



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 708 OF 2010

JAMES GAKUNJU.....CLAIMANT

VERSUS

DORIC INDUSTRIES LIMITEDRESPONDENT

JUDGMENT

By a Memorandum of Claim dated 17th June 2010 and filed in court on 21st June 2010 the Claimant seeks the following orders against the Respondent.

- a. A declaration that the Claimant's claim is valid;
- b. Payment of dues owing for overtime, Sundays and public holidays,

Kshs. 7,231,680/-;

- c. Accrued payment for 9 years in lieu of annual leave,

Kshs. 1,896,000/- ;

- d. A refund of the rent paid by the Claimant and that was to have been paid by the Respondent, Kshs. 843,696/-;
- e. Certificate of Service;

The Respondent filed a statement of defence on 12th August 2010 . On 28th July 2011 the Respondent filed a supplementary Memorandum of Response. Again on 10th September 2012 the Respondent filed an Amended Memorandum of Defence which states at paragraph 1 thereof that it supercedes the statement of defence and the supplementary Memorandum of Response.

In the Amended Memorandum of Defence the Respondent denies the claim and avers that the claim is bad in-law, inept, ambiguous and does not disclose proper particulars of the claim. The Respondent prays that the claim dismissed.

The case was heard on 8th October 2013. Mr. Olembo instructed by Nyiha, Mukoma & Company Advocates represented the Claimant while Mr. Nduru instructed by Muturi Njoroge & Company Advocates represented the Respondent.

Claimants case

The Claimant alleges that he started working for the Respondent in mid 2000 unofficially and on 4th April 2001 officially when he received the letter offering him employment from the Respondent's Managing Director Mr. Francis Ngige (RW1). He testified that rent and power bills were deducted from his salary which were not indicated on his pay slips. That the Respondent paid a cheque to the landlord and recovered from his salary. He testified that he worked overtime and never took annual leave. He testified that he resigned from employment because the Respondent did not comply with what had been agreed. He urged the court to grant his prayers.

Respondent's Case

Francis Jason Ngige (RW1) testified that he is the Managing Director of the Respondent Company. It was his testimony that the Claimant joined the company in January 2004. Prior to that date the Claimant used to run errands for the company at a fee. On the letter dated 4th April 2001 which the Claimant alleged was the letter of engagement RW1 stated that it was a declaration of his intention and not an appointment letter. He stated that the Claimant was employed as a Production Manager and not technical director as alleged by the Claimant.

On the Claimant's claim for rent RW 1 testified that the Respondent used to pay the Claimant's rent until 2006 when Kenya Revenue Authority (KRA) audited the company and found that they were paying rent for the Claimant and not deducting income tax on the house rent. The company was penalized by KRA for the unremitted tax. After that the company added house allowance to the Claimant's salary and stopped paying rent for his residence. RW1 denied that the Respondent owed the Claimant rent.

On the claim for overtime RW1 stated that there were overtime request forms as a policy. On work performed on public holidays and Sundays RW1 admitted that this was done when there was pressure of work but he could not recall which particular days the claimant worked. He stated that there is no time the Claimant asked for payment of cash for overtime worked.

On the claim for annual leave not taken RW1 stated that the Claimant requested for cash in lieu of leave.

RW1 stated that the Claimant took leave and never reported back to work for about 3 weeks before he sent his resignation letter to the company by courier.

Issues for determination

After close of hearing parties filed their respective written submissions. The Respondent also filed a list of authorities which cited the following:-

- a. Thomas de la Rue(K) Ltd. Vs. David Opondo;
- b. Hughes Vs. Metropolitan Railway Company;
- c. Amendment of Pleadings - S. Ouma
- d. Statutory interpretation (Hints) – R. Kuloba
- e. Failure to observe Court Rules(Hints) R.Kuloba;

I have considered the pleadings, the viva voce evidence, the written submissions and list of authorities. In my opinion the issues for determination are the following:-

1. Date of employment of the Claimant.
2. Whether Claimant is entitled to overtime, pay in lieu of annual leave and house rent.

1. When was the Claimant employed?

The Claimant alleges he was employed unofficially in mid 2001 and officially by letter dated 4th April 2001 which he produced as appendix 1 to the Memorandum of Claim.

The Respondent however avers that the Claimant was employed in January 2004. RW 1 stated that there was no letter of appointment, and that the letter produced by the Claimant was declaration of intention.

Both the Employment Act 2007 and its pre-decessor provided for employment contracts to be in writing. The Employment Act 2007 provides at Section 10 (7) that where an employer fails to produce prescribed written particulars of employment it shall be the employer's duty to prove or disprove an alleged term of contract. This position is fortified by Section 97 and 98 of the Evidence Act.

