



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1053 OF 2013

LABANA ARNOLD BULIMO..... CLAIMANT

VERSUS

MALINDI ROOSTERS LIMITED RESPONDENT

Mr Nyabena for Claimant

JUDGMENT

1. The Claimant was employed by the Respondent in September 2008 as a waiter at a monthly salary of Kshs 9,000. He worked continuously until the 15th November 2012 when he wrote a letter of resignation. He was paid Kshs 13,000 final dues but he declined since it was not the correct figure.

The claimant offered to serve one month notice as from 15th November 2012. The claimant seeks payment of;

- i. Service gratuity at the rate of 15 days for each completed year of service Kshs 6,000
- ii. Leave travelling allowance from 2009 to 2012 at Kshs 3,000 per year Kshs 12,000
- iii. Payment for public holidays worked for four (4) years amounting to 44 days in the sum of Kshs 29,333.30
- iv. Overtime for four (4) years amounting to 2,112 hours at Kshs 4,160 Kshs 87,859.20
- v. House allowance for December 2008 to December 2012 @ 15% of basic salary Kshs 66,000
- vi. Refund of the Uniform (2 pairs of trouser per year) Kshs 800 and two pairs of shoes Kshs 1,200 and;
- vii. Provision of certificate of service

2. The claimant states that he was never given leave, paid house allowance and never paid overtime for the period worked. He states that he worked during all public holidays and was not given extra payment in respect thereof.

3. The Claimant adds that he worked faithfully and diligently until when he resigned from employment and on 15th January 2011 he received a salary increment of Kshs 500. The letter commending him for hard effort, punctuality and dedication is attached as appendix '4'. The Claimant prays that the claim be allowed in its entirety.

Response

4. The Respondent filed a memorandum of reply dated 13th August, 2013 in which it denies offering the Claimant employment in September 2008. The Respondent however paid the Claimant monthly salary of

Kshs 10,000 net after deductions. Respondent therefore denies that the Claimant was entitled to house allowance.

5. The Respondent further denies that the Claimant was entitled to payment of overtime as claimed or at all. The Respondent added that any public holiday worked was paid for. The Respondent deposited Kshs 13,000 at the Labour office when the Claimant refused to take it. Furthermore, the Respondent has attached the General Wage order for the year 2012 where it is shown the minimum monthly wage for a waiter in Nairobi inclusive of house allowance to be Kshs 9,266.30.

6. It is conceded that the claimant was entitled to not less than twenty one working days of leave with full pay per year. The Respondent has attached leave forms in which it is shown the Claimant took all the leave days due to him.

7. All these forms are duly approved. The same forms show that the Claimant was entitled to weekly off days.

8. RW1 for the Respondent the Human Resource Manager of the Respondent testified that the claimant was only owed Kshs 13,000 upon his resignation. The money was deposited at the Labour Office. That the claimant was not entitled to service gratuity because he was duly registered with NSSF and NHIF and all the dues were remitted.

9. That all employees who worked during public holidays were given a day off. This is evident from the leave forms submitted by the Respondent. That witness testified that the Claimant reported at 10.30 am in the morning and started to work at 10:30. They were provided with breakfast, lunch and dinner. The workers broke at 3 p.m. and came back at 6 o'clock.

10. There were no excess hours worked and overtime was paid when employers worked on public holidays. There was no overtime payable during the normal working days. With regard to house allowance, this was not payable because the Kshs 10,000 paid was net after deducting NSSF and NHIF. The Claimant was on oral contract but the Respondent followed the applicable general order for the time.

8. In 2008, the Claimant earned Kshs 7,500 net and not Kshs 10,000 as alleged. The company has no provision for house allowance and so that claim is not payable.

Determination

9. The only issue for determination is whether the Claimant who voluntarily resigned from work is entitled to the terminal benefits set out in the statement of claim. From the averments in the pleadings and annexures thereto and considering the oral testimony under oath by the Claimant and RW1 the following facts have been proven on a balance of probabilities.

10. House Allowance

i. That the Claimant earned Kshs 7,500 when he was employed in 2008. At the time he resigned in 2012 he earned a net salary of Kshs 10,000. From the General Wage Order for the year 2012, the claimant was not underpaid at all and the net salary paid included house allowance. The Claimant has also not shown that he was under paid from the period 2008 to the year 2011. The burden of proof is on the Claimant and the same has not been discharged with respect to the Claim for payment of house allowance.

11. Service gratuity

It is not in dispute that the claimant was registered with NSSF and NHIF and the statutory dues were remitted on his behalf by the Respondent. In terms of Section 35 (5) as read with 35 (6) (d). The Claimant is not entitled to payment of Service gratuity as claimed since he was covered by NSSF.

12. Leave Travelling Allowance

It is clear that the Claimant was granted 21 days leave for every year served and in addition was given weekly off days to compensate for any overtime or public holidays worked. There is no contract of employment provided by the Claimant which entitled the Claimant to leave travelling allowance. This is not a minimum statutory term of service for waiters and the Claimant has therefore failed to prove that he was entitled to payment of leave travelling allowance in arrears.

13. Overtime and Payment for public holidays worked.

The court finds the evidence of RW1 credible and probably true that the Claimant did not work overtime during normal working days and was compensated with overtime pay and/or off days whenever he worked on public holidays. To this end the Claimant has also failed to prove that he is entitled to any arrear payment in respect of overtime for extra hours worked on normal days or during public holidays. The claim is also dismissed.

14. Refund for Uniform and pair of shoes

This claim of Kshs 2,000 is not contested and same is granted.

15. Certificate of Service

The Claimant was not granted a certificate of service upon resignation and therefore the prayer is granted.

16. In the final analysis, the court awards the Claimant;

- i. Kshs 13,000 not in dispute which amount was deposited with the County Labour Office.
- ii. Kshs 2,000 refund in respect of uniform
- iii. Certificate of service

17. The Respondent is to provide the Certificate within 30 days from date of this judgement and pay a sum of Kshs 15,000 to the claimant within the same period.

18. The Respondent is to pay costs of this suit due to the failure to provide a certificate of service to the Claimant upon his resignation. No interest is awarded on the decretal amount because the Respondent had deposited the amount with the Labour office prior to the filing of this suit.

Dated and delivered at Nairobi this 20th day of November, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE