



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

CAUSE NO. 117 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ERASMUS OMOITI EROTOCLAIMANT

-Versus-

THE BOARD OF MANAGEMENT KAPSOYA

SECONDARY SCHOOL ELDORET RESPONDENT

J U D G E M E N T

By a Statement of Claim dated 13th April, 2013 the Claimant seeks the following prayers against the Respondent -

a) 6 years service pay @ Kshs.10,116.15 being the prescribed minimum wage order the **Regulation of Wages (General) (Amendment) Order, 2013**

of a Night Watchman plus 15% house allowance of

Shs.1,517.40 making a total of Kshs.11,633.55 - Kshs. 69,801.30

b) 3 years unpaid leave not taken

@ Kshs.11,633.55 -Kshs. 34,900.65

c) 6 years weekly rest day pay Kshs.487.90 - Kshs.149,297.40

d) 6 years overtime pay @ 4 hours daily

@Kshs.89,55 per hours - Kshs.784,458.00

e) 6 years public holidays pay @Kshs.179.50

for 10 holidays annually -Kshs. 10,746.00

f) 6 years under payment of salary

@Kshs.4,933.55 - Kshs.355,215.60

Kshs.1,404,418.90

Less paid

Kshs. 40,000.00

Kshs.1,364,418.90

g) Costs and interests.

The Respondent filed a Reply to the claim in which it denies owing the Claimant the amount claimed.

At the hearing of the case the Claimant testified on his behalf while the Respondent called 2 witnesses RW1 PATRICK KOSGEI KIPKENDA the Principal of the school and RW2 RODGERS KIPKORIR NDIWA, the school bursar and supervisor of the Claimant. Parties thereafter filed and exchanged written submissions.

The facts of the case are not contested. The claimant was employed by the Respondent as a school watchman following his retirement from the Civil Service where he alleged to have been employed as a machine attendant in the Ministry of Works. At the time of employment by the Respondent he was on pension from the Government. The Claimant was registered as a member of both NSSF and NHIF. At the time of termination his salary was Shs.6,740.

The Claimant resigned from employment at the end of December 2014 having given notice of 3 months by his letter dated 1st October 2014. Upon resignation he was paid Shs.40,000 which according RW1 was a token of appreciation as the Claimant was already a pensioner.

Determination

The only issues for determination is therefore whether the Claimant is entitled to the prayers sought.

(a) Service Pay

Having been a member of NSSF the Claimant is not entitled to service pay according to section 35(6) of the Employment Act which provides that -

(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.

The Claim for service pay is therefore dismissed.

(b) 3 Years Unpaid Leave

In his testimony the Claimant confirmed that he took leave for 3 years. However the leave forms submitted by the Respondent show that the Claimant took off days as follows -

- 8th March to 12th March, 2009 (5 days)
- 23rd January to 29th January, 2014 (6 days)
- 22nd April, 2014 (One day)
- 9th July, 2014 to 14th July, 2014 (6 days)

- 23rd January, 2013 to 29th January, 2013 (6 days)
- 22nd April, 2013 to 27th April, 2013 (6 days)
- 9th July, 2013 to 14th July, 2013 (6 days)
- 8th December, 2013 to 6th January, 2014 (25 days)

There is no evidence of leave taken prior to 2013 with the exception of 8th March, 2009. Since it is the responsibility of the Respondent to produce such records, the court can only presume that the records do not exist because no leave was taken. Taking into account the last 3 years of the Claimant's Service, he should have taken 63 days leave but there is only evidence of 56 off days leave taken. The Claimant is entitled to the balance of 7 days which I award him at Shs. 3491.95 based on the daily rate of Shs. 498.85 provided for in the General Order.

(c) Weekly Rest Days

According to the duty rosters produced by the Claimant who was confirmed by the respondent's witnesses to have been the one preparing the same, one security guard worked during the day and 2 during the night. The duty roaster shows that they worked for 7 days a week and that there were only 3 guards at any one time. For this reason the Claimant is entitled to one rest day for each week worked but limited to only 3 years. Since there are 52 weeks in a year, for 3 years there were (52 x 3) 156 days off days not taken which I award the Claimant at Shs. 76,416.60

(d) Overtime

The Claimant alleges he worked overtime of 4 hours daily as he worked from 6 am to 6pm while on day duty and from 6pm to 6am while on night duty. The Respondent's witnesses however testified that the night shift was from 6pm to 6am while the day shift was from 8am to 5pm. I do not believe the Respondents on day shift hours first, because there is no record of the same and secondly, that it is not logical that the day and night security did not hand over to the next shift. Security is a 24 hour service and logically one shift hands over to the next shift before signing off duty. For these reasons, I find that the Claimant worked 2 hours overtime per day. I will however treat this as a continuous wrong and award him overtime for 12 months only at 2 hours per day at (313(days) x 2 x 498.85) excluding rest days. I therefore award the Claimant shs. 312,280.10 on account of overtime.

(e) Public Holidays

The Claimant prays for 6 years Public Holidays at Shs.10,746.00. The Respondent did not deny that he worked on Public Holidays and was not paid for the same. At 10 days annually as claimed but limited to 3 years, the Claimant is entitled to 30 days paid at double the hourly rate as provided under Rule 6 of the Regulation of Wages and Conditions of Service (General) Order. I award him Shs. 9,977.

(f) Underpayments

The Claimant prays for Underpayments of Shs.355,215.60 although the tabulation is at a flat rate assuming that the Claimant earned a salary of Shs.4,933.55 for all the years he worked. The wages earned by the Claimant over the years according to payslips produced by the Respondent together with their written submissions are as follows;

- December 2009	Shs.5,000-
- December 2010	Shs.5,180-
- December 2011	Shs.5,280
- December 2012	Shs.6,000
- December 2013	Shs.6,280

- December 2014 Shs.6,740

The Statutory Minimum Wages for the period is as follows -

- May 2009 (not available)
- May 2010 - 6974
- May 2011 - 7846
- May 2012 - 8873.80
- May 2013 - 10,116.15

The underpayments are therefore as follows -

-May 2010 - April 2011 (6974-5180x12) shs. 21528
- May 2011 - April 2012 (7846-5280x12) shs.30,792
- May 2012 - April 2013 (8873-6000x12)shs.34,476
- May 2013 - April 2014 (10,116.15-6280) shs.46,032
- May 2014 - December 2014) 10116.15-6740) shs.27,008
Total Kshs. 159,836.00

Conclusion

In summary therefore I enter Judgement for the Claimant against the Respondent as follows -

1. 3 Years unpaid leave Shs. 3,491.95
2. Weekly Rest days Shs. 76,416.60
3. Overtime Shs. 312,280.10
5. Public Holidays Shs. 9,977.00
6. Underpayments Shs. 159,836.00
Total Kshs. 562,001.65

The Respondent will also pay the Claimants costs and interest shall accrue on decretal sum from date of Judgement.

Before I conclude, I must comment on NSSF contributions for the Claimant. The employer is required to write a letter to NSSF confirming that the claimant has left its employment and that his contributions should be released to him. The letter should be accompanied with a tabulation of the contributions made for the Claimant. The Respondent is directed to do so if the same has not been done to enable the Claimant withdraw his benefits from NSSF. I must add also that the fact that the Claimant was a pensioner does not affect his benefits from any other employment as the Respondents sought to persuade court as that would be discrimination. Each employee is entitled to be treated equally irrespective of the fact that they are on pension from previous employment.

Dated, Signed and Delivered this 24th day of November, 2016

MAUREEN ONYANGO

JUDGE