



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.93 OF 2010

PETER OENGA ONGAGA CLAIMANT

VERSUS

PAYLESS CAR HIRE & TOURS LIMITED RESPONDENT

JUDGEMENT

1. This matter commenced before the High Court as Civil Suit No. 527 of 2009 and on 4th February 2009 the file was transferred to the Industrial Court and registered as Industrial Cause No.93 of 2010 on 8th February 2010. While the file was at the High Court, there was ex-parte judgement that had been entered but the same was set aside and before the Industrial Court the parties were allowed to make amendments to their pleadings. On 29th October 2012 the claimant filed Further Amended Memorandum of Claim which outlined the claim to comprise

- a. *Non-payment of arrears of overtime*
- b. *Non-payment of meal allowances*
- c. *Non-payment of December 2008 salary*
- d. *Payment of service charge*

2. The respondent filed their defence on 4th May 2010 admitting the claimant was their former employee who absconded duty without notice in January 2009 by failing to turn up for work and seeking employment elsewhere and thus not entitled to his outlined claims. At the hearing, the claimant gave evidence in support of his claim and also called witnesses, Mr Onesmus Momanyi. The respondent in evidence called Mr Jai Radia the Managing Director of the respondent. At the close of the hearing, both parties filed their written submissions on 29th April 2014 and 13th May 2014 for the claimant and respondent respectively.

Claimant's case

3. In May 2005 the claimant was employed by the respondent as a Bus Driver at a monthly salary of Kshs.11, 723.00 together with house allowance of kshs.1, 958.00 but was never issued with a letter of appointment. Each month the claimant got a pay slip. The employment was done in Nairobi but the claimant was deployed to work in Arthi River at Daystar University (the University) which is in Machakos District with work that involved transporting members of Daystar University staff from the Arthi River Campus to Daystar University Nairobi Campus in Nairobi District. The claimant would do the transporting severally within the day as required. His day started at 5.00am and would end sometime at 9pm or 11pm depending on work allocated. Each time the claimant did a trip he was required to complete mileage sheets when he started his journey/trip showing the time and mileage reading and after end of journey would indicate end time for each trip. The mileage sheets were issued by the respondent

and were all used to calculate his overtime and the amount of work done. The University would stamp in confirmation on each mileage sheet and the respondent used these records as confirmation that the claimant was at work and to work out overtime claims. The mileage sheets were closely monitored by the University Transport Coordinator who always accompanied the claimant in all trips to ensure the bus upon clocking 4000 kilometres the university paid extra mileage charges. The university put these controls to ensure there was no cheating to avoid losses.

4. The claimant states that during his employment he was never paid all his overtime dues consistently and without the letter of appointment he was unable to know his terms well and only relied on his pay slip and what his co-workers told him from experience and circulars issued by the respondent from time to time. The claimant joined the Game Hunting & Safaris Union who had a Collective Bargaining Agreement (CBA) with the respondent but did not address the issue of overtime. The claimant established from various sources that he was entitled to overtime pay of Kshs.200.00 per hour and Kshs.250.00 meal allowance which were never paid or when paid, there was an underpayment.

5. The claim is for Kshs.1, 658,315.00 as unpaid overtime during his employment after his termination in December 2008. He also claims for ksh.503, 590.00 for unpaid meal allowances during his employment and the salary for December 2008 at Kshs.13, 681.00 remain unpaid. There is claim for service Charge for 3 years worked amounting to kshs.20,520.00 That the claimant was refused to join the Long Distance Truck Drivers & Allied Workers Union after the respondent resisted which resulted in many drivers losing their job, the claimant was apprehensive that he would lose his job and therefore looked for another job.

