



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAIROBI

CAUSE NO.1801 OF 2011

SIMON KIMANI GITURA..... 1ST CLAIMANT

BOAZ MWANZI OSOTSI..... 2ND CLAIMANT

SOLOMON CHEGE 3RD CLAIMANT

VERSUS

THE ADMINISTRATOR, THIKA SUB COUNTY RESPONDENT

JUDGEMENT

1. Issue in dispute, the refusal/failure by the Respondent to pay retirement overtime benefits and dues to the claimants.
2. The suit herein was filed on 26th October 2011 against the Town Clerk, Municipal council of Thika. There was an amendment to the claim vide application dated 28th October 2013 which was allowed by consent and amended claim was filed on 29th October 2013. There was a further amended claim on 5th June 2015. The respondents was given time to file amended response and or defence, but there was non-compliance up and until the time the suit proceeded for hearing. At the close of the claimant's case, the Respondent opted not to call any evidence.
3. The defence filed on 19th December 2011 is the only record of the respondent. The same is not amended and relate to an entity [Town Clerk, Municipal council of Thika] that no longer exists. This is the reason the Claimants applied to amend the claim, it was allowed and parties directed to file their amended pleadings. As such, the defence is left bare.
4. On the claim, the Claimants were employed by the Respondent on diverse dates and at the time the Respondent was under the name, Town Clerk, Municipal council of Thika, and by virtue of the County Government Act,2012, the Respondent herein inherited the assets and liabilities of the predecessor, the Municipal Council of Thika.
5. The claim is that between 2007 and 2008 the Claimants were issued with notices of retirement by the Respondent and subsequently retired in 2008. The Claimants had during their employment earned overtime but the Respondent did not pay for it Town Clerk, Municipal council of Thika the time of retirement, the Respondent acknowledged owing such overtime dues and in part payment, a sum of kshs.100,000.00 was paid to each claimant. There is unpaid balance of overtime as follows;

1st Claimant kshs.208, 028.00;

2nd Claimant kshs.429, 066.00; and

3rd Claimant 58, 749, 00.

6. All not paid. The Claimants have made demand and follow up but the Respondent has remained adamant hence the claim herein. The Claimants seek such payments with costs.

7. In evidence, the 1st Claimant testified for and on behalf of the claimants. He testified that they were all employed by Town Clerk, Municipal council of Thika, which has now changed to the Respondent by operation of the new constitution and devolution and under the County Government Act, 2012. The Claimants were enforcement askaris for the Respondent until their retirement in 2008. Overtime was computed but not paid in full and claim the balance. The Claimants were supposed to work from 8am to 4pm but were asked to work until 7pm every day and all the hours were logged and computed. The Respondent kept all the overtime records which they used to compute the dues but each Claimant was only paid kshs.100, 00.00 and the balance has never been paid.

8. The Claimants retired on 31st December 2008 and claimed kshs.338, 028.00 and kshs.100, 000.00 was paid with a balance of kshs.238, 028.00 being due.

9. The 2nd Claimant was claiming kshs.208, 028.00 which is unpaid having been paid kshs.100, 000.00 while the 3rd Claimant is claiming Kshs.58, 749.00 as he was only paid kshs.100, 000.00. All the dues were computed and the clerk gave each Claimant copies of the outstanding dues with the stamp of the respondent. The computations were made by the Respondent officers who had the work records. The paid dues were made via cheques. The balance is still due and should be paid with interest and costs.

Defence

10. As noted above, the Respondent did not amend the filed defence. However the substance of it is that of mere denials and that the Claimants were paid in full and nothing is owing from the respondent. That the claims have no merit and should be dismissed.

Determination

11. Without call of evidence by the respondent, the claims by the Claimants have not been controverted. There is no material evidence to challenge the claims.

12. I however must add. Proceedings herein commenced on 26th October 2011 when the Claimant filed the memorandum of claim. Upon service, the respondents filed the defence on 19th December 2011. Retirement and overtime dues and benefits are employment related claims and where an employer is challenged in this regard, as a matter of course, the work records, employees records relevant therein are as of necessity imperative to file. Such records are not only necessary to support the defence case but for the court to be able to effectively assess the record with regard to the employer's compliance with legal requirements are to payment of all work and employees due. The failure to file such records therefore goes to the root of the case, and where an employer does not file the record, this reflects that the records do not exist, which is an unlawful practice or the records do not support the employers case.

13. I take it that the records relating to the employment of the Claimants are in the possession of the respondent, such records were used to assess their retirement benefits, these records were used to compute the overtime dues and part of that overtime was paid. The balances claimed would then require the Respondent to submit a full record of full payment of a record of the balances not paid.

14. Without such record being produced on court, is left with the claimant's case only. Overtime should be paid in accordance with the First Schedule to the Employment Act. Where not paid an employee

asserts such a claim, such is lawfully due.

I enter judgement for the Claimant against the Respondent in the following terms;

- (a) The Claimants are owed overtime earned while in the employment of the respondent;**
- (b) The Claimants shall be paid the sum of kshs.695,843.00 in overtime pay;**
- (c) Such amounts (b) above shall be paid with interests; and**
- (d) Costs awarded to the claimants.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF JUNE 2016.

M. MBARU

JUDGE

In the presence of

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