

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 126 OF 2013

(Formerly Nairobi Cause No. 2096 of 2012)

EVANSON ONDIEKI.....CLAIMANT

-VERSUS-

**BOARD OF GOVERNORS LAMURDIAC SECONDARY
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26th July, 2013)

JUDGMENT

The claimant **Evanson Ondieki** filed the memorandum of claim on 16.10.2012 through Ogeto and Ogeto Advocates. The claimant prayed for Kshs.141,890.60 being underpayments from 1.5.2001 to end of February 2009; overtime between January 1998 to 31st December 2005 being Kshs.193,585.90; off duty and rest days from January 1998 to 31st May 2012 being Kshs.319,628.35; and public holidays between January 1998 to 30th April, 2010 making a sum of **Kshs.708,946.20**.

The respondent filed the statement of response on 01.03.2013 through Rodi Orege and Company Advocate and prayed for dismissal of the claim with costs. The respondent counterclaimed for **Kshs.118,466.00** being overpayment of wages in view of the applicable statutory minimum wages. The case was heard on 3.7.2013. The claimant gave evidence to support his case. The respondent's witnesses were the Principal (RW1) Charles N. Gichohi, respondent's cook (RW2) Joseph Njuguna Kimani, and respondent's chairperson Josephat Githunga Kibithe.

The respondent employed the claimant as a guard from 1.11.1997 and after seven years of service redeployed him to serve at the farm for six years and finally as a grounds man for one year. The claimant served for 14 years. The only issue for determination is whether the parties are entitled to the remedies as prayed for. The court makes the following findings:

1. On overtime, the claimant testified that he worked from 6.00 pm to 6.00 am making twelve hours. He stated that he was to work for 10 hours and he was not paid the overtime served. RW2 testified that as guards they served alternately on night and day shifts and during the day they worked from 8.00 am to 5.00 pm. It was submitted that the respondent could not produce the relevant records because the fire of 2004 destroyed the records. The respondent paid the agreed monthly pay and which the court finds was above the prescribed minimum statutory wage. The demand letters did not include the claim for overtime and the respondent has submitted that the claim was an afterthought. The court finds that the claimant is not entitled as prayed because the minimum statutory wage was paid and the demand having not been made before filing the suit the claim was a mere after thought, unjustified and shall fail.
2. On underpayments, the respondent has submitted that the claimant served in a rural area categorized as **"all other areas"** under the wage Orders and the claimant's claim was based on the erroneous category of Nairobi Area and Mombasa Municipality. The court has perused the material on record and finds that the submission was valid and the claimant's claim for

underpayment shall fail. On the other hand, the respondent has computed the overpayment in view of the applicable minimum wages. The court considers that the respondent paid the agreed wages and there was nothing illegal in paying the claimant above the minimum wage and the counterclaim shall fail.

3. For rest days, off duties and public holidays the claimant testified that he was not accorded rest but that he worked and he was not paid for the work done on such days. RW1 stated the guards had a rotation for rest days and when the guards worked on such days they were paid or given off days. The claimant was in school even on public holidays because the school was also his home. The court has considered the evidence and finds that there is no ground to doubt RW1's evidence and the claimant's claim shall fail.
4. On annual leave and rest, generally RW1 stated that the claimant was entitled to rest during school vacations and sometimes the claimant refused to go on leave as he resided in the school premises. There is no evidence that the claimant requested to go on leave and he was denied the chance or that he was compelled by the respondent not to take the annual leave. In circumstances where by the school premises were also the respondent's home, it is improbable that the claimant was denied rest during school vacation and the claim shall fail.

In conclusion, both the claim and the counterclaim are dismissed with orders that each party shall bear own costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 26th July, 2013**.

BYRAM ONGAYA

JUDGE