6. In support of his claim, the claimant gave evidence that he applied for a job with the respondent and was taken in May 2005 and agreed with the respondent that his salary was to be kshs.12, 000.00 per month but this was not the correct salary that was due to him. He was working at Daystar University Arthi River Campus as a Bus Driver with capacity to carry 62 passengers. His duties were to drive the university staff from Arthi River Campus to the Nairobi Campus along Valley Road and each day made 3 to 4 trips starting at 5am and close work depending on traffic conditions sometime at 9, 10 or 11pm. His salary remained at kshs.12, 000.00 as there was no discussion about other benefits, leave, overtime and other benefits that were due. However after working for 2 months some overtime was paid but on subsequent months there was no such pay despite working overtime. The respondent would issue notices and place them at the notice board at the University premises and from these notices the claimant realised that he was not being paid all his dues and he could not ascertain what was due as he had no letter of appointment. Benefits were therefore paid on *ad hoc* basis.

7. The claimant also gave evidence that for every trip that he did from Arthi River to Nairobi he was accompanied by the Transport Coordinator from the university and always used Mileage sheet to log on the time of start, kilometres covered and the coordinator would countersign in confirmation as any coverage beyond 4000 kilometres attracted extra payment to the respondent, a pay that was over and above the contract amount. All the mileage sheets were filed with the University and the respondent had copies. These mileage sheets were important to all the parties; the driver, the respondent and the university. The driver used the sheets to claim overtime, the respondent could only pay based on work done and claim extra pay for excess kilometres covered and the university required confirmation of work completed. On each mileage sheet;

- i. It noted the registration number of the motor vehicle
- ii. The date
- iii. Number of passengers from the university
- iv. Fuel consumption
- v. Mileage covered
- vi. Kilometres covered
- vii. Location from and to where
- viii. Time from start
- ix. Time from start to end
- x. The dates of work

8. All these details were set in columns and on each day the claimant would take these records noting the hours covered and the Coordinator would stand and leave a copy for the driver which the claimant took to the respondent as the employer who kept all originals.

9. In May the claimant got communication sent to all drivers, a memo stating that all mileage sheets were to be completed and signed before payments could be made. However these mileage claims were paid in some months and in others there were no payments. The claimant's salary remained at Kshs.12,000.00 without any mileage or overtime being paid. The claimant was not able to ascertain the criteria used by the respondent to calculate the overtime;

In July 2005 overtime was paid;

May 2005 no overtime was paid;

June 2005 overtime was partly paid;

In December 2005 the claimant received Kshs.39,678.00;

In September he was paid Kshs.36,091.00.

10. The claimant was surprised to receive the pay of Kshs.36,091.00 in September and forced him to go to the supervisor to report the *mistake* but was told that these were part of his dues. The next time he saw a higher pay on his pay slip, he did not ask questions. The claimant decided to ask the Union to help but they were not useful despite being a member and had union dues deducted from his salary. The claimant joined the Union in January 2007 after discovery that the respondent was making deduction to the union from his salary but never protested even though he had not given his consent. He also found out that there was a CBA between the respondent and the union. He was an ordinary driver under the CBA and his salary rate was noted in the various notices issued by the respondent with an indication that his overtime was Kshs.200.00 per extra hour worked and had been increased to Kshs.267.00 which he used to make his claim.

11. The Claimant together with other drivers decided to join another union of Kenya long Distance Drivers Union and applied to the respondent to make deductions to the new Union but the respondent refused resulting in Industrial Cause No. 400 of 20098. After this notification many drivers were terminated and the claimant decided to look for another job as he was suffering with his overtime not being paid.

12. The claimant is seeking pay as under the CBA that was applied for drivers and mechanics. He was also transferred out of Nairobi and was entitled to Kshs.250.00 as meal allowance per day. He was allocated work from Machakos to Nairobi and this entitled him to meal allowance per day. He was working long hours from morning to late night. At this time the road he was using was under reconstruction from Arthi River to Mlolongo and was forced to spend many hours on the road due to diversions and sometimes when it rained, there were huge traffic jams. He never got lunch allowance while undertaking his duties and thus seeks overtime at Kshs.1,658.315.00, lunch allowances at Kshs.503,590.00 and his December salary that was never paid. The claimant left as his grievances were not being addressed. He is also seeking service charge for the 3 years he worked with the respondent. He is also seeking costs and interest.

