



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1358 OF 2013

WILLY WANGECHA WAINAINA.....CLAIMANT

VERSUS

DH GRAY.....1ST RESPONDENT

ROSSLIN RIDING STABLES.....2ND RESPONDENT

JUDGEMENT

Issue in dispute – wrongful and failure to pay full retirement benefits.

1. In July, 1988 the 1st Respondent employed the Claimant at the 2nd Respondent business at a monthly pay of kshs.8, 800.00 until 19th March 2011 when the Claimant retired. The Respondents have since failed to pay retirement dues and benefits.

2. The Claimant is seeking;

(a) ½ basic pay x number of working years all being Kshs.99, 733.33;

(b) Overtime hour's 1988 to 2005 all at Kshs.648, 266.60;

(c) Overtime hours from 2005 to 2011 all at Kshs.114, 426.00; and

(d) Service Kshs.99, 733.00.

3. That of the above dues, the Claimant was paid kshs.26, 000.00 only.

4. The Claimant testified in support of his claims. That he was employed by the Respondent and was taking care of horses and became a teacher trained at the riding schools. The Claimant would be at work for 6 days a week from 7am to 7pm with a lunch rest and in total he would be working for 10 hours a day. He was paid kshs.8, 000.00 per month.

5. The Claimant also testified that each year he took 21 leave days but was never paid for overtime work hours. He went to the labour officer in 2005 and the Respondent reduced his work hours from 10 hours to 9 hours. In 2011, the Respondent brought in a new teacher who said he could not work with the Claimant as he was highly trained and demanded that the Claimant should retire. The Respondent computed his terminal dues upon retirement at kshs.24, 000.00 only as the Respondent had given him cash for school fees throughout his employment. The dues therefore paid were less than what the Claimant had received from the respondent.

6. The Claimant also testified that he is seeking his terminal dues with regard to overtime pay not part of his terminal dues upon retirement. That such dues set out under the claim should be paid.

7. On cross-examination, the Claimant testified that in 2005 he went to the labour officer with a complaint for working for 10 hours. This was reduced to 9 hours. He continued to work for 9 hours until retirement. There was an extra one (1) hour work overtime every day and the computation of the same at 26,000.00 is not correct. That the 1st Respondent gave him cash for school fees to be repaid through his terminal dues and all these payments were computed at kshs.265, 000.00. Every the Claimant got an advance for school fees, the Respondent kept a record.

Defence and counter-claim

8. In defence, the Respondent admit that they had employed the Claimant but deny owing him any retirement benefits. That the claim for service pay is unfounded pursuant to section 35(5) of the Employment Act. The claim for overtime is denied as upon the advice of the labour officer in December 2005, all accumulated overtime was paid at Kshs.26, 000.00 for the period of 1988 to 2005. The overtime claim from 2005 to 2011 is denied save that the overtime due relate to 504 hours based on the Regulation of Wages, the total overtime pay is kshs.29, 559.00, which sum the Respondent is willing to pay.

9. In counter-claim, the respondents' case is that upon employing the claimant, and in the course of such employment, the Respondent advanced the Claimant the sum of Kshs.265, 000.00 which he agreed to offset against terminal dues that would be paid at the termination of his employment. Such monies were advanced and acknowledged by the claimant. The Claimant never repaid these monies and hence judgement should be entered against him for the payment of the same.

10. In evidence, the Respondent witness was the 1st Claimant who testified that upon employing the Claimant in 1988, in 2005 he reported a case at the labour office and the issue of work hours was resolved and a payment for accumulated hours settled. The labour officer advised the Respondents to stop employees working for 10 hours and have 9 hours. He paid the Claimant Kshs.26, 000.00 to settle the dispute.

11. Subsequently the Claimant worked for 9 hours and the minimum wage was paid to him at kshs.8, 800.00 per month. This included his overtime pay hence the wage went up.

12. Mr Grey also testified that he made an offer to the Claimant to pay for the extra one (1) hour on goodwill as there was no overtime pay due. He computed the time to 504 hours all at Kshs.29, 000.00 which was based on advice from the labour officer. This was to cover overtime from 2005 to 2011.

13. Mr Grey also testified that while the Claimant was his employee, he got salary advances which he was to repay with his terminal dues. Such advances were acknowledged and he kept a record. The Claimant would requires school fees for his family members and take cash. For each salary ticket the Claimant got, he signed for the advances all amounting to kshs.265, 000.00. That he did the best for the Claimant as he had children in school and they had good work relations.

14. Upon the Claimant filing suit, the Respondents have counter-claimed for the payment of kshs.265, 000.00 advanced to the Claimant while in the employment of the respondent.

Submissions

15. Only the Respondent filed their written submissions.

16. The Respondents submit that the overtime pay for the period of 1988 to 2005 is paid and settled and the Claimant is estopped from claiming the same. There is acknowledgement of kshs.26, 000.00 in settlement of such dues. Such payment were effected through the advice of the labour officer. In any case where such dues were not settled in 2005, to claim the same at this time is time barred under the

provisions of section 90 of the Employment Act, 2007.

17. The Respondents are willing to pay a goodwill amount for one(1) hour overtime work for the period of 2005 to 2011 all being 504 hours and this multiplied with the wage and at 1.5 rate all being kshs.29,559.00.

