



**Kenya National Private Security Workers Union v Eccel Services International Limited
(Cause E007 of 2023) [2024] KEELRC 1874 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E007 OF 2023
ON MAKAU, J
JULY 19, 2024**

**BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT
AND
ECCEL SERVICES INTERNATIONAL LIMITED RESPONDENT**

JUDGMENT

1. The claimant is a registered Trade Union and brings this suit on behalf of its member Ms.Irene Kathure (grievant). By a Memorandum of Claim filed on 2nd May 2023, the claimant alleges that the grievant was summarily dismissed by her supervisor Mr.Victor Kinoti on 30th December 2022 for requesting to be compensated for off/rest days, house allowance and overtime worked. It is claimant's case that the dismissal was unfair and prays for; -
 - a. One-year salary as compensation for unfair termination being Kshs 331,152.
 - b. One month salary in lieu of notice being Kshs 15,722.
 - c. Standard overtime worked from 15th May 2021 to December 2022 being Kshs 158,106.
 - d. Annual leave of Kshs 14,888.
 - e. House allowance from May 2021 to June 2022 being Kshs 36,797.
 - f. Off and rest days from May 2021 to December 2022 being Kshs 69,784.
 - g. Public holidays from June 2021 to December 2022 being Kshs 24,852.
 - h. Unremitted NSSF for 13 months being Kshs 5200.
 - i. Unremitted NHIF for 13 months being Kshs 6500.



2. The respondent has denied the claim and avers that the grievant absconded work from 31st December 2022 and never reported back. It contended that it updated all the NSSF and NHIF remittances for the grievant up to 31st December 2022. It denied ever receiving any letter from the grievant after she absconded and prayed for the suit to be dismissed with costs.

Evidence

3. The grievant testified as CW1 and she adopted her written statement dated 27th April 2023 as her evidence in chief. She further produced 17 documents as exhibits. In brief, her evidence was that she was employed by the respondent as a security Guardette from 12th May 2021 and left on 30th December 2022. Her salary was Kshs 7000 per month but she was not paid for over time, leave, off days and public holidays.
4. Her exit was through summary dismissal by his supervisor Mr.Kinoti because of her persistent request for off days. When she wrote letters requesting for off days, the supervisor told her that her services had been terminated because she had become a nuisance. Thereafter, she called the respondent's Managing Director Mr.Mutai who confirmed the termination.
5. She then escalated the matter to the claimant and conciliation was attempted at the Labour office but it failed to resolve the dispute hence this suit. Her attempts to secure another job did not bear fruits until after seven months. Therefore, she prayed for judgment against the respondent.
6. On cross-examination, she admitted that she signed a contract but contended that she signed without knowledge of the contents. On further cross-examination, she admitted that she gave her details to the manager to fill a form for her including name, her father's name, her children and her next of kin. She also gave the details of her health and the nearest police station. Although she alleged that she could not read and write in English properly, she was able to read her letter dated 3rd August 2021 without any problem.
7. She admitted that she wrote the letter dated 9th July 2022 asking for off days, leave and house allowance. She stated that she is a member of the claimant union and that she pays union dues directly to the claimant. She admitted that the receipts for Union membership were written by Mr.Mati and they had no stamps. She further admitted that she never informed the respondent that she was a member of any union.
8. She confirmed that her work station was at Chiakariga Ward in Tharaka Nithi County and she was residing nearby. She stated that female guardettes were working both day and night shifts. She contended that her first leave ought to have been in June 2022.
9. The respondent called her Administrator, Mr.Timothy Rugendo as RW1. He also adopted his written statement dated 6th February 2024 as his evidence in chief and produced 8 documents as exhibits. In brief, he contended that the suit is bad in law because it is filed by a person who is not an Advocate and that the claimant lacks locus standi to sue the respondent.
10. However, he confirmed that the grievant was employed by the respondent on 16th May 2021 as a guardette for a monthly salary of Kshs 6880 although she was being paid Kshs 7000. He further stated that the grievant signed the employment contract without any objection and she was posted to St.Orsola Mission Hospital in Tharaka Nithi County, Chiakariga Ward as a day guard. She worked there until 30th December 2022 and absconded work without any lawful cause. Despite demand, she failed to do clearance and handover company property including uniforms, jungle Belt, Lanyard,



Military Boots, Rungu (PR24), Walkie Talkie Radio, Whistle, Torch, and cap which can be used for criminal activities.

