

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 150 OF 2013

JOHN MUSERA LIBABUCLAIMANT

VERSUS

MISS KAUR PANESAR.....RESPONDENT

JUDGMENT

1. The Claimant's suit against the Respondent was for unfair termination and for this the Claimant sought various reliefs against the Respondent. The suit was partially compromised in relation to underpayment on house allowance and two days leave. The two issues that were not agreed on were overtime and reason for termination. The parties agreed to file written submissions and the matter was subsequently set before me as the Judge previously handling the case was transferred to Kericho Industrial Court (as it was then known).
2. The Claimant filed submissions on 19th August 2014 and submitted at length on the items he sought to recover. He sought Kshs. 109,804.85 on overtime and tabulated the underpayment using the rate applied as opposed to the rate permitted under the wage guidelines. He also submitted that there was housing allowance due Kshs. 39,900/-, pro rated annual leave 1,723/-, one month in lieu of notice Kshs. 13,800/- and that the Respondent did not have a valid reason for termination. He placed reliance on the case of **John Kakai v Daystar University Cause No. 977 of 2010**. He thus sought payment of the sums under the various heads in his claim.
3. The Respondent filed written submissions on 22nd October 2014 and in the said submissions submitted that the Claimant was never terminated but absconded from duty on his own volition without any provocation by the Respondent. She submitted that the Claimant was her personal driver under her direct supervision. On overtime it was submitted that the Claimant was paid each time he worked overtime as shown in the payment vouchers annexed to the Statement of Claim. On the compensation sought for unfair termination the Respondent submitted that the Court should be guided by the provisions of Section 49 of the Employment Act and the factors the Claimant's contribution to his own predicament. She placed reliance on the cases of **Lawrence Onyango Oduori v Kenya Commercial Bank Limited [2014] eKLR** and **Joseph Njoroge Kiama v Summer Ltd [2014] eKLR**.
4. The claim in regard to house allowance was settled by parties and is not for determination. The matters that remain for determination are overtime and reason for termination. It is clear that overtime was paid as indicated in the vouchers against which the Claimant signed. I would hold that in view of the acceptance of the sums on overtime not a cent would be recovered in addition.
5. The reasons for termination are not clear. The Claimant asserts he was terminated by a supervisor on 9th November 2012. The Respondent in her defence submits the Claimant did not report on 3rd, 4th and 5th July 2012. The Claimant did not prove that he was terminated. He did not name the

supervisor who allegedly sent him packing. I thus hold the termination of the Claimant's employment was procedural.

6. The underpayment is glaring and from the Regulations of Wages (General) (Amendment) Orders it is clear the Claimant was entitled to higher pay than that given by the Respondent. I would therefore find that he proved his claim for Kshs. 109,804.85/-.
7. On the counter claim, the Respondent carefully avoided bringing muster rolls to Court or attendance sheets to prove the alleged desertion of employment by the Claimant. It was her duty to establish the Claimant absconded to entitle her to recover for the lack of notice. The sum allegedly borrowed is not documented and the Respondent is thus not entitled to recover. The counterclaim is without merit and is dismissed with costs.
8. The Claimant is entitled to a Certificate of Service in terms of Section 50 of the Employment Act. He is to also have costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of February 2015

Nzioki wa Makau

JUDGE