



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 532 OF 2014**

**DANIEL NJUGUNA MWANGI.....CLAIMANT**

**VERSUS**

**DE LA RUE CURRENCY AND SECURITY PRINT LIMITED....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant, Daniel Njuguna Mwangi was an employee of De La Rue Currency Security Print Limited, the Respondent herein. He brought this claim seeking relief for unlawful termination of employment. The claim is contained in a Statement of Claim dated 2<sup>nd</sup> April 2014 and filed in Court on even date. The Respondent filed a Memorandum of Defence on 25<sup>th</sup> June 2014.

2. At the hearing the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Jayne Ng'ethe. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 18<sup>th</sup> October 1993. He rose through the ranks from the position of cleaner at employment to Print Supervisor at termination.

4. By the nature of his employment the Claimant would be called upon to work overtime for which he was compensated. However in November 2013, the Claimant was notified by the Respondent's Head of Operations that he would henceforth be required to work overtime without compensation. The Claimant states that this was contrary to his terms of employment.

5. The Claimant's concerns on this development were ignored and on 20<sup>th</sup> December 2013 his employment was terminated on allegations of failure to work overtime as required. At the time of termination, the Claimant earned a monthly salary of Kshs. 180,185. Upon termination, the Respondent offered to pay the Claimant salary up to 20<sup>th</sup> December 2013, one month's salary in lieu of notice and three days' leave pay.

6. It is the Claimant's case that the termination of his employment was unlawful and unfair. His claim is as follows:

a) A declaration that the termination of his employment was unfair;

b) Salary up to 20<sup>th</sup> December 2013;

- c) One month's salary in lieu of notice;
- d) 3 days' leave pay;
- e) 12 months' salary in compensation
- f) Benefits;
- g) Costs plus interest.

### **The Respondent's Case**

7. In its Memorandum of Defence filed on 25<sup>th</sup> June 2014, the Respondent admits having employed the Claimant and states that he worked as Print Supervisor as at 20<sup>th</sup> December 2013.

8. The Respondent avers that prior to April 2013, the Claimant earned overtime pay for work done beyond normal working hours. It was however an express term of the Claimant's employment contract that depending on business operational needs or other exigencies, the Respondent could from time to time alter or vary the normal working hours including starting and finishing times of duty.

9. The Respondent further states that in April 2013, new salary bands and terms of employment for the Claimant's category of staff were adopted. The Claimant was thus placed under Band D. In April and May 2013, it was expressly explained to the Claimant and the other employees within his category that there would no longer be overtime pay. Under this arrangement, work done outside normal working hours would be compensated by time off. From April 2013, the Claimant did not earn any overtime.

10. On 22<sup>nd</sup> November 2013, the Respondent's Process Manager explained to the Claimant that due to business demands he was required to attend work on 23<sup>rd</sup> and 24<sup>th</sup> November 2014. The Claimant failed to attend work as instructed and was therefore issued with a show cause letter dated 28<sup>th</sup> November 2013 to which he responded on 2<sup>nd</sup> December 2013.

11. The Respondent states that in his response the Claimant admitted having failed to comply with the instructions issued by the Process Manager. By letter dated 16<sup>th</sup> December 2013, the Claimant was invited to a disciplinary hearing to be held on 19<sup>th</sup> December 2013. His right to be accompanied by a colleague was explained.

12. At the disciplinary hearing the Claimant explained that he had failed to attend work on 23<sup>rd</sup> and 24<sup>th</sup> November 2013 because he had been told that he would not be paid overtime. The Respondent found the Claimant's explanation unjustifiable and decided to terminate his employment.

13. It is the Respondent's case that on account of his position as a Supervisor, the Claimant was not entitled to overtime pay. Further, if the Claimant was aggrieved, he should have availed himself of the Respondent's grievance handling procedure.

### **Findings and Determination**

14. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

15. The termination of the Claimant's employment was documented by letter dated 20<sup>th</sup> December 2013 stating as follows:

*"Dear Daniel,*

**TERMINATION OF EMPLOYMENT**

*Further to the disciplinary hearing meeting held on 19<sup>th</sup> December 2013 at the Conference room to discuss your failure to report to work on 23<sup>rd</sup> and 24<sup>th</sup> November 2013, in which you opted not to be represented by your colleague, this is to formally inform you of the decision arrived at by management.*

*As you were informed during the meeting, if without leave or other lawful excuse an employee absents himself from his place of work or willfully neglects to perform any work which it was his duty to perform or knowingly refuses to obey a lawful command, it warrants summary dismissal. By your own admission you admitted failing to work on 23<sup>rd</sup> and 24<sup>th</sup> citing these two days as being a weekend and that you are not ready to work for free since you are not paid overtime. This is despite being informed clearly during implementation of the salary banding that your role would not attract overtime payment and having several meetings on the same issue.*

