



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 7 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOHN RIOBA MAUGO.....CLAIMANT

-Versus-

RILEY FALCON SECURITY SERVICES LIMITED.....RESPONDENT

RULING

Judgment in this case was delivered on 8th September 2016. In the judgment the court awarded as follows-

1. One months' salary in lieu of notice Kshs. 12,548.50

2. Accrued leave at 26 days for 41 months from

17th November 2010 to 24th April 2014 at

26 days per year Kshs. 37,157.40

3. Overtime at 20 hours per week for 52 weeks

at one and a half times the normal

hourly rate $(20 \times 52 \times 12548.50 / 225 \times 1.5)$ Kshs. 87002.90

4. Rest days: the claimant was paid overtime

for rest days at 1x1 instead of double the hourly rate.

He is entitled to the balance of 1x1 based on 12x the

hourly rate $(12,548.50 / 225 \times 12 \times 52)$ Kshs. 34,901.00

5. Underpayments

The claimant was paid Kshs. 8,392.00 instead

of Kshs. 12,548.50, an underpayment of

Kshs. 4156.50 per month for 12 months he is
entitled to (12,548.50-8,393x12) Kshs. 49,878.00

6. Compensation at 6 months gross salary

(12,548.50x6) Kshs. 75,291.00

7. Certificate of service

8. The respondent will also pay the claimant's costs and interest on decretal sum from date of judgment.

By an application dated 31st October 2016, the Claimant seeks review of the judgment as follows-

1. The award issued by the honourable Judge as set out in items 3, 4 and 5 as summarised in the conclusion of the said judgment be reviewed so as to ascertain **the actual total sum to be awarded** to the Claimant togetherwith the computation thereof.

2. The Applicant be awarded the costs of this application.

The Claimant states that there is an apparent error on the face of the record which should be rectified as follows-

a. i. The Claimant is entitled to Underpayments for the 3 year period immediately before his dismissal. Factoring the three (3) years period immediately before his dismissal the court allowed at paragraph 1 at page 20 on underpayments, the payable underpayments would be:-

(a) For the period May 2011 to April 2012 ($\{15\% \times 8,463 = 1269.45\} + 8,463 = 9,732.45$ cts [gross basic minimum wage] - 6811.30 cts [actually paid as gross basic salary] = 2,921 x 12 months) = **Kshs.35,053.80 cts underpayment;**

(b) For the period May 2012 to April 2013 ($\{15\% \times 9,571.65 = 1435.75\} + 9,571.65 = 11,007.40$ cts [gross basic minimum wage] - 8,464cts [actually paid as gross basic salary] = 2543.40cts x 12 months) = **Kshs.30,520.77cts underpayment;**

(c) For the period May 2013 to April 2014 ($\{15\% \times 10,911.70 = 1636.76\} + 10,911.70 = 12,548.50$ cts [gross basic minimum wage] - 8,393 [actually paid as gross basic salary] = 4,155.50 x 12 months) = **Ksh.49,866 underpayment;**

Totaling to Kshs.115,440.60cts

ii. That in essence, item number 3 on overtime at page 23 of the Judgement, the calculations ought to be tabulated for the years worked, the court having found that it was a continuing injury as per the provisions of section 90 of the Employment Act at paragraph 2 at page 20 on overtime. And therefore the tabulation for overtime would be:-

(I for the period 17th November 2010 and April 2011

(154 hours x 1.5 x 67.80 [hourly rate])

=**Kshs.15,661.80 cts;**

(ii) For the period May 2011 and April 2012

(336 hours x 1.5 x 76.30 [hourly rate])

=Kshs.38,455.20cts;

(iii) For the period May 2012 and April 2013

(336 hours x 1.5 x 86.30 [hourly rate])

=Kshs.43,495.20cts;

(iv) For the period May 2013 and April 2014

(336 hours x 1.5 x 96.40 [hourly rate])

=Kshs.48,585.60/-

Totaling **Kshs.146,197.80cts** instead of Kshs.87,002.90cts.

The application is made under section 12(2) and 16 of the Employment and Labour Relations Court Act and Rule 17, Rule 33(1)(b), (2), (3), (4) and (5), Rule 34 of Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions of law. The application is supported by the affidavit of the Claimant in which he reiterates the grounds on the face of the application.

When the application came up for hearing I recommended that the parties try to discuss and reach an out of court settlement. However this was not successful and I therefore directed the parties to file submissions restricted to calculations of what each of them deem to be what is due to the Claimant.

The Claimant's position is as follows-

a) Item 3 (overtime) of the award issued by this honourable court on 8th September 2016 be and is hereby corrected as follows:

i) For the period 17th November 2010 and April 2011

(154 hours x 1.5 x 67.80 [hourly rate])

= Kshs.15,661.80cts

ii) For the period May 2011 and April 2012

(336 hours x 1.5 x 76.30 [hourly rate])

=Kshs.38,455.20cts

iii) For the period May 2012 and April 2013

(336 hours x 1.5 x 86.30 [hourly rate])

=Kshs.43,495.20 cts

iv) For the period May 2013 and April 2014

(336 hours x 1.5 x 96.40 [hourly rate])

=Kshs.48,585.60cts

Totaling Kshs.146,197.80 cts instead of Kshs.87,002.90 cts.

b) Item 4 (rest days) of the award issued by this honourable court on 8th September, 2016 be and is hereby corrected as follows:

i) Between the period 17th November 2010 and April 2011

(23 days at the rate of 8,651.45 for every 14 days worked)

Kshs.14,213.10cts

ii) Between the period May 2011 and April 2012

(48 days at the rate of 9732.45 for every 14 days worked)

=Kshs.33,368.40cts

iii) Between the period May 2012 and April 2013

(48 days at the rate of 11007.3975 for every 14 days worked)

-Kshs.37,739.65cts

iv) Between the period May 2013 and April 2014

(48 days at the rate of 12548.455 for every 14 days worked)

-Kshs.43,023.27cts.

