



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**  
**CAUSE NO. 30 OF 2013**  
**(Nairobi Cause No. 2345 of 2012)**

ALBERT OUMA AKEYO.....CLAIMANT

*Versus*

MAGUNA ANDU SELF SELECTION

STORES LTD. ....RESPONDENT

**JUDGMENT**

The claimant in this suit avers that he was employed by the respondent in the year 2002 and later promoted in 2009 to the level of a supervisor with a monthly salary of Kshs.18,000 and an additional sum of Kshs.15,000 as management allowance. According to his memorandum of claim, by the time of his disputed termination he was earning Kshs.40,000 per month.

He avers that his termination was occasioned by the fact that he evinced his intention to leave the respondent's employment through resignation. He states that upon receipt of the resignation letter, the respondent asked him to leave immediately despite the fact that he had intended to leave one month from the date of his resignation.

It is his case that upon termination of employment the respondent declined to pay him his terminal dues prompting the current suit.

The claimant therefore seeks an order of this court directed to the respondent to pay him the sum of Kshs.3,600,284/40 comprising of overtime, severance pay, salary in lieu of notice and salary for June, 2012 and leave pay.

The respondent on its part refuted the claimant's claim stating that the claimant is not entitled to any benefit at all.

According to the respondent the claimant's salary was not raised by Kshs.15,000 as alleged. The respondent further denies the claimant was earning Kshs.40,000 or at all and that his services were rightfully terminated when he absconded from employment.

Regarding the claim for over time, the respondent denied this claim and averred that the same was time barred.

At the hearing of the suit the claimant testified that he was employed by the respondent in 2002 as a shop attendant and later promoted as supervisor in 2009. Upon promotion his salary was increased to

Kshs.30,000.

According to his evidence he left employment on 2nd July, 2012 when he tendered his resignation. He had intended to leave his employment by 2nd August but was asked by the Human Resource Manager to leave immediately. He stated that he was not paid his terminal dues and salary upon being asked to leave.

It was his evidence that he used to report to work at 7.30 am and leave at 8.30 pm from Monday to Saturday and on Sundays he used to work from 9.30 am to 8.30 pm. This he testified was overtime for which he never got paid. He further stated that he never went on leave for the period he worked.

Regarding averment by the respondent that he was employed in 2009 he countered that he was employed in 2002 and is the reason the respondent had been remitting his NSSF dues since 2008. According to him 2009 was the year of promotion not employment.

In cross-examination he admitted that both the letters dated 2nd July, and 2nd August, 2012 emanated from him. But maintained that his actual resignation was 2nd July, 2012. He denied delivering the letter dated 2nd August. He maintained that by the time he quit his employment his consolidated salary was Kshs.40,000 which was inclusive of management allowance.

The respondent called a Ms. Immaculate Wangui who stated that she does business at Juja and was an employee of the respondent at the material time. It was her evidence that the claimant sought a day off but was declined since there was no one to stand in for him. The claimant nonetheless took the off and when he was called on 2nd July, 2012 to explain why he proceeded on off without authority, he told her that she did not want to listen yet the claimant had worked throughout. According to her evidence the claimant then asked to be paid for his accrued leave for three years but this was declined. The claimant then told her that he wanted to resign and gave her a letter dated 2nd August, 2012. She said that the claimant had mistaken the dates. She testified that when she asked the claimant to fill the leave forms he refused and demanded his dues.

Ms. Wangui further testified that he told the claimant that he could not get overtime since he was getting management allowance. She further testified that the claimant had 21 days of leave in 2011 and pro rata in 2012 and that the management wanted him to rest hence could not pay him in lieu of leave. She admitted that the claimant was not paid his salary for June, 2012 but the respondent had no problem paying him.

The issues for determination in this dispute are essentially four:-

- (a) When was the claimant employed? Was it 2002 or 2009?**
- (b) Whether the claimant was entitled to claim leave not taken during the year in subsequent years.**
- (c) Whether the management allowance took care of overtime.**
- (d) Whether he is entitled to the reliefs sought in his memorandum of claim.**

On the issue of when the claimant was employed, the claimant has maintained that he was employed in 2002 and promoted in 2009 and to support this position he argued that it is because he was an employee of the respondent that they were remitting his NSSF dues prior to 2009. The claimant further attached his letter of appointment dated 1st February, 2009.