*Therefore we regret to inform you that we are terminating your services with the Company with effect from 20<sup>th</sup> December 2013. Though your actions warrant summary dismissal, you will be given one (1) month notice, but you will not be required to serve notice. Therefore we will pay you one (1) month salary in lieu of notice.*

*By copy of this letter, Finance Department is requested to pay you:*

- i) Salary up to and including 20<sup>th</sup> December 2013*
- ii) 1 month salary in lieu of notice*
- iii) 3 days pending balance for this year's leave entitlement*

*The Company will therefore pay you **KES 120,992** (One hundred and twenty nine hundred and ninety two shillings) (sic). We have attached an analysis sheet from Accounts for the same, for your reference.*

*In accordance with the new retirement benefits rules, you will be paid your contributions to the Provident Fund. You can also be paid 50% of the Company's contribution to the fund on request. The rest of the Company's contribution will be retained in the Provident Fund until retirement age. However, should you wish to transfer your contributions only or both your and the company's contribution to a new retirement fund, please contact Liberty Pension Services Limited, our Provident Fund Administrators.*

*Please arrange to return all company property in your possession. The attached clearance certificate should be signed and returned to the Human Resources department today.*

*We take this opportunity to thank you for the services you have rendered to the Company.*

*Yours sincerely,*

*De La Rue Currency and Security Print*

*(Signed)*

**David Hepple**

**Head of Operations”**

16. From this letter and further evidence adduced before the Court the reason for termination of the Claimant’s employment was his failure to report for duty on 23<sup>rd</sup> and 24<sup>th</sup> November 2013 as instructed by the Respondent’s Process Manager, Victor Miringu. The facts are not in dispute; what is in question is whether the Claimant was entitled to decline to report for duty on 23<sup>rd</sup> and 24<sup>th</sup> November 2013 which fell on a weekend and would therefore have been his rest days.

17. The Claimant was unequivocal that he failed to report for duty on the said days because he would not be paid overtime compensation. The Respondent’s defence is that although the Claimant had previously earned overtime pay, this had been discontinued in April 2013 upon adoption of new salary bands which had placed the Claimant under Band D. The Respondent states that the Claimant had been duly notified that being a Supervisor he was no longer entitled to overtime pay. Any extra time worked could only be compensated by time off.

18. In advancing its argument, the Respondent relied on Clause 6 of the Claimant’s terms and conditions of employment dated 21<sup>st</sup> April 2010, providing as follows:

**“Working Hours**

*Your normal working hours are 0800 to 1700 hours from Monday to Friday inclusive. Weekly working hours will be 40.*

*Depending on business operational needs, or other exigencies of business, the Company may from time to time alter or vary the normal working hours including the starting and finishing times of duty.”*

19. In order to answer the question whether the Respondent had a valid reason for terminating the Claimant’s employment, the Court must ask the corollary question whether the decision to discontinue overtime payment to the Claimant upon which he declined to report for duty on 23<sup>rd</sup> and 24<sup>th</sup> November 2013 was itself lawful.

20. In the final submissions filed on behalf of the Claimant, reference was made to Sections 10(5) and 13(1) of the Employment Act, 2007 which require the employer to first consult with the employee on any changes to the terms of employment and second, to notify the employee of those changes in writing.

21. The Respondent produced some power point presentation on the Salary Banding but there was no evidence of any consultations made with the Claimant, much less any notification of the changes to his terms of employment. That said I must find that the Respondent’s decision to discontinue payment of overtime compensation to the Claimant was not only unilateral but also unlawful.

22. Indeed as held by **Radido J** in ***James Ang’awa Atanda and 10 others v Judicial Service Commission [2017] eKLR*** unilateral variation of terms of employment by an employer is an unfair labour practice as contemplated under Article 41(1) of the Constitution of Kenya, 2010.

23. The logical conclusion is that since the instruction to work overtime without monetary compensation was itself unlawful, no charge based on it could stand. There was therefore no reason for the termination of the Claimant’s employment and the ensuing disciplinary process had no leg to stand on.

**Remedies**

24. In light of the foregoing, I award the Claimant twelve (12) months’ salary in compensation. In making this award I have taken into account the Claimant’s length of service, his clean employment record and

his legitimate expectation that he would continue working for the Respondent until normal retirement. I have also considered the Respondent's conduct in the termination transaction. The claims for one month's salary in lieu of notice and three days' leave pay are admitted and are payable.

15. The Claimant admitted having received his salary for December 2013 and thereby abandoned this claim. He also did not pursue the claim for benefits.

26. Finally I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....Kshs. 2,162,220

b) 1 month's salary in lieu of notice.....180,185

c) 3 days' leave pay (180,185/30x3).....18,018

**Total.....2,360,423**

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. I further award the costs of this case to the Claimant.

29. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI**

**THIS 31<sup>ST</sup> DAY OF MARCH 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kimakia for the Claimant

Mr. Leshan for the Respondent