Totalling Kshs.128,344.42cts instead of Kshs.34,901.00 cts.

c) Item 5 (underpayments) of the award issued by this honourable court on 8th September 2016 be and is hereby corrected as follows:

i) For the period May 2011 to April 2012

([15% x 8463=1269.45] + 8463=9732.45 - 6811.30=2921.15)

=Kshs.35,053.80cts

ii) For the period May 2012 to April 2013

([15% x 9571.65=1435.75] + 9571.65

=11007.40 - 8464.00=2543.40 x 12)

Kshs.30,520.77cts

iii) For the period May 2013 to April 2014

([15% x 10911.70=1636.76] + 10911.70

=12548.50cts - 8393=4155.50 x 12)

=Kshs.49,866.00

Totalling Kshs.115,440.60 cts

The Respondent also filed submissions as follows-

1.The court awarded the claimant **overtime** at 20 hours per week for 52 weeks since the same was a continuous wrong which has a limitation period of one year as per section 90 of the Employment Act hence the said amount should remain as calculated by the court subject to alteration on the amount, salary used. The Public Security Services Order at Rule 7(2) provides that the employee's basic monthly wage should be used in calculation of the overtime and not the gross salary.

$$20 \times 52 \times 10,911/225 \times 1.5 = 75,649.60$$

2.The court awarded the claimant **rest days** and calculated the same for one year, it is our opinion that the same is correct since it also falls under continuous wrong which is subject to the one year limitation period as per section 90 of the Employment Act.

3.The court held that the claimant was being **underpaid** from May 2011 and the calculations should be from May 2011 to the date of termination as follows:

May 2011 to April 2012 =35,053.80/-

May 2012 to April 2013 =30,520.77/-

May 2013 to April 2014 =49,886/-

Total =115,440.60

4.The Judgment be reviewed to reflect the amounts awarded to the plaintiff as follows:

a) One month salary in lieu of notice -Kshs.12,548.50

b) Accrued leave -Kshs.37,157.40

c) Overtime should be amended to -Kshs.75,649.60

d) Rest Days -Kshs.87,002.90

e) Rest days -Kshs.115,440.60

f) Compensation 6 months -Kshs.75,291.00

TOTAL - **KSHS.403,090.00**

LESS AMOUNT ALREADY PAID -Kshs. 296,778.80

AMOUNT OUTSTANDING **-Kshs. 106,311.20**

5.The application be allowed with no order as to costs.

6.The respondent be granted 30 days stay to settle the balance of the decretal sum being Kshs.106,311.20.

Determination

I have considered the application and the arguments by the parties on each of the items set out in the application. From the submissions of the parties, it is apparent that both parties desire a review but are not agreed on what the award should be.

I will consider each head of claim in the application separately.

1. Underpayments

In the judgment I awarded the claimant underpayments for 3 years. I specifically awarded as follows

The claimant is entitled to underpayments for the 3 year period immediately before his dismissal as follow. ... I award the claimant underpayments from May 2011.

However when tabulating the same under paragraph 5 of the conclusion I only awarded underpayments for 12 months. This is therefore an error on the face of the record. I agree with the claimant and review the judgment to reflect the award of underpayments for 3 years as follows:

May 2011 to April 2012 Kshs. 35,053.80

may 2012 to April 2013 Kshs. 42,179.50

May 2013 to April 2014 Kshs. 34,781.50

2. Overtime

The claimant prays that the award be reviewed by providing for overtime for each of the entire period the claimant was in employment from November 2010 to April 2014 while the Respondent prays that the court retains the period as one year but the calculation be based on basic salary as provided in the Public Security Services Order (sic) at Rule 7(2).

The reasons for awarding the claimant overtime based on consolidated wage and for 12 months only is that overtime is a continuing wrong, and that the claimant was paid a consolidated wage. The arguments by both the claimant and the Respondent are not matters that can be dealt with in a review as they do not constitute errors on the face of the record but rather, an interpretation of the law which can only be reviewed or set aside in an appeal. I therefore decline to review the award on this item.

3. Rest Days

I awarded the claimant rest days of Kshs. 34,901.00. According to the Claimant he should have been awarded rest days from 17th November 2010 to April 2014 being the entire period of service. As observed in the judgment the claimant was paid for rest days worked at the rate of 1 to 1 instead of 1 to 2 as provided in the Protective Security Services Order for 52 weeks being one year. As stated in the case of overtime, this is a matter of interpretation of the law and not an error on the face of the record. It is therefore not a subject of review but rather appeal.

For this reason I decline to review the award on rest days.

Conclusion

For the above reasons the award is reviewed in terms of the award on underpayments only by setting aside the award therein and substituting therefore the following-

May 2011 to April 2012 shs. 35,053.80

May 2012 to April 2013 shs. 42,179.50

May 2013 to April 2014 shs. 34,781.50

The rest of the award is retained in terms of the judgment dated 8th day of September 2016.

There shall be no orders for costs on the application.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE