



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 778 OF 2012**

*(Before Hon. Justice Mathews N. Nduma)*

**CHARLES NGUMA MAINA.....CLAIMANT**

**VERSUS**

**RILEY SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The only issue for determination in this suit is whether the Claimant is entitled to payment of terminal benefits to wit:-

(a) Service pay	Kshs. 51,571.
(b) Overtime for 7 years (weekdays)	Kshs. 4,831,008.
(c) Overtime for 7 years (Saturdays)	Kshs. 805,168.
(d) Overtime for 7 years (Public Holidays)	Kshs. 226,996.
<b>Total Claim</b>	<b><u>Kshs.5,914,743.</u></b>

2. The claim is set out in the Memorandum of Claim filed on 9<sup>th</sup> May, 2012. The Claim is denied vide a statement of defence filed on 18<sup>th</sup> June, 2013.

3. The parties agreed to proceed by way of written submissions and therefore no oral testimony was adduced.

4. The Claimant relied on annexures A to F attached to the Memorandum of Claim.

5. In terms of the letter of appointment, the claimant was employed as a driver on 1<sup>st</sup> March, 2001 earning salary of Kshs.6,186 per month. He was entitled to 30 days paid leave.

6. The letter of appointment provides that the Claimant would be called to perform overtime from time to time in excess of established hours and would therefore be paid any overtime accumulated in one week and in excess of five hours.

7. The Claimant worked diligently until when he resigned from service voluntarily by a letter dated 3<sup>rd</sup> November 2008. The respondent accepted the resignation by a letter dated 22<sup>nd</sup> November, 2008 noting that the Claimant did not serve the requisite one (1) month notice and he should pay the respondent accordingly.

8. In the letter of resignation attached to the statement of defence, the Claimant did not seek payment of any terminal benefits by the Respondent at all or as claimed in this suit.

9. Section 109 of the Evidence Act Cap 80 Laws of Kenya provides –

*“the burden of proof as to any particular fact lies on the person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

10. The Claimant produced payslips, which made a provision for payment of overtime and showed the Claimant was from time to time paid

leave pay and leave allowance. That he was also paid for NSSF and NHIF.

11. No evidence was adduced by the Claimant at all regarding the days he had worked overtime and was not paid in respect thereof.

12. In **Fred Makori Ondari v The Management of the Ministry of works Sports Club [2013] eKLR** at paragraph 12, Rika J held –

*“He does not give details of the overtime done whether it was authorized by his employer; whether he ever demanded for payment while on duty; and why he would wait until termination to claim overtime pay that accrued from as early as 10 years prior to termination ..... The prayer for overtime pay is rejected ..... If he intended to pursue service pay under this head, he would not be entitled to service pay as he was registered under the National Social Security Fund. This prayer is rejected.”*

13. In the present case, the prayer for payment of overtime during weekends, Saturdays and public holidays is rejected on the basis that no tangible evidence was adduced by the claimant to substantiate the entitlement.

14. Similarly, the Claim for payment of Service pay is rejected for want of proof, it being clear that the Claimant was registered with NSSF and contributions were made by the respondent on his behalf. The Claim for Service pay is therefore untenable in terms of section 35(5) as read with sub-section 35(6) of the Employment Act, 2007.

15. Accordingly, the suit is dismissed in its entirety with costs.

**Dated and Signed in Kisumu this 5th day of February, 2018**

**MATHEWS N. NDUMA**

**Judge**

**Delivered and signed in Nairobi this 16th day of Feb, 2018**

**MAUREEN ONYANGO**

**JUDGE**

**Appearances**

M/s. Gakoi for Claimant

Mr. Kilonzo for Respondent

Anne Njung'e – Court Clerk