



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO.1118 OF 2010 Consolidated with 113 of 2010

JULIUS GICHERU GACHAHI
..... 1ST CLAIMANT

GEORGE THIONGO NDIRANGU.....
..... 2ND CLAIMANT

-VERSUS-

THE BOARD OF GOVERNORS MARAGI SECONDARY SCHOOL
.....RESPONDENT

JUDGEMENT

By Memorandum of Claims dated 21st September 2010 and filed in Court on 24th September 2010 the Claimants **JULIUS GICHERU GACHAHI** and **GEORGE THIONGO NDIRANGU** claim overtime against the Respondent the **BOARD OF GOVERNORS, MARAGI SECONDARY SCHOOL**. Both of them claim overtime as follows:-

1. Julius Gicheru Gachahi

4380 daysx2 hoursx1.5x5,500x1/225=321,200.

2. George Thiongo Ndirangu

(i) Overtime during working days

4,144 daysx1.5 hoursx6,220x1.5x1/225=257,757

(ii) Overtime during off days

672 daysx4 hoursx1.5x1/225x6,220=111,462

TOTAL:- Kshs.369,219

The Respondent filed defence to each of the 2 claims on 14th October 2010 in which it denies owing either of the 2 Claimants any overtime and prays for their claims to be dismissed with costs.

The 2 cases were first mentioned separately in Court on 19th January 2011 and both were fixed for hearing on 24th May 2011. On 23rd May 2012, the 2 disputes were consolidated. The cases were eventually heard on 28th January 2013 after several adjournments. Mr. Karanja holding brief for Mr. Kirubi appeared for the Claimant's while Mr. Gichachi appeared for the Respondent.

CW1 MR. JULIUS GICHERU GACHACHI testified that he was employed by the Respondent in February 1997 as a night Watchman until 31st December 2009. He worked for 12 years and was paid monthly. He was paid basic salary and house allowance through a bank account. He was issued an appointment letter stating that he would work for 10 hours. He worked daily but was given 1 rest day every week. He reported to work at 5.00 p.m. and left at 7.00 a.m. thus working for 12 hours every day. He was never paid overtime. He prayed to the Court to order the Respondent to pay him for overtime worked.

In cross examination he stated there were 2 Watchmen and they worked together. He denied that they worked alternately with the other Watchman by the name Ben Maina. He stated they only worked separately when one of them was off duty. He stated the tabulation at Exhibit JGGB was done by Labour Officer. He denied that either his advocate or the Labour Officer were the ones who told him what to claim. He stated that he took annual leave of 21 days every year. He denied that he was ever paid for overtime at all. When referred to Respondent's annexure 2 which is pay sheets per month from November 2008 to April 2010, he denied that he ever signed the record. He stated that when he left employment he was paid Shs.33,480 which was his retirement benefits. He stated that he asked for payment of overtime and the school refused to pay.

CW2 GEORGE THIONGO NDIBARU testified that he was employed by the Respondent from 17th February 1995 up-to 2010, a total of 14 years. He testified that he performed all sorts of jobs as messenger, in stores and cleaning toilets. His letter of appointment stated he was a messenger and his hours of work was 8 hours per day from 7.00 a.m. to 5.00 p.m. He worked extra hours reporting to work at 6.00 a.m. and leaving at 6.30 p.m. He worked from Monday to Saturday. He took 21 days leave. He worked longer because there was a lot of work. He was paid monthly but was never paid overtime. He left employment on retirement and was paid Shs.43,540 as retirement benefits. He is claiming overtime as calculated by the Labour Officer.

Under cross examination he stated that his working hours were 49.5 hours per week. He was cleaning from 5.00 p.m. to 6.30 p.m. He took 21 days annual leave and was off duty 4 days a month. He was paid whenever he worked on public holidays and did not work every day during school holidays. He admitted signing the pay sheets. He signed for his final payment.

The Respondent called 2 Witnesses, **RW1 CATHERINE MUTHONI SAMUEL**, the school Principal and **RW2 JULIUS GICHIA MUGO**, the school bursar.

RW1 testified that she is the school principal and Secretary to the Board by virtue of her position. She knew JULIUS GICHERU GACHACHI who was employed by the school as a Watchman. He retired on 27th January 2010. She testified that the school had 2 Watchmen who worked on alternative days. The watchmen worked from 5.00 p.m. and handed over to the office messenger the following morning at 7.30 a.m. There was no watchman during the day. In a week of 7 days the Watchmen worked 4 days.

On Saturday there was a Watchman during the day. The Watchmen worked 52 hours a week instead of the official 60 hours. Julius was paid monthly and signed the pay sheet. He was paid overtime in November 2008, January, April, May, June, September, October and December, January, February, March and April 2010. He retired upon attaining retirement age of 55 years and was paid gratuity of Kshs.33,480/= He was given 2 weeks to confirm if the payment was correct and accepted payment after confirmation that he had no other claim. He did not claim overtime. To her knowledge there was no overtime payable to Gicheru. After Gicheru left she received a letter from his advocate dated 5th July 2010. She invited the Claimant to go and explain how his claim arose. He did not go to verify and instead RW1 received another letter from the Advocate asking the Respondent to respond to the claim.

The next thing she saw was the summons. She was never summoned to go to the Labour Office and did not receive any calculation from the Labour Officer. On Gicheru's claim for overtime for 12 years, RW1 stated that Gicheru did not work every day. The claim included off days when he did not work and for public holidays when he was paid overtime.