13. On cross-examination the claimant stated that he worked with many other drivers but was not aware that they had contracts of service as he was never issued with any contract. He drove a bus and made two trips per day back and forth from Arthi River at the University Campus to Nairobi Campus. His work was on the road and worked beyond 8 hours per day which stretched beyond the allocated time and since he had no contract that defined his terms of service, he did as was required.

14. The claimant also confirmed that he was unionised and there was a CBA that was applicable to him. From what was paid to him as overtime, he calculated all his overtime hours and is claiming the

difference based on Kshs.200.00. that the claimant was employed in Nairobi but deployed in Arthi River in Machakos and the applicable rates for transfer were not used on him but for drivers going to Mombasa and Kakamega. Lunch allowances were due if one did 200 kilometres away from place of work and since the claimant worked under the respondent contract with Daystar University. The claimant did not see the contract condition that he had to only cover 195 hours in a month and for the time he worked he got overtime in some months but most were not paid for. He was not aware of the contract terms between the respondent and the University and the number of hours that each driver was to run as against the hours the claimant was expected to driver to get overtime between him and the respondent. He however recorded all the mileage sheets for the respondent to their benefit and cannot use the sheets as the basis of his claim.

15. That the claimant was unionised and there were deductions. Meal allowances were not covered in the CBA. He stopped reporting to work when he realised that his dues were not going to be paid. He did not give notice before leaving his work. He did not report back in January 2009. His pay for December 2008 was never paid. He never slept out of his work place as he had a house allocated a house by the University to enable him be at work early and due to late hours when he finished his day late at night. His claim for service charge is made despite the respondent paying his NSSF and NHIF. He did not take leave but was paid instead.

16. The other witness for the claimant was Onesmus Momanyi who works with Daystar University as the Procurement Officer and previously the Transport Manager where he worked with the claimant and had the role of directing drivers to ensure mileage was entered properly and that each driver gave service as required. So he checked all mileage sheets. There was a contract between the respondent and the University for Provision of transport for students and staff. The claimant was supposed to do 4000 kilometres per month and anything extra was charged per kilometre and so these kilometre records were checked carefully to avoid the University paying more. The claimant's day started at Arthi River Campus to Nairobi Campus. He started his bus at 5.30am and would be at Nairobi before 10.40am when he was to return back to place of origin and again depart at 1pm, and due to traffic he would arrive late after 8pm. The claimant remained on standby in case of any emergency, he would be called to ferry staff or their children back and forth from Arthi River to Nairobi. He was never idle at any given time.

17. The witness also stated that he carefully checked the mileage sheets and where a driver took more than the allowed 4000 kilometres, he was taken as responsible and a disciplinary issue for him. He signed all the mileage sheets which were used to pay the respondent. In all the buses, there was a university employee as conductor to ensure that all journeys were authorised. It was not possible for the claimant to seat alone and do the mileage sheets. The university had to keep the records monitored to ensure that all drivers kept to 4000 kilometres and pay for any extra kilometres. The university had an audit team to look at all these records on a daily basis to ensure strict compliance. Each bus had a work ticket from the respondent and the university conducted checked on to with a record of all kilometres covered.

18. On cross-examination, the witness stated that he used to the University Administrative Assistant who hired various transported the respondent inclusive. There was a contract between the University and the respondent which he had access to but was not conversant about the contract between the claimant and the respondent or with any of the other drivers. In the university contract there were set conditions;

The university indicated which drivers they preferred;

The drivers had to reside at the university;

The drivers had to follow University regulations

The drivers were not allowed to take alcohol

19. The drivers had to keep mileage sheets to avoid going beyond 4000 kilometres a months. He was not aware how the respondent calculated overtime for their drivers. The hours were outlined in the time sheets but it was not possible to know how the respondent used to pay for these hours for their drivers.