The statements from NSSF showing the claimant's account was filed in court as part of the list of documents in support of the claim. They clearly show that the respondent started remitting the claimant's contribution from March, 2003. In absence of any proof to the contrary, the claimant has sufficiently shown to the court that he was an employee of the respondent as far back as 2003. It would be hard to find any justification for remitting NSSF dues on behalf of the claimant prior to 2009 if he was not an

employee of the respondent. The court therefore finds that the respondent did not employ the claimant in 2009 but simply promoted him. The claimant on the other hand has failed to produce any evidence to support his claim that he was an employee of the respondent in 2002. The court will therefore consider March 2003 as his date of appointment.

Concerning whether the claimant was entitled to claim leave not taken during the year, the claimant's letter of appointment dated 1st February, 2009 (which for purposes of this judgment is a letter of promotion) provides that all leave had to be completed by December 31st each year and failure to do so would result in forfeiture of any outstanding leave days.

The claimant argues that since he proved that he was employed by the respondent in 2002, clause 6(1) contained in his letter of promotion cannot apply in retrospect hence cannot cover any period worked prior to 2009. Whilst this may be true, the claimant gave only evidence regarding the nature of his work as a supervisor after promotion in 2009 which both parties seem to agree did not allow him room to go on leave unless someone was available to relieve him. No evidence was led by him to show that prior to his promotion the nature of his work prevented him from going on leave.

Section 28(4) of the Employment Act provides:

***“...the uninterrupted part of the annual leave with pay... shall be granted and taken during twelve consecutive months of service... and the remainder of annual leave with pay shall be taken not later than eighteen months from the end of leave earning period...”***

Although the Act does not specifically state so, the use of mandatory “shall” imports to this provision a meaning that any leave not taken as stipulated by the statute stands forfeited. Any other interpretation would render the provision perfunctory.

The claimant seeks from the court leave for 7 years. That is to say from 2002 when he claims he was first employed by the respondent to 2009 when he got promoted. The claim was filed in the year 2012.

Employment contracts are contracts like any other hence are governed by law of limitation of actions. No leave has been sought to bring this aspect of the claim out of time. If the claim for leave not taken were to be sustainable at all, the court could only entertain leave from 2006. Any claim before 2006 would therefore be caught up by law of limitation. But nothing has been shown to court to warrant making this order besides as stated above, section 28(4) of the Employment Act would prohibit such a claim. In this regard the claimant claim for leave prior to his promotion in 2009 fails in its entirety. The court would like to observe that leave is fundamental labour right protected by the Constitution, Employment Act and relevant international conventions. No worker should be denied leave or dismissed for asking for it when it is due. To do so would be to engage in an unfair labour practice. The court however discourages practice by most employees who sit back and watch their rights at work being violated only to re-awaken them when their services are terminated.

On the question of whether the claimant is entitled to claim overtime, the claimant submitted that overtime is pegged on actual number of hours worked beyond normal working hours while allowances are not. In this respect, the claimant submitted, the respondent cannot claim that allowances covered for overtime. He further submitted that even if it were to be true that the allowance covered for overtime, The letter of promotion came in February 2009 when the claimant had already worked overtime for the previous years.

On the respondents part, it was submitted that overtime was not available to the claimant since he was paid a management allowance of Kshs.15,000 over and above his pay of Kshs.25,000. According to the respondent, the management allowance was to cover for all allowances including overtime. It was submitted that the claimant was not keeping to usual hours as he was in a supervisory position and would therefore report earlier than other employees and leave later.

The respondent further submitted that even if overtime was payable the claim could not be sustained since the same was barred by reason of section 90 of the Employment Act.

It is not in dispute that the claimant was a supervisor. It is further not in dispute that he was being paid some allowance for that position. Management allowance of Kshs.15,000 in addition to his monthly salary. What is disputed is whether this so called management allowance was equal to overtime or not.

The claimant has argued that overtime is earned by working extra hours while allowance is paid whether one works extra hours or not.

Section 20 of the Employment Act requires an employer to give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee. The statement is required to contain:

- (a) gross amount of wages or salary of the employee**
- (b) any statutory deductions from gross amount and the purposes for which they are made**
- (c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part payment.**

Section 31(1) of the Act further provides that an employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee as will enable the employee to obtain reasonable accommodation.

From the foregoing, it is a mandatory statutory requirement to issue an employee with a written statement of his or her emoluments and in that statement, it is mandatory to state the statutory deductions and house allowance where an employee is not housed by the employer. The only exception with regard to house allowance is where an employee is paid a consolidated salary containing an element intended to be used by the employee as rent.