RW1 testified that she knew the 2nd Claimant who worked for the respondent as an office messenger for 14 years. He was paid Shs.43,540 on 27th May 2010 which was his final payment. He signed for the payment and the school organized a party for the 2 Claimants. The 2nd Claimant was not forced to sign. He worked from 7 a.m. to 5 p.m. and 4 hours on Saturday. He was supposed to work for 49.5 hours per week but only worked 44 hours. He was paid whenever he worked overtime. He worked during school holidays except when he was on leave. The school did not need the 2nd Claimant for extra work as his duties were very specific. She testified that the school does not owe the 2nd Claimant anything.

In cross examination RW1 stated the 1st Claimant was paid whenever he worked overtime without him having to request for the payment. She stated that there was a difference between the amount paid for overtime differed depending on hours worked and overtime was more whenever the 1st Claimant covered up for the other watchman. The Watchmen worked during the night.

She stated the 2nd Claimant was a messenger and used to clean school at 6.30 a.m. as there are teachers who reported for work at 6.45 a.m. when the offices are clean.

In re-examination she stated that 2nd Claimant was supposed to report at 7.00 a.m. and if he arrived earlier he was not paid overtime.

RW1 JULIUS GICHIA MUGO testified that he was the school bursar and also supervised non-teaching staff and was in charge of their payments. He stated that both Claimants retired in May 2010. He testified that both Claimants were paid whenever they worked overtime. It was the policy of the school that overtime is paid together with the same month's salary at the rate of 1 day's salary per day. The hourly rate is daily rate divided by the number of hours per day. He testified that he was not aware of any money outstanding in favour of the Claimants.

In cross examination he testified that he was employed in 2008 and got information from the schedule of work. He recorded any overtime from the register in the office where the workers reported and calculated the overtime. In re-examination he stated that employees signed before they received their salary.

I have considered the pleadings, the testimony of all the witnesses, the submissions filed by Counsels for both parties and the law. The only issue in dispute is whether the Claimants are owed any money for working overtime and if so, how much.

The Regulation of Wages (General) Order provides for payment of overtime at Rule No.6 as follows:

1. Overtime shall be payable at the following rates:-

- a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;**
- b) for time worked on the employee's normal rest day or public holiday at twice the normal hourly rate.**

2. For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and-twenty-fifth of the employee's basic minimum monthly wage.

3. Notwithstanding subparagraphs (1) and (2) of this paragraph and paragraph 5,

overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks:-

- a) one hundred and forty-four hours for employees engaged in night work;***
- b) one hundred and sixteen hours for all other adult employees.***

Both claimants have claimed overtime for all years worked at a constant rate as follows:-

1st Claimant (Julius Gicheru Gachahi) 2 hours each day.

2nd Claimant (George Thiongo Ndirangu) 1.5 hours during working days and 4 hours on off days.

Both Claimants admitted taking 1 day off per week and 21 days annual leave. These admissions clearly show that their claims were not accurate as they have claimed for all days of the year. No attempt was made to recalculate the amount claimed to omit the off days and leave days.

The Respondent denied that either of the Claimants is owed overtime. RW1 and RW2 stated any overtime work done was paid for together with salary for the same month. The Respondent produced the pay sheet showing that Gicheru the 1st Claimant was paid overtime at varying rates for all the months worked between November 2008 and April 2010 while Thiongo the 2nd Claimant was paid overtime in November 2008, January, 2009, February and March 2010. Both Claimants denied ever receiving payment of overtime. 1st Claimant denied signing the pay sheet while the 2nd Claimant confirmed that he signed the pay sheet every month.

Both Claimants admitted that they do not know how the overtime rate was calculated as the calculations were done by the Labour Officer. Both claimants also admitted that they did not make any claim for overtime before the demand letters sent by their advocate in July 2010 and that they accepted and signed for payment of gratuity as final payment to them.

I find the evidence of the claimants short of proving that they are owed the amounts claimed or any other sum.

Both claimants admitted taking 1 day off every week and 21 days annual leave. Both claimants also admitted that they were paid overtime for work done on public holidays. They however denied in their testimonies that they were paid overtime. No mention was made about the signed pay sheets which clearly show that the 1st claimant was paid overtime every month from November 2008 to April 2010 while the 2nd Claimant was paid overtime together with his salary for some of the months.

The record clearly shows that the claimants received overtime with salary. The rate may have been lower than the statutory rate of 1.5 times per hour. However, both claims are glaringly inaccurate as the claims are for all the days of the years they worked, including the days when they were paid overtime, the days when they were off duty and the days when they were on annual leave. It is not the duty of the court to calculate claims for claimants. A claimant must clearly demonstrate how he has calculated any amount claimed in the Memorandum of claim. The claimants have not demonstrated how they arrived at the amounts claimed or that they are entitled to the same or any other sum. On the contrary they have admitted that the calculations were incorrect for failing to take into account days when they did not work and days when they were paid overtime.

For these reasons I find that the Claimants have not proved their respective claims against the Respondent and dismiss the claims.

There shall be no orders for costs.

Orders accordingly.

Read in open Court and Signed on this 24th day of June 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

MUEKE H/B FOR GICHACHI FOR Claimants

NO APPEARANCE FOR Respondent