Respondent's case

20. The respondent employed the claimant as a grade 2 driver on a salary of kshs.11, 723.00 and house allowance of Kshs.1, 958.00 per month and was issued with a letter of appointment. The claimant was not unionised and was engaged as a driver placed with Daystar University. He picked and dropped the staff of the university as designated following a contract between the respondent and the University. His salary was paid based on terms and conditions of work and all his dues were paid. When the claimant did not work overtime, no pay was due or paid. There is no meal allowance due as the claimant did not work outside his principal area. The claimant received all his salaries but declined to collect his pay for December 2008. He absconded duty and without notice left for another job.

21. In evidence, the respondent called Jai Radia as their witness, the Managing Director of the respondent since 1988 when the company was started. That the respondent is involved in car hire and transport where the claimant was an employee and was placed at Daystar University with whom they had a contract for the provision of transport. He picked staff from Arthi River Campus to Nairobi Campus and did trips within the day with fixed timelines. There was a mileage sheet with start time and finish time for each trip, number of trips was indicated and all the sheets were to be confirmed by the University employee who accompanied the driver at all times. The contract was that the respondent had to provide 4000 kilometres every month for each bus and if this exceeded, the extra miles were computed and paid for separately.

22. When the respondent got the contract with the University, the witness hired 9 drivers on the same terms and conditions based on the Employment Act. Overtime was agreed as payable based on work above 195 hours per month and from mileage sheets, the total less 195 where the extra was paid for at 1 ½ time the basic pay [1 ½ x basic pay]. This was the formula that applied to all drivers. Every month the claimant earned overtime, the same was paid and indicated on his pay slip. That the claimant absconded duty. The human resource manager tried to call him but the phone was off. The claimant left in December 2009 and never came back and failed to collect his December pay. The mileage sheets were for the benefit of the respondent and the University to help claim for any extra kilometres covered. None of the other 8 drivers made any claims apart from the claimant. The claim for meals was not part of the contract and even where this was due, the claimant was based at the University which provided all meals free of charge together with housing even though the respondent paid a house allowance. The University offer was just a benefit. The claim is therefore baseless as the rate of Kshs.200.00 is used for chauffer driven vehicles and not under the terms the claimant was employed under.

23. On cross-examination the witness stated that all contracts were handled by the human resource officer and even where there is no contract, the law applies. The claimant was not a casual employee and all his salaries were paid. That the claimant never asked for his contract for the 3 years he worked for the respondent. He absconded duty and has no valid claim. Over time was calculated based on the standard hours each driver had to do of 195 hours. That overtime paid was calculated by the accountant and not the witness. There was a CBA with the Game and Hunting Union where the claimant was a member.

Submissions

24. The claimant submitted that the claimant was never issued with an employment contract or letter of appointment to spell out his terms and thus relied on the terms under the CBA and the various memos that were issued by the respondent and the experiences from other drivers. The claim for overtime is based on what the claimant felt was supposed to be a rate of Kshs.57.00 per hour and from the mileage sheets all adds up to Kshs.1,658,513.00. The claimant was transferred from Nairobi to Machakos and should earn a meal allowance of Kshs.250.00. he claims for the December salary and service charge for each year worked.

25. The respondent on their part submitted that they had a contract for provision of transport to the University and the claimant was not privy to this contract as he had his own contract of employment that had his terms and conditions of work outlined. Any overtime due was paid per the applicable law and in some cases the claimant was overpaid. The claimant absconded work and is not entitled to the claims.

The issues and determination

Whether the claimant is entitled to the outlined claims

Whether there are any remedies

26. A contract of employment is the foundation upon which employment terms and conditions are outlined. This is a document that every employer should strive to provide to each employee. Even where the employer for one or other reasons fails to provide this document and the employee commences employment, the time to issue it should not exceed two months. Section 9 of the Employment Act;

9. (1) A contract of service?

