



**Opuko v Labrak Security Services Limited (Cause 775 of 2018)
[2024] KEELRC 1083 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1083 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 775 OF 2018
NZIOKI WA MAKAU, J
MARCH 5, 2024**

BETWEEN

MICHAEL ODOYO OPUKO CLAIMANT

AND

LABRAK SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. In his Memorandum of Claim and Witness Statement both dated 21st May 2018, the Claimant averred that the Respondent employed him as a Security Guard with effect from April 2004 to December 2017. He averred that he reported to work as usual on 11th December 2017 but was informed that the company had replaced him and his services were therefore no longer needed. He averred that he was not given any explanations or reasons for the termination of his employment despite his numerous attempts to dialogue with the Respondent. He further averred that on 22nd January 2018, he received a letter dated 22nd January 2018 from the Respondent stating that his services were no longer required in the company with effect from 11th December 2017.
2. The Claimant's case was that his contract was unfairly terminated because: he was not given the requisite 30 days' notice under section 35(1)(c) of the *Employment Act*, he was not issued with notices and letters to show cause prior to the termination and the Respondent neither notified the Labour Office of the reasons for the termination nor accorded him an opportunity to be heard in defence. He averred that the Respondent had failed to regulate his working hours and subjected him to overtime work with no pay or compensation and that it also did not pay his 12 months' wages for loss of employment as provided in law. Moreover, that the Respondent failed to reduce their engagement into writing despite the Claimant having worked for it for more than three (3) years and that it also did not give him paid leave. He also claimed service pay and a certificate of service and asserted that the Respondent paid him wages below the minimum wages for watchmen in cities as prescribed by the



Regulation of Wages (General) (Amendment) Order, 2017. The Claimant thus prayed for judgment against the Respondent as follows:

- a. A declaration that the Respondent's decision to terminate the Claimant's employment was unfair, irregular and therefore null and void.
 - b. A declaration that the Respondent's decision to withhold the Claimant's terminal dues was unfair, irregular and therefore null and void.
 - c. Compensation for unfair termination of employment as follows;
 - d. One month's salary as payment in lieu of notice – Kshs. 14,000/-
 - e. Unpaid salary for the months of February, March and April 2017 – Kshs. 42,000/-
 - f. Severance pay – Kshs. 91,000/-
 - g. Unpaid lawful leave dues – Kshs. 225,400/-
 - h. Compensation for overtime
 - i. Compensation for unwarranted Kshs. 200/- mandatory uniform deduction – Kshs. 31,200/-
 - j. 12 months' pay compensation for loss of employment – Kshs. 182,000/-
 - k. General Damages for unfair termination of employment.
 - l. Costs of this cause.
 - m. Interest on (c), (d) and (e) above at Court rates.
3. The Respondent filed its Response to Memorandum of Claim, wherein it averred that the Claimant has no valid claim against it and that the letter of termination dated 22nd January 2018 is a forgery as it never wrote such a letter to the Claimant. According to the Respondent, the Claimant wrote a letter of Resignation dated 15th January 2018 that was received by the Respondent on the same day and on which the Respondent acted instantly by paying the Claimant all benefits salaries and claims due to him. It denied receiving any demand letter from the Claimant's Advocates on record and further denied that the Claimant used to earn a monthly salary of Kshs. 14,000/-. The Respondent further averred that the Claimant is not entitled to any of the sums claimed or at all.

Evidence

4. The Claimant testified that while working at the Respondent, his gross pay was Kshs. 6,000/- and he would at times get Kshs. 4,000/- in advance and later be paid Kshs. 2,000/- at the end of the month. He asserted that the standard salary rate at that time was Kshs. 14,900/- a month and denied that he resigned from the Respondent company. He further denied that he generated the termination letter, stating that the same was issued to him. Under cross-examination, the Claimant stated that he was summarily dismissed on 22nd January 2018 by his Supervisor and the Respondent's Director then called to tell him that he was give him another posting. That however, the next time he went to the Director's office, the said Director told his secretary to issue the Claimant with a termination letter, which was the one before Court. That it was the said secretary named Loice Moraa who typed, signed and handed over the termination letter to him in the presence of the employer. In re-examination, the Claimant stated that his dismissal was verbal on 11th December 2017 at 5.00pm which was also the last day he reported to work. He further stated that Loice Moraa had been assigned many roles including Personal Secretary and Supervisor.