11. He further stated that the Kshs 7000 salary was within the minimum salary for a day watchman in Tharaka Nithi County, Chiakariga Ward according to the General Wage Order of 2018 being Kshs 7240/- inclusive of house allowance. He stated further that, the grievant had earned 21 days leave which she exhausted before 30th December 2022 when she absconded work. He denied the claim for over time contending that the grievant's contract of employment provided her working hours as from 0.600 to 18.00 hours.
12. He contended that employee's grievances are dealt with by the regional supervisors as per the respondents' policy. He admitted that the matter was referred to the Labour officer Mr.Jafar A.Haji for conciliation and the respondent provided proof that the grievant had absconded work and that her salary for December 2022 had been paid. No further communication was received except court summons and pleadings in this matter.
13. On cross-examination he admitted that employees are free to join trade union and are also entitled to compensation for working more than eight (8) hours. He also admitted that security guards are entitled to house allowance. He admitted that the grievant was never given her annual leave.
14. He admitted that after that the grievant absconded work, the respondent never wrote any letter to her about the desertion of work but it made a phone call. He further contended that the respondent made a report to Nkubu police station after the grievant failed to return the company's property. He contended that when grievant was called to the office via the phone call, she declined contending that a Mr.Geoffrey Kirema had found another job for her.

Submissions

15. The claimant submitted that the grievant was dismissed from employment by Mr.Victor Kinoti without justified reason and without prior notice or an opportunity to be heard contrary to section 35, 41 and 45 of the Employment Act, 2007. Consequently, it was argued that the dismissal was unlawful and unfair, and the grievant is entitled to compensation.
16. For emphasis, reliance was placed on the case of Peter Apolo Ochieng v Amedo Centre Kenya Limited [2016] eKLR and Kenya National Private Security Workers Union v Board of Trustees Salvation Army (UR) where the court held that it is unfair and unlawful to dismiss an employee without following a fair procedure.
17. The claimant further submitted that the grievant was a member of the union by dint of Section 52 of the Labour Relations Act which allows a member to pay union subscriptions directly to the union. In that regard, it contended that Recognition Agreement is not mandatory.
18. It further submitted that it referred the dispute for conciliation under section 69 of the Labour Relations Act and the respondent attended and told the conciliator that it had paid the grievant her salary for December 2022. However, no evidence of the payment was shown and the matter was referred to this court.
19. The claimant further submitted that the reliefs sought are merited by dint of section 27,28,31,35,36 and 49 of the Employment Act which relates to rest days, annual leave, house allowance, termination notice and compensation for unfair termination respectively. Reliance was also placed on section 48 of the Labour Institution Act and paragraph 7 (1) and 9(2) of the Private Security Services Order 1998 which provides for minimum wages, overtime work and public holidays respectively.



20. The respondent on the other hand, urged the court to ascertain whether the claim is properly before the court. In its view there is no recognition agreement or any connection whatsoever between it and the claimant. The claimant has also not produced as exhibit a certificate issued under section 19 of the *Labour Relations Act* to prove that it was indeed a registered trade union.
21. It further submitted that Mr. Josphat Mati is not an Advocate with mandate to prosecute and cross examine witnesses in this court and therefore the proceedings he conducted were unlawful. For emphasis, reliance was placed on the case of *Kenya Plantation & Agricultural Workers Union v Mahee Flowers Ltd* [2023] KEELRC 1369 (KLR) where Nderitu J held that union official has no right to practice law in court the same way an Advocate does.
22. The respondent further submitted that the membership of the grievant to the claimant union has not been proved because the receipts produced as evidence of union subscription do not make sense sequentially. The oldest receipt produced was issued on 13th December 2021 and it is number 10439 while receipt number 10403 was issued on 9th July 2022. It is the defence case that the grievant was not a paid up member of the claimant and the said subscription receipts were made for purposes of misleading the court. Hence the court was urged to strike out the suit for being incurably defective and not properly before the court.
23. Besides the foregoing points of law, the respondent submitted that the grievant voluntarily absconded work from 30th December 2022 in breach of her contract of employment. It reiterated that when it called the grievant about her desertion of work, she responded that her referee Mr. Kirema had secured for her another job. The grievant admitted that she was called to return respondent's company property.
24. The respondent maintained that the grievant insubordinated its authority by failing to comply with instructions to return the company property. As such the grievant has not cleared with the company which is necessary before issuance of certificate of service. The said offence notwithstanding the grievant was not issued with any dismissal letter.
25. It is the defence case that the claimant has not proved its case on a balance of probability and therefore the reliefs sought are not merited. In its view, the grievant made false allegations in her evidence and her evidence should be taken with a pinch of salt. It was submitted that the grievant absconded work and therefore she is not entitled to compensation for unfair termination and salary in lieu of notice.
26. Besides, the claim for under paid salary has been denied for the reason that the grievant's work station was not in Municipality but "other areas" under the applicable General Wage Order. It was further submitted that claimant has not adduced evidence to prove the claim for overtime work, rest days and public holidays worked. It was further argued that the salary paid to the grievant was inclusive of house allowance and therefore no house allowance is payable to her. Finally, the claim for unremitted NHIF and NSSF deductions, if any, should be paid to NSSF and not the claimant or grievant.
27. In conclusion, the respondent submitted that it did not infringe any of the grievant's rights and therefore the suit should be dismissed with costs.

