



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 624 of 2011

ALLAN KAGARI LUMADEDE CLAIMANT

VERSUS

AL SAIDCO ALARMS LIMITED RESPONDENT

J U D G M E N T

By a memorandum of claim filed in court on 17th November, 2011, the claimant who avers that he was at all times material to the suit an employee of the respondent, sought the court's intervention to order the respondent pay him among others salary arrears for November, 2009, unpaid leave, 40 days of public holidays and Sundays which he worked, underpayment of basic salary contrary to the relevant wage order; house allowance, transport and leave allowance. According to the claimant, he worked for the respondent as a security guard through an oral appointment which commenced from 5th November, 2005 to 30th November, 2009 when he left the respondent's employ on his own volition.

At the time of his resignation he was earning a monthly salary of Kshs.4,800 per month.

He avers that upon resignation the respondent was to pay him his dues but this was not done giving rise to the instant suit.

During the hearing the claimant reiterated most of the averments in the memorandum of claim and further stated that his pay was Kshs.4,800 while his statutory wage ought to have been Kshs.8,463. He then asked the court to award him the difference between his statutory wage and the actual wage he was paid for the four years he worked for the respondent.

In cross-examination the claimant stated that the reason for his resignation was that he found another job and that he never gave the requisite notice to the respondent.

He further stated that during his employment by the respondent he only went on leave once. Concerning rest days he stated that he had one rest day per week. The respondent for its part while admitting the claimant was its employee denies it is indebted to the claimant.

According to the respondent, the claimant took all his leave days for the entire duration he worked and was granted off duty for any public holiday worked. At the trial the respondent called one witness a Mr. Stephen Kimunyi who stated that he worked for the

respondent as operations manager.
 He stated that salaries were paid through payroll and that there were no payslips. All guards were required to sign the payroll.
 It is not in dispute that the claimant was an employee of the respondent. Further the claimant has himself admitted that he resigned from his employment without giving the required notice or paying the respondent's salary in lieu of notice.
 The issues in dispute and which the court requires to determine are: First whether the respondent during the time it had the claimant in his employ underpaid him; second whether the claimant ever took all his leave days.

Section 35 of the Employment Act provides for mode of determination of employment where the contract of employment is unclear or non-existent. No employment contract was exhibited. It therefore means the provisions of the Act will apply. The claimant was paid monthly hence the contract was terminable by one months notice or salary in lieu thereof. The claimant therefore ought to have given one month's notice or salary in lieu. He has admitted he did not give one month's notice he is therefore liable to pay the respondent one month's salary which the court hereby awards.
 On the issue of leave whereas the respondent alleges that the claimant took all his leave, no record of leave schedule for the respondent's workers was produced in court to vouch for this. The claimant for his part annexed to his memo of claim the only annual leave he claims to have ever taken.

It is the responsibility of an employee to keep employment records. No reason was given why a schedule of leave for the respondent's employees could not be produced to controvert the claimant's claim for three years untaken leave. On balance of probabilities therefore, the claimant has satisfactorily demonstrated that for the four years he worked for the respondent he only took one annual leave and the court hereby awards him the remaining three years at the rate of one month's salary for each year.

On account of payment of salary below statutory minimum, the respondent in their own submissions acknowledged the existence of Legal Notice numbers 42, 38 and 70 which prescribed minimum wage for workers in the claimant's category. The court therefore awards the claimant the sum of Kshs.23,530 as the difference between statutory minimum wage and the actual wages paid to the claimant during the period he worked for the respondent.

In conclusion the court awards the claimant as follows:-

1.	3 months salary in lieu of leave (6,130 x 3) =	18,390.00
2.	Underpayment of wages	<u>23,530.00</u>
		41,920.00
	Less: One month's salary in lieu of notice	<u>6,130.00</u>
		35,790.00
		=====

The claimant shall have interest on this award as well as costs.

It is so ordered.

Dated at Nyeri this 25th day of February 2013.

Abuodha J. N.

Judge

Delivered at Nairobi this 11th day of April 2013.

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

M. Onyango

Judge