



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 229 OF 2014

JACOB JOSEPH ONYANGO

CLAIMANT

v

JOHN NDUNGU MUREITHI

NDUMU HOUSE (ONE IN ONE LODGING)

RESPONDENT

JUDGMENT

1. Jacob Joseph Onyango (Claimant) sued John Ndungu Mureithi, Nduma House (One In One Lodging), (Respondent) on 25 June 2014, and he stated the issues in dispute as

1. Unfair termination
2. Underpayments
3. Annual leave
4. Gratuity
5. Public holidays
6. Overtime.

2. According to an affidavit of service sworn by one Bonface P. Owuoché and filed in Court on 24 July 2014, the Respondent was served with Notice of Summons and Memorandum of Claim on 1 July 2014.

3. The Respondent should therefore have filed a Response before 15 July 2014 but no Response was on record even by time of hearing.

4. On 24 July 2014 the Court directed that the Cause be mentioned on 24 September 2014 for directions.

5. On 24 September 2014, the Court fixed the Cause for hearing on 5 February 2015 and the Claimant was directed to serve a hearing notice.

6. On 5 February 2015, the Respondent did not appear in Court. An affidavit of service sworn by Bonface P.O. Owuoché and filed in Court on the same day attested to service of a hearing notice. However, the Cause could not be reached for hearing, and the Court directed that the hearing would proceed on 29 April 2015.

7. The Claimant filed an affidavit of service in Court on 23 April 2015 confirming service of a hearing notice and in the absence of the Respondent on the hearing date, and being satisfied with the service, the Court allowed the hearing to proceed.
8. The Claimant testified.
9. He stated that the Respondent employed him in 1995 as a night guard at a monthly wage of Kshs 2,000/- and that in April 1995, the wage was increased to Kshs 2,500/-. In October 1995, the Respondent again increased the wage to Kshs 4,500/- which he earned until dismissal on 16 May 2013.
10. According to the Claimant, he was underpaid by a total of Kshs 280,709/40.
11. He further stated that he used to work Monday through Monday from 6.30 pm to 8.00 am instead of 8 hours and without payment of overtime. He also stated he used to work during public holidays. For these, he stated he was seeking Kshs 1,133,674/10 and Kshs 723,340/95 as normal overtime and overtime on rest days and off duties respectively.
12. For overtime during public holidays, the Claimant claimed Kshs 275,989/30.
13. The Claimant also stated that the Respondent did not provide him with housing nor pay him house allowance.
14. On leave, the Claimant stated that when on leave he would personally pay the person who relieved him and he was seeking Kshs 76,883/50.
15. Regarding the dismissal, the Claimant stated that on the material day, the Respondent came in the morning to collect the previous night's revenues after which he told him his services were no longer required and that he should collect his dues at 10.00am.
16. The Claimant stated that the Respondent gave him only Kshs 200/- which he refused to accept, after which he reported a dispute to the Labour office.
17. The Labour officer wrote 2 letters to the Respondent but he tore them up when the Claimant delivered them to him.
18. The Claimant also sought compensation for unfair termination of employment.
19. The Respondent was served with Notice of Summons but did not file a Response. He was served twice with hearing notices but he failed to appear or arrange for representation.
20. The legal consequence of the failure to file a Response and appear at the hearing to challenge the Claimant's evidence is that the facts as set out in the Memorandum of Claim and the Claimant's testimony are not challenged or controverted. Therefore there are no real disputes as to the facts.
21. Considering the above and sections 9, 10, 41, 43, 45 and 74 of the Employment Act, 2007, the Court finds that the Claimant has proved his case and that the Respondent has failed to discharge the statutory burden placed on employers by the law.

Appropriate remedies

Pay in lieu of Notice

22. The Claimant sought Kshs 10,116/15 and the Court finds he is entitled to the same by dint of section 35 of the Employment Act, 2007 and Legal Notice No. 197 of 2013 prescribing minimum wages.

16 days worked in May 2013

23. The Claimant is entitled to the wages earned and he quantified the same as Kshs 5,058/75.

Gratuity

24. The Claimant sought Kshs 133,072/20 as gratuity. No evidential, contractual or statutory foundation for this head of claim was laid before Court. It is declined.

Underpayments

25. The Claimant cited the relevant Regulation of Wages Orders (Legal Notices) and the Court would find for him as claimed in the sum of Kshs 280,707/40.

Normal overtime/Sundays and public holidays

26. Under these heads, the Claimant sought Kshs 1,133,674/10, Kshs 723,340/95 and Kshs 275,989/30 respectively. The Court would find in his favour.

Annual leave

27. The Court finds for the Claimant in the sum of Kshs 76,883/50 as claimed.

Compensation

28. The Claimant sought the maximum compensation quantified as Kshs 139,602/60.

29. This remedy is discretionary. The factors to consider are outlined in section 49(4) of the Employment Act, 2007. The Claimant served the Respondent for about 18 years.

30. Considering the length of service, the Court would award him the maximum compensation assessed as Kshs 139,602/60 (based on the prescribed minimum wage in 2013).

Conclusion and Orders

31. The Court finds and holds that the termination of the Claimant's employment was unfair, the Respondent having failed to prove the reasons and that the reasons were valid and fair and awards him and orders the Respondent to pay him

a. 1 month notice pay	Kshs 10,116/15
b. 16 days worked May 2013	Kshs 5,058/75
c. Underpayments	Kshs 280,707/40
d. Normal overtime	Kshs 1,133,674/10
e. Sunday overtime	Kshs 723,340/95
f. Public holidays overtime	Kshs 275,989/30
g. Annual leave	Kshs 76,883/50
h. 12 months wages compensation	Kshs 139,602/60
TOTAL	Kshs 2,645,374/75

32. Claimant is awarded costs.

Delivered, dated and signed in Nakuru on this 10th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent did not appear

Court Assistant Nixon