(a) For a period or a number of working days which amount in the aggregate to the

Equivalent, of three months or more; or

(b) Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months; shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3) and section 10(1);

...

...

27. These provisions are given more strength by section 10(1) of the Employment Act;

10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment? [emphasis added]

28. The duty rests on an employer to issue this document and when there is conflict as to the provisions of it, the Court expects the employer as under section 74 of the Employment Act to produce this document;

74. (1) an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

29. The claimant repeatedly stated in his claim and in his evidence that he was never issued with a letter of appointment. The respondent on their part at paragraph 2 of the statement of defence state that the contract issued to the claimant was attached as “PCH1” but on looking at annexure cited, this turn out to be a contract between the respondent and the University and not the claimant’s contract of employment. The end of this is that there is no contract of employment that was provided neither to the claimant nor to the court. In these circumstances the court is bound by the word of the claimant and the applicable law in assessing the claims before court.

30. Hours of work are stated or outlined in the contract of service. This is a mandatory provision that should be stated in the contract of service. Section 10 gives an outline;

(2) A written contract of service shall state?

(a) The name, age, permanent address and sex of the employee;

(b) The name of the employer;

(c) The job description of the employment;

(d) The date of commencement of the employment;

(e) The form and duration of the contract;

(f) The place of work;

(g) The hours of work;

(h) The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(i) The intervals at which remuneration is paid; and

(j) The date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

(k) Any other prescribed matter.

(b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;

(C) ...;

(d) either the place of work or, where the employee is required or permitted to work at various places, an indication of that place of work and of the address of the employer;

(e) Any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the person by whom they were made, and;

31. In principle, section 10 is a draft employment contract which every employer should borrow from every time they have a new employee. It gives a comprehensive outline of what should form the essential components of an employment contract. The job description; commencement dates and duration, place of work and hours of work, remuneration and the due benefits and any other terms and conditions of work that an employer finds necessary to outline. Further to this section 10 provides that an employer should state that where either party wishes to terminate the contract, the notice period should be indicated and more importantly where the employer is supposed to work from or report to work and where there is a union with an existing CBA, the applicable CBA must be stated. These are reasonable and principally important details that every employer should also provide to court where there is a dispute as an employer should have a record of all their employees.

32. Failure to submit any records with regards to the employment of the claimant and leaving the claimant to grope into the darkness with his claim while they bear this responsibility is most absurd. The lack of these documents has made it a most tedious process for the Court going through all the copies of work sheets, pay slips and other documents submitted. Since there is no other record submitted by the

respondent, the court will take the record of the claimant as the only evidence. I take that the respondent failed to submit any records since they had notice of the claim and the records in their possession was against their case.

33. The claimant is seeking overtime earned from May 2005 to December 2008. The basis of this is that he worked for long hours starting from 5 and 5.30am and would only close as late as 11pm in the night. He filed mileage/work sheets indicating the time he clocked each day and this was confirmed by an employee of the University. These mileage sheets were eventually used by the respondent to claim for extra hours done in excess of 4000 as agreed in the contract. In defence the respondent stated that the claimant had a contract, which provided that the claimant had to do 195 hours in a month and any extra hours had to be paid overtime at the rate of 1 ½ based on the basic pay of kshs.11,723.00.

34. There is no contract to help assess the terms that applied to the claimant. Equally the CBA attached to the claim and which the claimant heavily relied upon though signed, the dates of registration are not indicated. The CBA is stated at paragraph 32 to apply from 1st November 2004 for two years meaning, effectively until 30 October 2006. It was the evidence of the claimant that he joined the Union in January 2007 a time after which the CBA refers to had lapsed and there is no indication of what happened upon the lapse. This is coupled with evidence that his Union had problems resulting into a Court Case Cause No.400 of 2010.

