



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 98 OF 2014

MAURICE OTIENO OLUNY.....CLAIMANT

VS

1 MOMBASA CONTAINER TERMINAL LIMITED

2 SDV TRANSAMI KENYA LIMITED.....RESPONDENTS

JUDGMENT

Introduction

1. The claimant was employed by the 1st respondent on 8.10.2007 as a Top Loader Operator. He worked upto 16.7.2013 when he voluntarily resigned. His salary was kshs.56,347.74 at the time of the said resignation. The resignation was accepted by the 1st respondent but the parties disagreed on payment of separation dues. The claimant therefore brought this suit seeking kshs. 1,840,201 as his terminal dues accruing from his employment contract in respect of salary arrears and overtime worked. He also prayed for certificate of service.

2. The first respondent admits that she employed the claimant but avers that he voluntarily resigned without notice of one month as required under the Collective Agreement (CBA). She never the less paid the claimant all his rightful separation dues and denies the claim for the alleged unpaid overtime worked and salary arrears.

3. On the other hand, the second respondent denies that she had any employment relationship with the claimant and prays for the suit against her to be dismissed.

Analysis and Determination

4. There is no dispute that the claimant was employed by the 1st respondent from 8.10.2007 as a Top Leader Operator to 16.7.2013 when he voluntarily resigned on account of his ill health. The issues for determination are:-

a) Whether the suit against the 2nd Respondent has merits.

b) Whether the reliefs sought against the 1st Respondent should be granted

Claim against the 2nd Respondent

5. The claimant has pleaded in his claim that his employer was the 1st Respondent. That the only reason he has enjoined the 2nd Respondent is because she shares the same premises and address with his employer. With due respect to the claimant's counsel, that joinder was not merited as no reasonable cause of action has been established against the second respondent. The court must therefore dismiss the claim against the second respondent.

Claim against 1st Respondent

6. The claims against the 1st Respondent include wages for 6 days worked but not paid, salary arrears for January 2012 to June 2013 and overtime from 2007 to 2011. The total claim is for kshs. 1,840,201 after deducting one month salary in lieu of notice.

Sixteen days unpaid salary

7. This claim was not given any particulars and or substantiated in evidence and written submissions. However on a balance of probability, I find that the claim for the 16 days was in respect of the days worked in July 2013 before resignation. Based on the salary of kshs.56,347.75 per months as demonstrated herein after, the unpaid salary for July 2013 is kshs.30,052.15 and I award the said sum to the claimant.

8. The claimant contends that on 20.12.2011, the first respondent wrote to him confirming that he was a unionisable staff and his terms of service were governed by the CBA. That the CBA had been signed between the Aviation and Allied Workers Union (K) and the second respondent on behalf of herself and the companies associated with her. Although the 1st Respondent denies that the second respondent is her mother company, she has admitted that the said CBA was the one governing her contract with the claimant. She has even referred to clause 35 thereof to fault the claimant's resignation without notice. I therefore find that the CBA was the written contract of employment between the claimant and the 1st respondent.

9. Under clause 5 of the CBA for the period 2012-2013 and which commenced on 1.1.2012, the employees wages were increased by 15%, 13% and 12% for job Grade A1, A2 and A3 respectively. The claimant averred that his salary increment was at the rate of 13% while his House allowance increased by kshs.1,000. That before then the claimant was receiving a consolidated salary of kshs.44,520.00. Under clause 7 of the CBA, each employee was entitled to kshs.7,500.00 as House allowance in 2012 and kshs.7,800 in 2013 meaning that before the increase by kshs.1,000, the House Allowance was kshs.6,500 and the rest of the claimants pay was the basic salary.

10. Flowing from the foregoing the claimants basic salary was kshs 44,520-6,500=38,020 per month and after the 13% increment it became 42962.60. After adding the new House Allowance of kshs.7,500, his gross pay became kshs.50,462.60 per month from January to December 2012. From January to July 2012, the gross salary remained kshs. 44,520.00 which was under paid by kshs 5,942.60 according to the CBA. The total underpayment for the said 7 months was therefore kshs.41,598.20. Through the witness statement by M/S Christine Onyango, the respondent avers that the said salary arrears of kshs.41,598.00 was paid to the claimant in full in August 2012. I have perused the claimants payslip for the month of August 2012 and confirmed that the said sum of kshs.41,598.20 was fully paid to the claimant as alleged by the defence witness. The further claim for kshs.22,915 as salary under payment for January – July 2012 is misconceived and is dismissed.

Salary Arrears for August – December 2012

11. The claimant has pleaded that his salary was increased to kshs.48,547 from August 2012 instead of kshs.56,847.60. He therefore pays for kshs.8,803 for the said 5 months. I have however calculated herein above his rightful gross pay as kshs. 50,462.60. Consequently I find that his salary for the said months of August-December 2012 was kshs.50,462.60-48,547=kshs.1,915.60 x 5=9,578. The claimant however prayed for a lesser amount of kshs.8,803 and that is what I award to him.

Salary Arrears for January-June 2013

12. There is no dispute that the claimant's salary was increased by 13% from 1.1.2013. That means that his basic salary of kshs.42,962.60 increased by 13% was to become kshs.48,547.75. The gross pay including the new House Allowance of kshs. 7,800 became kshs. 56,347.75. However, the claimants' pay during that period was kshs.48,547 which represented an under payment by kshs.7,800.75 per month. The total underpayment for the 6 months was therefore kshs.46,804.50. The respondent has not proved that she paid the said sum to the claimant as a result I therefore award the same to the claimant.

Overtime

13. The claimant averred that he worked overtime between 2007 and 2011 but he was never paid for the extra hours. He prayed for kshs. 1,788,848.40 for overtime. The 1st Respondent denies that the claimant worked extra time as alleged in his suit. She further denies the unsigned Form filed as exhibit 3 by the claimant saying that it was not authenticated by the claimant's supervisor.

14. I have considered paragraph 6 and 15 of the claim which stated that the claimant worked overtime from 2007 to 2011 and he was not paid but from February 2012 the first respondent started paying for overtime worked. If I understand the claimant well, he is stating that his employer continued to default in payment of his overtime pay until February 2012. In other words the breach by the respondent ceased in February 2012 according to the claimant.

15. Under section 90 of the Employment Act, provides that no civil action or proceedings based or arising out of a contract of employment may be brought unless

“It is commenced within three years next after the act, neglect or default complained of or in case of continuing injury or damage, within twelve months next after the cessation thereof,”

16. In consideration of the foregoing provision, there is no doubt that the claim by the claimant for over time worked between 2007 and 2011 is time barred. The default having ceased in February 2012, the claim for overtime should have been commenced within 12 months thereafter being not later than February 2013. That was not done and as such the court has no jurisdiction to determine the same for being filed out of time. The claim for overtime for 2007-2011 is therefore declined.

Certificate of service

17. I have noted from the respondents documents filed herein that a certificate of service was written on 26.7.2013. It is the right of every employee to get Certificate of Service under section 51 of the Employment Act. I therefore order the respondent to issue claimant with the certificate.

Disposition

18. For the reasons stated above I enter judgment for the claimant in the sum of 85,659.65 less kshs. 56,347.75 being one months salary in lieu of notice leaving a net of **kshs.29,311.90**. The claimant will have interest on the said sum plus half costs of the suit.

Signed, Dated and Delivered this 29th day of July 2016

ONESMUS MAKAU

JUDGE