Analysis

28. Having considered the pleadings, evidence and submissions, there is no dispute that the grievant was employed by the respondent as a security guard at Ursola Mission Hospital, Chiakariga, Tharaka Nithi County. The issues for determination are: -
 - a. Whether the suit is fatally defective.



- b. Whether the grievant was dismissed by the respondent or she absconded work.
- c. If she was dismissed, whether the dismissal was unfair and unlawful.
- d. Whether reliefs sought are merited.

Fatal defect

- 29. The respondent submitted that the suit is defective because it was filed and prosecuted by an unqualified person, and that the grievant was not a paid-up member of the claimant union. In addition, it was argued that there is no evidence that the claimant is a registered union and there is no recognition agreement signed between the claimant and the respondent.
- 30. I have considered the foregoing points and the evidence adduced by the claimant. There is a letter on record dated 7th October 2020 signed by the claimant's General Secretary authorizing Mr. Josphat Mati to represent unionizable employees in the vast Mt. Kenya East Region in labour disputes before the Employment and Labour Relations Court.
- 31. There is also evidence of membership of the grievant to the union, in form of subscription receipts. The receipts were produced by consent without any objection. Only during submissions has the respondent raised the issue of inconsistency in the numbering of the receipts. This court is not capable of ascertaining whether a fraud was committed or whether the receipts are false documents. Therefore, I treat the receipts as valid documents from the claimant union.
- 32. As regards the issue of whether the claimant is a registered trade union, I find that the respondent did not raise the said issue in its pleadings or during the hearing. It only raised it during the submission and the claimant did not have any chance to respond. It is therefore unfair to condemn the claimant on that issue without giving it a chance to respond.
- 33. The last point on the alleged defect is the lack of a recognition agreement between the claimant and the respondent. However, the emerging jurisprudence from this court and the Court of Appeal is that lack of recognition agreement does not bar a trade union from representing its members in court to agitate for their labour rights. The authority to represent an employee is given to the trade union by the membership and not by the recognition of the trade union by the employer.
- 34. In view of the foregoing matters, I am not persuaded by preliminary objection, and I therefore overrule it entirely and proceed to consider the suit on merits.

Dismissal or absconding

- 35. The claimant's case is that the grievant was dismissed summarily by her supervisor Mr. Victor Kinoti for her persistent request for rest days. The grievant produced letter dated 3rd August 2021 requesting for rest days. The respondent denied receipt of that letter and the claimant did not prove that service was effected. Consequently, I find that there is no link between that letter and the alleged dismissal more than one year down the line.
- 36. The grievant further alleged that she was verbally dismissed by her supervisor Victor Kinoti on 30th December 2022 because she had become a nuisance in her persistent request for off days. There is however no evidence of the alleged persistent requests for rest days. No letters were produced as exhibits or electronic texts or eye witness was called to prove the alleged persistent requests. There is also no evidence to prove that the grievant called the respondent's Managing Director to protest against the alleged dismissal by her supervisor.



37. In view of the foregoing, I find and hold that the claimant has fallen short of proving, on a balance of probability, that the grievant was summarily dismissed from work by the respondent. This leaves me with no option but to believe the evidence by the respondent that the grievant voluntarily absconded work. An employee is said to abscond work if he/she leaves employment without notice and with no intention of reporting back. It is therefore clear in my mind that the issue of unfair and unlawful termination does not arise.