35. The above notwithstanding, largely due to the inaction of the respondent, it is now settled that reasonable working hours are eight (8) and any time worked beyond these basic hours should be compensated.

36. There are numerous mileage sheets submitted by the claimant, initially these were submitted as copies and the court had to suspend the reading of the judgement to have the original mileage sheets provided. The reason being that the mileage sheets only indicate a number without the enumeration as to the time. These are worksheets done by the claimant with the approval of an officer from Daystar University. The respondent only got to see a copy of these mileage sheets at the end of the month to calculate the dues and to claim any over-hours done from the agreed rate with the contracting entity Daystar University. These time lines are recorded as 5.30, 8.30, 4.00, and 8.30 without an indication as to whether this was in the morning of evening, night or day apart from the records with regard to a few time sheets. therefore became impossible to the Court, even with the best application of fairness to allocate the overtime hours that are due to the claimant due to lack of clarity as to how many hours he went overtime based on his own evidence or the documents now left to the court to analyse. This is a task the Court made with the best effort and lacking in evidence, to allocate them as claimed will be an unjust and unreasonable engagement noting that even on the original records do not state the hours properly.

37. A good example is the mileage sheet for 5th May 2005;

Claimant start kilometres were 19459;

He covered 19502 kilometres and addition of 43;

He travelled from Daystar to valley road;

Time out at 5.00; and

Time in at 7.30

38. On the same day the claimant left valley road at 7.40 and to daystar at 8.20

Later at 11.45 and back 12.40

Back at 2.00 and in at 2.00 [record overwritten]

Later out at 4.00 and in at 5.15

Back at 5.30 and in at 7.05

Out at 11.45 and in at 12.48

Out at 7.00 in at 2.00

39. At this point it is virtually impossible to tell whether the claimant was out in the morning or late into the night spilling over to the 6th of May 2005 or still within the time sheet and mileage for the 5th of May 2005. This record further goes on to indicate;

Out at 4.00 in at 5.15

Out at 5.20 in at 8.00

Out at 8.00 in at 9.15

Out at 5.20 in at 7.00

40. This process goes on and the last item for the day is time out at 7.20 and in at 8.10. These details do not speak to the evidence at all. This cannot be the same person, with the same motor vehicle on the same route making so many trips in one day on an area that require over an hour to traverse and back in an hour making it a journey of 2 hours back and forth. Unless this route is mapped clearly by the witness and the driver who took these trips the court is left guessing as to how many hours were actually covered by the claimant on any particular day. This was his duty to articulate as the court will not serve as his advocate in this regard. I believe this was the purposes for which the claimant called Mr Momanyi from Daystar University to confirm as at all time in the bus he drove there was an officer from the university to confirm the hours covered and would counter-sign on the register. I do not find this analysis from the claimant, his witness in support or in his submissions. Even with regard to the Court looking at the original records, the impact is the same. The analysis is lacking.

42. I however find the mileage sheet for 16th May 2005 the claimant worked from 1.00pm until 7.00pm a time of 7 hours; based on the minimum time allowed at 8 hours the claimant worked on several occasions overtime as below;

On 17th May 2005 5.50am to 7.00pm a period of 12 hours with 4 hours more;

On 18th May 2005 5.00am to 7.00pm a period of 12 hours – 4 hours more;

On 10th February 2006 7.15am to 8.00pm a period of 13 hours – 5 hours more;

11th February 2006 7.30am to 6.00pm a period of 9 hours – 1 hour more;

9th June 2007 9.00am to 7.00pm a period of 11 hours – 3 hours more;

10th June 2007 8.00am to 6.00pm a period of 9 hours – 1 hour more;

26th September 2007 5.00am to 9.00pm a period of 17 hours – 9 hours more;

10th October 2007 5.00am to 11.00pm a period of 19 hours – 11 hours more;

23rd July 2008 5.00am to 8.30pm a period of 16 hours – 8 hours more;