5. The Respondent's witness, Sameer Ali Muzafar (RW1), testified that the Claimant went to his office, wrote a resignation letter dated 15th January 2018, personally gave the same to him and left. He noted that the signature on the said resignation letter was similar in all the documents the Claimant had signed such as the Verifying Affidavit before Court. RW1 acknowledged that Ms. Loice Moraa used to work for him but stopped during COVID-19 and denied that he instructed her to write the Claimant's termination letter. He reiterated that the termination letter before Court was forged and that the Court should dismiss the Claim with costs. Under cross-examination, RW1 stated that only he and his wife have access to the company's letter head which were in the drawer in his office. Further, that the Claimant never went to collect his dues and that the Claimant used to earn Kshs. 10,000/- even though he did not avail proof of payment. He admitted that there was underpayment in the Claimant's case considering the minimum pay for security guards was Kshs. 14,000/-. RW1 however refuted that the dues in the Claim was what was owed to the Claimant.

Claimant's Submissions

6. According to the Claimant, the following were the issues for determination by this Court:
- a. Whether the dismissal of the Claimant was unfair, illegal, irregular and wrongful.
 - b. Whether the Claimant is entitled to the reliefs sought.
7. The Claimant submitted that contrary to sections 41(1), 43 and 45 of the *Employment Act*, the Respondent did not give him the reasons for his summary dismissal. He cited the case of *Mary Chemwono Kiptui v Kenya Pipeline Company Limited* [2014] eKLR in which the Court held that the reasons for termination must be given prior to and not after termination. He fronted that section 44(4) of the *Act* is clear that the decision of an employer to dismiss an employee under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same constitute justifiable and lawful grounds for dismissal. In this regard, the Claimant cited the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* [2013] eKLR wherein the Court observed that in a termination case, the employer is obligated to hear and consider any representations by the employee before making the decision to dismiss or give other sanction. It was the Claimant's submission that he is neither guilty of any misconduct nor was there any reason given to warrant his abrupt and unlawful dismissal and that the dismissal was thus unlawful, unfair, irregular hence null and void.
8. The Claimant further submitted that he is entitled to the unpaid salaries and notice pay claimed and that it was also evident that the Respondent failed to grant him paid leave and pay him his lawful dues contrary to section 28(1) of the *Employment Act*. That the Respondent's failure to regulate his working hours and subjecting him to overtime work with no pay was contrary to section 27(1) of the *Act* and that section 35(5) of the *Act* requires the payment of service but which did not happen in this case. He asserted that he is entitled to a certificate of service as under section 51(1) of the *Act* and urged the Court to award him compensation equivalent to 12 months' pay in terms of section 49(1)(c) of the *Act*. In making the prayer for maximum award, the Claimant relied on the decision in *Fredrick Ouma v Spectre International Ltd* [2013] eKLR in which the Court awarded the claimant 12 months' gross salary on account of wrongful dismissal and/or termination of employment.
9. On the issue of underpayment, the Claimant submitted that given the minimum wage for security guards was at Kshs. 14,000/- for those working in Nairobi, he urged this Court to compensate him at the said rate. He cited the case of *Abisalom Ajusa Magomere v Kenya Nut Company Limited* [2014] eKLR wherein the Court awarded the claimant 12 months' pay for unfair termination, one month's



salary in lieu of notice, leave pay, service pay, and salary for 7 days worked. The Respondent did not file submissions in the matter.

10. The Claimant was terminated on 22nd January 2018 and the termination was backdated to 11th December 2017. The Claimant was not given the requisite 30 days' notice under section 35(1)(c) of the Employment Act, neither was he issued with notices and letters to show cause prior to the termination. Had this been a redundancy, the Respondent never notified the Labour Office of the reasons for the termination. As the Claimant was not accorded an opportunity to be heard in defence prior to his termination per section 41 of the Employment Act, his termination was ipso facto unfair and unlawful. The Claimant was thus entitled to receive pay for the month of January 2018 since the termination was not effected till 22nd January 2018. The Claimant was not candid when he sought underpayment for the entire duration of his employ. If he knew he was underpaid, why did he wait until he was terminated to raise the issue? The sums sought under this head would therefore not be due as he acquiesced to the reduced pay. In relation to overtime, the Claimant did not demonstrate that he ever sought any dues on this account further demonstrating he had accepted to work overtime, if at all, for free. The Claimant would in the final analysis be entitled to:
- a. One month's salary as payment in lieu of notice – Kshs. 14,000/-
 - b. Unpaid salary for the months of February, March and April 2017 – Kshs. 42,000/-
 - c. Salary for December 2017 and January 2018 – Kshs. 28,000/-
 - d. Severance pay – Kshs. 91,000/-
 - e. Costs of the suit.
 - f. Interest at court rates on the sums in (a), (b), (c) and (d) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH 2024

NZIOKI WA MAKAU

JUDGE