I find the Claimants authorities on this issue that is the case of **Thomas De la Rue (K) Ltd V David Opondo Omutelema [2013]eKLR**, and the readings quoted to be irrelevant while **Hughes V Metropolitan Railway Company** cannot be relied upon by the Respondent as what is in court is an opinion in a book commentary about the case. If a party wishes to rely on a case, it must supply a copy of the decision to the court, not a book commentary about the case.

For the foregoing reasons I find that the Respondent has not discharged its duty to disprove that the Claimant's employment with the Respondent commenced on 4th April 2001.

2. Overtime

RW1 did not deny that the Claimant worked overtime. He only stated that there was a policy on overtime which policy he stated was not in existence when the Claimant worked there. Overtime is one of the particulars whose records an employer is required to keep under Section 10 and 74 of the Employment Act.

The Respondent has not discharged the burden of disproving the allegations by the Claimant. The Claimant did not submit the policy document, the forms he alleges were used for overtime or even the records of overtime worked by other employees showing that the Claimant's name is not among them.

The Claimant on the other hand made claims for overtime as if he worked overtime every day for the whole of the period he worked for the Respondent. This is humanly not possible. He did not state what time he started working and what time he finished.

Section 90 of the Employment Act provides that in the case of a continuing injury or damage the Claimant must make his claim within twelve months next after the cessation thereof. I will assume that the claim for previous years is time barred except for the last 12 months of his employment.

By inference, the Claimant having claimed to have worked nine normal hours and 3 overtime hours worked for a total of 12 hours a day. The maximum working hours per week as provided under the Regulation of Wages (General) Order are 52 hours over a period of 6 days. The Claimant therefore worked 72 hours per week which means he worked an extra 20 hours every week. For 52 weeks he worked for (20 x 52) 3,744 overtime hours per year. At the rate of 1.5 times normal hourly rate this comes to 5616 hours.

The Claimant's last salary was Shs. 85,000.

As provided in the General Order, that would amount to 225 hours per month. This divided by his salary would give an hourly rate of Shs. 378.

For 5616 hours worked over a period of 12 months the Claimant is entitled (20 x 52 x 1.5 x 378) Shs.589,680/- .

I award the Claimant Shs. 589,680/- as overtime for 12 months.

This rate is inclusive of Saturdays as the hourly rate of 52 hours covers 6 days a week.

Assuming that the Claimant worked for 52 Sundays a year and 10 public holidays a year, this would

come to 62 days a year. RW1 did not deny that the Claimant worked on public holidays and Sundays. To quote his exact words, he stated “***This would happen when there was pressure on products. I can’t remember when we worked public holidays and Sundays.***” Without records, I will presume that the claim by the Claimant that he worked every Sunday and every public holiday not to have been disproved by the Respondent. For 62 days at 12 hours per day the Claimant worked 744 hours. At double rate pay per hour this would come to (744 x 378 x 2) Shs. 562,464.

I award the Claimant the sum of Shs. 562,464 for overtime on rest day and public holidays worked during the last 12 months of his employment.

The total overtime awarded to the Claimant is therefore Shs. 1,152,144.

b) Pay in lieu of annual leave.

The Claimant alleges he did to take annual leave for the entire period he worked for the Respondent from April 2001 to 14th January 2010. The Respondent’s position is that the Claimant was paid in lieu of annual leave.

According to the Respondent’s bundle of documents, the Claimant was paid leave pay as follows: -

March	2008	Shs. 52,500
April	2008	Shs. 52,500
February	2009	Shs. 50,630
May	2009	Shs. 85,000
November	2009	Shs. 85,000
December	2009	- Took leave of 28 days.

The Claimant was therefore paid in lieu of leave for 5 years and took leave in December 2009 covering a total period of 6 years, that is April 2001 to April 2007. The only period not accounted for is therefore from May 2007 to December 2009, a period of two years and 8 months or a total of 32 months.

At one month’s salary per year worked this would work out at Shs. 226,667.00.

I therefore award the Claimant Shs. 226,667 in lieu of annual leave for two years and 8 months.

c. House Allowance

The Claimant alleges that he was not paid house allowance and that the Respondent paid his salary and then recovered house allowance from him.

RW1 explained the company used to pay the Claimant’s house allowance until KRA penalized the Respondent following which the Claimant was paid a consolidated salary. This being the case it was in order for the Respondent to recover the rent it paid on behalf of the Claimant.

I therefore find that the Claimant has not proved that he is entitled to house allowance and dismiss the claim.

d. Costs

The Claimant shall be paid his costs with interest at court rates.

Orders accordingly.

Delivered and signed in open court on 19th May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Treser holding brief for Olembo for claimant

No appearance for Respondent