24th July 2008 5.00am to 9.00pm a period of 17 hours – 9 hours more;
28th July 2008 5.00am to 9.00pm a period of 17 hours – 9 hours more;
19th August 2008 5.00am to 9.00pm a period of 17 hours – 9 hours more;
1st October 2008 9.00am to 11.30pm a period of 15 hours – 7 hours more;
2nd October 2008 5.00am to 9.00pm a period of 17 hours – 9 hours more;
3rd October 2008 5.00am to 8.00pm a period of 16 hours – 8 hours more;
4th October 2008 7.00am to 10.30pm a period of 16 hours – 8 hours more;
5th October 2008 6.00am to 10.30pm a period of 15 hours – 7 hours more;
8th October 2008 5.00am to 7.20pm a period of 15 hours – 7 hours more;
14th October 2008 5.00am to 9.10pm a period of 17 hours – 9 hours more;
15th October 2008 5.00am to 9.00pm a period of 17 hours- 9 hours more;
16th October 2008 12.10pm to 8.00pm a period of 8 hours;
17th October 2008 5.00am to 9.10pm a period of 17 hours – 9 hours more; and
18th October 2008 9.00am to 7.30pm a period of 12 hours – 4 hours more.

43. These are the only records that the court could confirm from the entire records. These are 148 hours overtime. The claimant gave evidence that he received payments for some overtime hours on an ad hoc basis. However these payments were until September 2005. The respondent witness confirmed that indeed whenever the claimant worked overtime he was paid for these hours at a rate of 1 ½ hours rate. There is no record to indicate what overtime was paid and what was not paid. This as outlined above is a bad labour practice. This works to the advantage of the claimant who will be awarded overtime worked all being 148 hours and based on his basic wage at Kshs.11,723.00 at the rate of 1 ½ hourly rate this amounts to kshs.10,845.00. This will be awarded.

44. There is claim for meal allowances. The claimant's evidence is that he was employed as a driver, was based at Arthi River in Machakos where he commenced his journey and ended it. The claimant cannot therefore say that he was removed from his place of work and located elsewhere for purposes of being allocated a lunch allowance as claimed. His work station did not change from the time of employment until his last day of work. Despite the contract of employment not having been issued to spell out his terms and conditions of work, the work requirement under section 33 and 91(1) (f) (ii) is that the provision for food or an allowance instead must be a condition spelt out in the contract of employment giving details and the time such meals and or food is to be taken to avoid disruption of work. There was no such evidence of a verbal or implied agreement on the provision for food. This will be declined.

45. The claim for December 2008 pay was made on the basis that the claimant was never paid for this month. He however gave evidence and stated at paragraph 24 of the Memorandum of Claim that in January 2009 he became apprehensive that he would lose his job and as a family man with responsibilities, he looked for another job. The respondent witness also gave evidence in this regard and stated that the claimant absconded duty and were forced to hire casual drivers to take over his duties until they established that the claimant would not report back. He did not give notice. The claimant can therefore not claim in equity where he fails to meet the same. Where notice was due before termination,

this was for the benefit of both parties even in a case where there was no written contract. Notice pay will therefore not be awarded.

46. Service charge [pay] was claimed on the basis that the claimant worked for the respondent for 3 years and was entitled to the same. Section 35 of the Employment Act only allow the payment if service pay where an employer has failed to remit statutory dues to NSSF and NHIF. The claimant admitted that these dues were paid in his case by the respondent to these bodies. The claim is therefore declined.

47. Costs are claimed with interest. Due to the non-issuance of the contract of employment that would have allowed the claimant to appreciate and understand his terms of employment, the respondent will meet the costs of the suit.

Conclusion

In conclusion judgement is hereby entered for the claimant against the respondent in the following terms;

- a. **Overtime pay is awarded at kshs. 10,845.00.**
- b. **Costs of the suit.**

These are the orders of the Court.

Read in open court at Nairobi this 16th days of July 2014.

M. MBARU

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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