GIRLS HIGH SCHOOL.....2ND RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Statement of Claim dated 7th November, 2014. It does not disclose any issue in dispute on its face.

The respondent in the Respondent’s Statement of Response dated 22nd October, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that he was employed as a watchman by the respondent by a letter of appointment dated 10th September, 1999. He earned Kshs.3,035.00 per month as the starting salary.

The claimant’s further case is that in June, 2010, he was employed to the position of Foremen/Herdsmen but not issued with a letter of appointment to this position. This was a very demanding position and he would he would report to work at 430 hours and leave at 2300 hours at night with no commensurate pay for the responsibilities of the new position. He raised this issue with the chairman of the 1st respondent when the 2nd respondent became non committal and hostile. He was not however issued with a letter of promotion or acting

position as had always been the trend here.

The claimant’s other case is a claim for payment for acting allowance as Foreman/Headman from June, 2010, overtime for working days, weekend and holidays or disturbance allowance for rising at 400 hours to 2300 hours from June, 2010 to 28th June, 2012 when the bundle sensor was fixed.

He avers that his salary stagnated unlike other workers who were employed later on and had raises on salary thus discrimination on his part. Despite demand and notice, this was not heeded and therefore this suit.

The claimant’s further case is that he was sent on compulsory leave by the 2nd respondent by a backdated letter dated 1st October, 2014 with a view to intimidating him from making his legitimate claim.

He prays as follows;

*a) Acting Allowance as foreman, overtime on working days, overtime weekends and holidays as quantified hereunder:-*

*i) Acting Allowance – June, 2010 to August, 2014 (51 months).*

*Basic Salary*  $10,717 \times 15 \div 100 = 1,607.55/=$

$1,607.55 \times 51 \text{ months} - \text{Kshs.}81,985.05/=$

*ii) Working Days overtime.*

*Basic Salary*  $10,717 \div 30 \text{ days} = 357.23$

$1,607 \times 11/2 = 535.85 \times 355.76 \text{ days} - \text{Kshs.}190,634/=$

*iii) Weekend and Holidays overtime.*

*Basic Salary*  $10,717 \div 30 \text{ days} = 357.23$

$357.23 \times 2 = 714.46 \times 308.84 \text{ days} - \text{Kshs.}220,654/=$

*b) Disturbance (Strenuous) Allowance for waking up at 4.00a.m and working up to 11.00p.m. as this Honourable Court may determine.*

*c) The 2<sup>nd</sup> Respondent's letter dated 1<sup>st</sup> October, 2014 be and is hereby expunged.*

*d) Promotion letter to be issued to the Claimant by the Respondents for the period worked in the position of Foreman/Headman.*

*e) The Respondents to meet the costs of this suit together with interest.*

*f) Any other Orders and/or relief that this Honourable Court may deem just and expedient to grant.*

The respondent's case is one of denial of the claim.

The respondent's case is that in the alternative, the claimant was re-deployed to a groundsman after she acquired the services of a private security services per the Ministry of Education guidelines. It is her case that the claimant's issues as raised with the respondent were duly addressed and he was notified of the position in writing and his salary was raised to levels higher than now claimed.

This matter came to court variously until the 19th October, 2018 when parties agreed a disposal by way of written submissions. This was done after earlier attempts of an out of court settlement *inter partes* were topended by the reluctance and hostility of the respondent.

The issues for determination therefore are

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

The 1st issue for determination is whether the claimant is entitled to the relief sought. The claimant in his written submissions dated 31st October, 2018 issues a chronology of his employment record as pleaded in his case as follows;

- 10th September, 1999 – letter of employment at a salary of Kshs.3,035.00.
- 15th November, 2010 – his letter raising issues on letter of deployment to Foreman/Headman and salary raise.
- 11th July, 2011 – grievance letter on reporting and closing time, overtime, raising salary on promotion
- 15th July, 2011 – answer to letter of grievance by the secretary Board of Governors/PTA.
- 19th June, 1997 – letter of promotion to Headman, job group D and salary structure all totaling Kshs.3,905.00.
- Various computations of overtime by the claimant.
- Payslips for the month of October, 2011, April, 2014 and July, 2014 – the last in the name of Joseph Kioko.
- Duty allocation roaster for 2014 which distinguishes the claimant and Joseph Kioko at positions 3 and 6.

· Copy of Code of Regulations revised 2006.

The respondent's in their written submissions dated 30th October, 2018 submit that the claimant cannot prove his case on a balance of probability and therefore the claim must fail.

The respondent further submits that there is no allowance known as disturbance allowance in labour relations and therefore the claimant must prove its existence and performance.

The respondent again submits that the General Wages Order provides for overtime expansion to workers but this must be guided by the order. In this instance, the claimant does not again prove existence of time expended as overtime at the work place.

I agree with the respondent. The claimant has only succeeded in proffering a claim but has not in any way substantiated or tendered evidence in support of the same. Overtime is provided for in law but must be negotiated and contracted between the employer and employee. It is not merely imposed by the employee. The employee cannot claim the same without supporting data on its initiation, contractual basis and therefore illegality.

The claimant's claim for disturbance allowance is superficial. It does not sound real. How does one run from 430hours to 2300 hours on a daily basis and survive? In any event, this, like is submitted by the respondent is not supported in law. The claim must therefore fail. I find that the claimant is not entitled to the relief sought and hold as such. And this closes the entire suit.

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

Dated and signed this 29<sup>th</sup> day of November 2018.

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 3<sup>rd</sup> day of December 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

**Appearances**

1. Mr. Chesire instructed by State Law Office for the claimant.
2. Mr. Ashiruma instructed by Ashiruma & Company Advocates for the respondent.