Reliefs

38. In view of the foregoing holding, the prayer for compensation for unfair termination and salary in lieu of notice must fail. Under section 49 of the *Employment Act*, the said reliefs are only available if the court finds that the contract of service has been terminated unfairly by the employer.

39. However, the claim for salary underpayment is merited. The grievant was paid a basic salary of Kshs 7000 instead of Kshs 7240.95 as prescribed by General Wage Order of 2018 which was replaced by the 2022 order which prescribed a minimum basic salary of Kshs 8109.90. The latter order took effect on 1st May 2022. Accordingly, from June 2021 to April 2022, the grievant was underpaid by Kshs 240.95 for each of the eleven (11) months equaling to Kshs 2650.45. From May 2022 to December 2022, the under payment was Kshs 1109.90 x 8 months equaling to Kshs 8,879.20. Hence the total underpayment of basic salary was Kshs 11,529.65.

40. As regards house allowance, the grievant was entitled to 15% of the minimum basic pay being Kshs 7240.95 x 15%=Kshs 1,086.14 x 11 months (from June 2021 – April 2022) =Kshs 11,947.56. During the next period upto December 2022 the house allowance was Kshs 8109.90 x 15% =Kshs 1,216.48 x 8 months=Kshs 9,731.88. Consequently, I award the claimant a total of Kshs 21,679.44 as the unpaid house allowance.

41. The claim for rest days has not been denied. The grievant worked for 19 months and she was entitled to four (4) rest days per month equaling to 44 rest days between June 2021 and April 2022, and 32 rest days between May and December 2022. Accordingly, for the first phase, she is awarded Kshs

$$7240.95 \times \frac{44}{30} \times 2 = \text{Kshs } 21,240.12.$$

$$\text{For the second phase she is awarded } \text{Kshs } 8109.90 \times \frac{32}{30} \times 2 = \text{Kshs } 17,301.12.$$

Hence a total award of Kshs 38,541.24.

42. The claim for overtime worked is based on the fact that the grievant was working for 12 hours everyday. The respondent contended that the said working hours was provided in the grievant’s contract of employment. Regulation 6 of the Regulations of Wages (Protective Security Services) Order, 1998 provides for 52 hours of work spread over six days of the week. The grievant was working 72 hours per week excluding the rest day which I have already considered above.

43. The total extra hours worked were 72-52=20 per week. Every month she worked approximately four weeks equaling to 80 hours every month. The grievant worked 11 months under the 2018 General Wage Order hence under Regulation 7 of the Protective Security Services Order, 1998, she is entitled

$$\text{to Kshs } 7240.95 \times \frac{80}{225} \times 11 = \text{Kshs } 28,320.16.$$

For the next phase 8 months under the 2022 Wage



Order, she is awarded Kshs 8109.90 x $\frac{80}{225}$ x 8 = Kshs 23,068.16. Hence the total award of overtime worked is Kshs 51,388.32.

44. The prayer for annual leave is also merited. The grievant worked for 19 months times 1.75 day per month equaling to 33.25 leave days. She is therefore awarded 33.25 x $\frac{8109.90}{30}$ = Kshs 8,988.47 for annual leave not utilized.

45. The claim for public holidays is declined for lack of particulars of the alleged 13 public holidays. Nowadays it is difficult to tell how many public holidays exist in Kenyan calendar. Likewise, the claim for unremitted NSSF and NHIF contributions must fail because there is no evidence that the grievant was deducted the said money from her salary. Her contract provided for Kshs 6880 salary per month but she was receiving Kshs 7000 through her bank. It means that nothing was deducted from her salary towards NHIF and NSSF contributions.

46. Finally, the claim for damages for breach of grievant's rights and loss of future earning is without legal basis and is declined.

Conclusion

47. I have found that the claimant has not proved a case of unfair termination of employment against the respondent. However, it has proved the claim for accrued employment benefits highlighted above. Consequently, I enter judgment for the claimant in the following terms: -

- i. Salary underpayment.....Kshs 11,529.65
- ii. House Allowance.....Kshs 21,679.44
- iii. Rest days.....Kshs 38,541.24
- iv. Overtime.....Kshs 51,388.32
- v. Leave..... Kshs 8,988.47

Total Kshs 132,127.12

The award is subject to statutory deductions but in addition to interest at court rate from the date of filing the suit. Since the claim has partially succeeded, the claimant is awarded half the costs of the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

