



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.124 OF 2016**

**WASHINGTON WAIGANJO WANGOMBE..... CLAIMANT**

**VERSUS**

**OTHAYA FARMER'S CO-OPERATIVE SOCIETY LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 25<sup>th</sup> May, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 02.06.2016 in person. The claimant prayed for judgment against the respondent for payment of unpaid work on public holidays Kshs.37, 180.00; unpaid salary of Kshs.323, 196.00; unpaid overtime hours Kshs.367, 773.00; costs of the suit and interest; and any other relief the honourable court may deem fit and just to grant.

The respondent filed the memorandum of response on 21.07.2016 through Sichangi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The claimant filed the reply to response on 04.08.2016.

The parties agreed that the suit be determined on the basis of the pleadings, documents, witness statements and final submissions on record.

There is no dispute between the parties that the claimant was employed by the respondent in February 2010 as a night watchman and deployed at Gichihi Coffee Factory in a place known as Othaya. It is not in dispute that the claimant served uninterrupted up to February 2016 when he left employment due to poor health.

The main and only issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The claimant has stated that he was underpaid throughout his service and has computed the underpayment dues in paragraph 15 of the statement of claim. The respondent has filed documents showing the amount paid to the claimant over the period of service but has not showed that minimum statutory wages were paid and as claimed by the claimant. It is not denied that the claimant served without a break in service and therefore his service must have converted to one based upon minimum statutory terms and conditions of service as envisaged in section 37 of the Employment Act, 2007. Accordingly, the court returns that the claimant is entitled to payment for underpayment as claimed and is awarded **Kshs.323, 196.00** as prayed for.

2. The material on record show that parties are in agreement that the claimant worked overtime throughout his employment. There is no evidence that the overtime was paid and if it was so paid, it was included in the monthly pay and the court returns that the computed monthly pay was nevertheless below the minimum wage so that the overtime as computed remained unpaid. In the circumstances, the court returns that the claimant is entitled to the overtime as claimed and is awarded **Kshs.367, 773.00** as prayed for and as computed in the statement of claim.

3. The respondent has filed summaries showing that the claimant worked overtime. There is no evidence that the overtime was paid and if it was paid, then it was included in the monthly pay

which was below the statutory minimum wage and the work on public holidays, therefore, remains unpaid. Accordingly, in absence of any other material on record, the court returns that the claimant was not paid for public holidays worked and is awarded **Kshs.37,180.00** as computed, claimed and prayed for.

4. The respondent to pay the claimant the costs of the suit fixed at **Kshs.30, 000.00**.

While making the findings the court observes that the respondent was given an opportunity to file bank statements to show that the claimant was paid the amounts as claimed, particularly for overtime and public holidays worked, but the bank statements were not filed.

In conclusion, judgment is hereby entered for the claimant against the respondent for the respondent to pay the claimant **Kshs.758, 149.00** by 01.08.2017 failing interest to be payable thereon at court rates from the date of this judgment till the date of full payment.

**Signed, dated and delivered** in court at **Nyeri** this **Thursday, 25<sup>th</sup> May, 2017**.

**BYRAM ONGAYA**

**JUDGE**