The practice in the industry however is that most employers issue this written statement, mundanely called payslip, itemising various deductions and allowances paid to an employee from time to time.

Whereas there is a statutory obligation to itemise statutory deductions and house allowance on the payslip, there is no obligation to do so for other allowances.

In this suit, neither the claimant nor the respondent produced any payslip to show the nature of deductions or allowances the claimant was entitled to. In the circumstances it is difficult to tell the nature of the allowance the claimant was being paid. However, as from 1st February, 2009, the claimant was promoted to supervisory role in respect of which he was being paid management allowance in the sum of Kshs.15,000 per month over and above his monthly salary. The respondent's witness Immaculate Wangui stated in her evidence that given the supervisory nature of the position the claimant was holding he had to report to work earlier than the rest and leave later than the rest.

The practice in the employment industry is that management staff are not normally entitled to overtime. The logic behind this is that they are part of the management and can be called to duty outside their regular hours and this is already catered for in the reasonably good salaries and allowances they are given. It is in this context that the court regards the management allowance that was being paid to the claimant and comes to the conclusion that he is not entitled to claim overtime as from the time he got promoted. Regarding the period prior to 2009, the claim for overtime would only be sustainable up to the year 2006 as any claim before this year would be statute barred by the reason of limitation period for bringing claims based on contract. There is a further problem that even if the court were to be prepared to award overtime for the period before 2009, such an award cannot be ascertained since the claimant has not disclosed the number of hours worked overtime and the salary he was earning prior to 2009 to enable

the court use as a basis for calculating the overtime. The salary the claimant was offered on promotion in 2009 cannot be used as a basis for calculating overtime as this would give undue advantage to the claimant. To this extent this claim fails for lack of evidence. Concerning when the claimant resigned, the respondent's witness testified that the claimant gave a notice of resignation dated 2nd July, 2012. The claimant admits writing both letters of 2nd July, and 2nd August, 2012 but maintained that his actual resignation was 2nd July, 2012 and that letter dated 2nd August, 2012 though written by him was never delivered. The court will therefore deem letter dated 2nd July, 2012 as the resignation letter.

The claimant averred that upon submitting the resignation letter he was asked to leave immediately and never paid his salary for June and July, 2012. To prove this he filed his bank statements which showed the respondent remitted his salary up to the month of May only. This was credited on 6th June, 2012. The respondent did not produce any evidence to show the claimant was paid salary for June and July 2012. This claim is therefore merited and is hereby allowed. Omission to pay the claimant his salary for June and July, 2012 vouches for the claim by the claimant that he was asked by the respondent to leave immediately. The allegation by the respondent that the claimant absconded work was not proved. No letter or memorandum was produced to show that any attempt was made to contact the claimant to show cause why he should not be dismissed for absconding duty.

The act of asking the claimant to leave work immediately without assigning any reason was therefore unlawful and unfair. Section 45 of the employment Act prohibits any employer from terminating employment of an employee unfairly. A termination of employment of an employee shall be unfair if it is found out that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of an employee. Section 43 requires that an employer proves the reason or reasons for the termination and where an employer fails to do so, the termination shall be deemed to have been unfair. In this case there was not even a reason. The effect of this is that the claimant's resignation was cancelled out by the act of the respondent of asking him to leave immediately thereby converting it to unlawful termination of employment with attendant consequences as stipulated in the Employment Act.

An employee who has been terminated unlawfully and unfairly is entitled to among others salary in lieu of notice as stipulated in the contract of employment or in the absence of contract, as stipulated in the Employment Act, service pay where appropriate, and up to one year's salary as compensation for unfair termination of employment. This statutory payment are in addition any other terminal benefits stipulated in the contract of employment.

To this extent the court awards the claimant one month's salary in lieu of notice and 6 months wages as reasonable compensation for unfair termination of employment. The claimant is not entitled to service pay since he was a member of NSSF.

In conclusion this court awards the claimant as follows:-

	<b><u>Kshs.</u></b>
(i) Salary for the month of June and July	- 80,000
(ii) One months salary in lieu of notice	- 40,000
(iii) Six months salary for unlawful termination	- <u>240,000</u>
	<b>360.000</b>
	=====

This award shall be subject to statutory deductions. The claimant is further entitled to the costs of the

suit.

It is so ordered.

*Dated at Nyeri this 4th day of October, 2013.*

**NELSON ABUODHA J.**

**JUDGE**

*Delivered in open Court in the absence of the Claimant and in the presence of Wahome for the Respondent.*

**NELSON ABUODHA J.**

**JUDGE**