



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 1172 of 2011

JULIUS KEYA WANYAMA.....CLAIMANT

VS

TARGET GUARDS LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 15th July and filed in Court on 18th July 2011, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Statement of Response on 9th August 2011. The case was heard on 3rd December 2012 with the Claimant appearing in person and Mr. Ogutu instructed by Mwaura & Wachira Advocates appearing for the Respondent. The Claimant testified on his own behalf while the Respondent did not call any witness but filed written submissions.

The Claimant's Case

2.The Claimant was employed by the Respondent on 14th April 2008, in the position of Operations Manager at a starting salary of Kshs. 30,000 which was later adjusted to Kshs. 70,000 (appointment letter is marked appendix 1 in the Claimant's documents).

3. According to the Claimant, the Respondent terminated his employment on 1st March 2011 verbally and without notice. The Claimant claimed that during the entire period of his employment with the Respondent, he worked for 24 hours per day without any rest day. He also worked on public holidays and did not take any leave.

4. It was the Claimant's case that the Respondent caused him to sign a termination of contract letter and issued him with 2 postdated cheques for Kshs. 60,500 each in settlement of his terminal dues. He was also allowed to purchase the Respondent's motor vehicle registration number KAT 337J. The Claimant claimed that the Respondent was using the police to harass and intimidate him.

5.The Claimant claimed the following:

- a) Accrued leave (42 days).....Kshs. 140,000
- b) Overtime (29,841.75 hours).....11,605,456
- c) House allowance (36 months).....378,000

d) 12 months' salary compensation.....840,000

6.The Claimant also asked for a Certificate of Service and costs of the case.

The Respondent's Case

7.In its Statement of Response, the Respondent admitted having employed the Claimant but denied that his salary was Kshs. 70,000. The Respondent further stated that the Claimant had been paid all his dues, including pay in lieu of notice (the settlement agreement is marked appendix 1 in the Respondent's documents). The Respondent denied that the Claimant worked beyond the hours agreed upon and maintained that the Claimant's salary was inclusive of house allowance. The Claimant took all his rest and leave days and any days not taken were fully compensated.

8.In response to the Claimant's claim that the Respondent was using the police to harass and intimidate him, the Respondent averred that the Claimant had upon leaving employment, carried with him some confidential files and documents which he had used to the detriment of the Respondent, prompting the latter to report the matter to the District Criminal Investigations Officer in Kabete, Nairobi.

Findings and Determination

9.The first issue for determination has to do with the Claimant's actual salary as at the time of termination of his employment. It was the Claimant's testimony that his salary was increased from Kshs. 30,000 in 2008 to Kshs. 70,000 in 2011. The Respondent denied the Claimant's claim that his salary was Kshs. 70,000 but did not provide any details as to what the actual salary was. Under Section 20 of the Employment Act employers are required to provide an itemised pay statement for their employees.

10. In the case of **Bernard Mutugi Daniel Vs Lenana Mount Hotel Limited (Industrial Court Cause No 1423 of 2012)** this Court held that:

“An employer who has custody of employee records cannot simply come to Court and say 'I deny that allegation and put the claimant to strict proof.’”

11. According to the settlement agreement dated 14th March 2011 which the Respondent used to pay the Claimant his terminal dues, the Claimant's salary for the month of February was Kshs. 55,000 while notice of one month was reflected as Kshs. 70,000. The Respondent did not challenge the veracity of this document. The Court has therefore adopted the figure of Kshs. 70,000 as the Claimant's salary as at the time of his leaving the Respondent's employment.

12.The second question is whether the Claimant was terminated or whether he left employment out of his own volition. A reading of the settlement agreement dated 14th March 2011 reveals some form of an exit plan which was agreed upon between the Claimant and the Respondent. It seems to me therefore that the Claimant's termination was by consent of the parties. Consequently, the Claimant's claim for compensation for unfair termination fails and is hereby dismissed.

13. With regard to the claim for accrued leave, the Respondent stated that the Claimant took his leave as it fell due or was compensated for the leave days not taken. The Respondent did not however produce any leave records. Section 10 of the Employment Act requires employers to keep employee records. In the absence of such records, the Court is left with no option but to go by the evidence of the employee. The Claimant's letter of appointment provided as follows:

“Given the nature of the company's business you will be eligible for a paid cash leave of 21 days having completed the above year.”

14. A plain reading of this provision indicates that the Claimant was entitled to to pay in lieu of leave at 21 days for each completed year of service. According to the settlement agreement the Claimant was paid Kshs. 70,000 as compensation for leave. The Claimant worked with the Respondent for 3 years. His total

leave entitlement was therefore 63 days . Commuted in cash it would amount to Kshs.147,000. The Claimant was paid Kshs.70,000 at the time of his leaving employment leaving a balance of Kshs.77,000 which is hereby awarded to the Claimant.

15.With regard to the claim for house allowance, the Court found the salary paid to the Claimant adequate as a consolidated salary inclusive of house allowance as anticipated by Section 31(2)(b) of the Employment Act. This claim therefore fails and is hereby dismissed. In similar vein, since the Claimant's letter of appointment provided for a salary inclusive of any overtime worked the claim for overtime is also dismissed.

16.In the final analysis I award the Claimant the sum of Kshs. 77,000 in compensation for earned leave. The Respondent is directed to issue the Claimant with a Certificate of Service.

Each party will bear their own costs.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF APRIL 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**