18. On service pay, the claim for Kshs.99, 733.33 is not due. Section 35(5) of the Employment Act provides that service pay is due to an employee terminated under an employment contract. The Act does not fix the service pay and the Claimant did not have a contract of employment so as to make such a demand. Such service pay only accrued with the enactment of the Employment Act, 2007 and no such pay is due to the claimant. that on the event the court finds that service pay is due, such should be based on 26 days' work per month a wage of Kshs.8,800.00 for 15 days each year served since 2007 all being kshs.20,307.60.0

19. The Respondents also submit that the counter-claim has not been challenged in any material way and should be confirmed.

20. The Respondents have relied on the following cases – **Evans Katiezo Aligulah versus Eldomatt Wholesale and Supermarket Ltd [2016] eKLR; Kennedy Shilaho Shibeka versus Chairman, board of Governors, Sigalagala Technical Training Institute [2016] eKLR; Livingstone Mutsune 7 another versus African Tours & Hotels Limited (in receivership) & another [2014] eKLR.**

Determination

21. In 2005, a time before the Employment Act, 2007 came into force, the Labour Officer had power and authority to advise any employer and employee on employment dues under the applicable legislation. The Minister conferred powers upon labour Officers to act on behalf and arbitrate on employment and labour disputes.

22. The Claimant does not deny that he received a sum of kshs.26, 000.00 for overtime dues for the period of 1988 to 2005. Such dues were paid upon the arbitration of the labour officer. As such, to claim for dues within the settlement of the labour officer in 2005 at this stage and within the current proceedings would be to negate the powers and authority conferred upon such officers. Such would also offend the clear provisions of section 90 of the Employment Act, 2007. Where the Claimant was dissatisfied with the findings of the labour officer in 2005, the applicable law permitted the Claimant to lodge his claim in that respect. Such cannot be introduced at this stage upon the lapse of 6 years for claims under the Employment Act (now repealed by the enactment of the Employment Act, 2007) of be filed within the context of section 90 of the Employment Act, 2007.

23. I find no basis for the claim of overtime pay for the same period over which the Claimant has since acknowledged overtime pay covering 1988 to 2005. To require the Respondents to pay overtime over the same period will be double payment. Such is declined.

24. The claim for overtime pay for the period of 2005 to 2011 when the Claimant retired is also set out as due. Work hours are regulated under section 27 of the Employment Act. The Regulation of Wages Orders set the minimum work hours as 8 hours work per day and any overtime work is remunerated at a different rate of 1.5 based on daily basic wage.

25. Where overtime pay was settled from December 2005 backwards, the due overtime upon retirement is from January 2006 to March 2011. This covers a period of 63 months. of these months, the Claimant confirmed he worked for 6 days a week all being 26 days per months and each such day to work overtime for one (1), the Claimant had a total of 1560 hours. On a monthly wage of Kshs.8, 800.00 the daily wage rate base amounts to an hourly rate of kshs.37.00. For the total overtime hours of 1560 hours x 37 x 1.5 all being 85,800.00. This is the due overtime pay for the subject period, 2005 to 2011.

Service pay is due to an employee in terms of section 35(5) read together with (6) of the

Employment Act which provides;

(5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) A registered pension or provident fund scheme under the Retirement Benefits Act;

(b) A gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) The National Social Security Fund.

26. Service pay is therefore due to an employee whose social security is not addressed within the course of employment. Where the Claimant as employed by the Respondent before the coming into force of the Employment Act, 2007 and statutory deductions were not effected and remitted to the relevant statutory bodies, the transitional provisions should have been addressed for the Respondents to comply with the mandatory provisions of section 35 of the Employment Act. In any event, a written contract of service became a mandatory requirement under section 8, 9 and 10 of the Act and where such a contract was not issued and the Claimant remained in the employment of the Respondent until March 2011, the provisions of section 37 of the Act automatically applied. The Claimant became a protected employee and the provisions of section 35 of the Act covered him. As such, service pay is due for the duration of employment as this did not terminate and was continuous from 1988 to 2011. Such service pay is set to cushion an employee exposed to vulgarities of having no social security by a pension, medical cover or any service payments at the end of employment.

27. For the 20 full years of served, the Claimant is entitled to 15 days' pay for each year based on his gross wage of kshs.8,00.00 all being Kshs.88,000.00.

Counter-claim

28. On the respondents' counter-claim, I find no challenge that negate it. The Claimant admitted that during his employment he received various advances, school fees payments for his children and he acknowledged the same. The Respondent kept the records. The counter-claim of Kshs.265, 000.00 is hereby confirmed.

Judgement is hereby entered in the following terms;

(1) The Claimant is owed the following dues;

(a) Overtime due awarded at kshs.85,800.00;

(b) Service pay at kshs.88,000.00

(c) The above sums shall be paid less what is due in Counter-Claim

(2) The Respondent is owed by the Claimant in terms of the Counter-Claim for the sum of kshs.265,000.00;

(3) The Claimant shall pay the Respondents dues owing at Kshs.265,000.00 less what is owed in overtime and service pay all being kshs.91,200.00; and

(4) Each party shall bear own costs.

Delivered in open Court at Nairobi this 25th day of November 2016.

M. MBARU JUDGE

In the presence of:

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