



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 148 OF 2013

(Originally Nairobi Cause No. 275 of 2011)

COLLINS OTIENO OWINO

CLAIMANT

v

RIFT VALLEY AGENCIES LTD

RESPONDENT

JUDGMENT

1. Collins Otieno Owino (Claimant) resigned from the employment of Rift Valley Agencies Ltd (Respondent) through a letter dated 5 January 2010.
2. He expected to be paid *terminal dues* which were not forthcoming and on 5 March 2010, he wrote to the Respondent seeking payment of *terminal dues*. He addressed a reminder/letter seeking *terminal dues* on 10 November 2010 to the Respondent's Chairman to no avail.
3. Consequently, the Claimant filed a Memorandum of Claim around 2 February 2011 seeking payment of the *terminal dues* (pay in lieu of notice, annual leave, overtime and house allowance).
4. The Respondent filed a Reply to Memorandum of Claim on 20 September 2011 and the Cause was heard on 11 February 2016, when the Claimant testified. The Respondent opted to close its case without calling any witness.
5. The Claimant filed his submissions on 11 March 2016 while the Respondent's submissions were not on file by 10 April 2016 as directed.
6. The Court has considered the pleadings, evidence and submissions and identifies the issue for determination as, *whether the Claimant is entitled to any of the heads of terminal dues as pleaded.*

Pay in lieu of notice

7. The Claimant voluntarily tendered a resignation which was accepted by the Respondent and he took leave as part of the notice period.
8. There is no legal requirement in this country that an innocent party in a voluntary resignation ought to pay the resigning party pay in lieu of notice.
9. The Claimant therefore cannot in the circumstances claim *pay in lieu of notice* from the Respondent (the Court presumes he was paid wages for the notice period as he did not lead any evidence otherwise).

Overtime

10. The Claimant's letter of appointment did not provide for daily or weekly working hours (contractual).
11. In testimony, he stated that he worked 7 days a week, 6.00am to 9.00pm, during public holidays.
12. However, the Claimant did not cite any Wages Order (the Employment Act, 2007 does not

expressly provide for payment of overtime) prescribing the minimum working hours in the industry the Respondent was carrying on business, and the Court is therefore unable to determine whether he is entitled to payment of overtime.

13. The Court is also cognisant of the fact that the Claimant was in management and by practice/custom in this country, those in management do not earn overtime pay but negotiate for an allowance such as responsibility or extraneous allowance to cater for the extra hours put in the job.

House allowance

14. The Claimant's appointment letter was clear that the remuneration was consolidated and therefore in terms of section 31(2)(a) of the Employment Act, 2007, the claim for house allowance is therefore contractually and legally untenable.

Annual leave

15. The Claimant's testimony that he only went on annual leave for the period 2004/2005 and 2005/2006 was not challenged or controverted by production of other leave application forms.

16. The Court would therefore have found for the Claimant for the balance of the untaken leave, save that in the view of the Court, claim for leave appear to be caught up by section 28(4) of the Employment Act, 2007 that outstanding leave be taken within 18 months.

Compensation

17. Compensation pursuant to section 49(1)(c) of the Employment Act, 2007 does not lie as the Claimant left of his free volition and was not dismissed unfairly.

Conclusion and Orders

18. The upshot of the foregoing is that the Court finds no merit in the Claimant's claims and orders that the Memorandum of Claim be dismissed with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 11th day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Maina instructed by Ikua, Mwangi & Co. Advocates

Court Assistant Nixon