



**Tatu v Radar Security Company (Cause 519 of 2017)
[2023] KEELRC 325 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 325 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 519 OF 2017
AK NZEI, J
FEBRUARY 9, 2023**

BETWEEN

RICHARD MUTUNGA TATU CLAIMANT

AND

RADAR SECURITY COMPANY RESPONDENT

JUDGMENT

1. The suit herein was instituted on 23rd June 2017 vide a Memorandum of Claim dated 4th June 2007. The Respondent entered appearance on 22nd August 2017 and filed a statement of defence on the same date. Amended statement of claim was filed on 10th January 2018 and a further amended statement of claim was filed on 9th October 2020, alongside a Notice of Motion dated 6th July 2020 seeking leave to further amend the Claimant's statement of claim. The application was allowed on 20th April 2021 by consent of Counsel for both parties; and the further amended statement of claim was deemed as duly filed, subject to payment of Court fees. Court (filing) fees is shown to have been paid on 21st April 2021.
2. The Respondent is not shown to have amended its statement of defence.
3. It is pleaded in the Claimant's further amended statement of claim that the Claimant was employed by the Respondent as a guard on 5th November 2015 at a monthly salary of ksh. 13,095 and other benefits and terms as per the letter of employment. The Claimant further pleaded that on 1st December 2016, the Respondent unlawfully terminated the Claimant's employment on false allegations without payment of his dues. That the termination was in contravention of the Employment Act 2007 and the Constitution as the Claimant was not given any notice and the reason given (for termination) was false; and that the Claimant was not given an opportunity to be heard despite his request in that regard.
4. The Claimant set out his claim against the Respondent as follows:-
 - a. House allowance (15% \times 13,095 \times 13 months).....ksh. 25,535.25



- b. NSSF dues deducted not remitted.....ksh 1,600
 - c. Leave for one yearksh. 13,095
 - d. Leave travelling allowances.....ksh. 3,300
 - e. Public holidays and Sundays worked (November 2015 to December 2016).....ksh. 26,500
 - f. Overtime worked (November 2015 -December
 - g. =2016- 4 hours per day X62.50 per hour).....ksh. 90,000
 - h. Twelve months' compensation for unlawful termination (12x13,095).....ksh. 157,140
 - i. Severance pay.....ksh. 6,547.50
5. In the statement of defence filed on 22nd August 2017 before amendment and further amendment of the Claimant's statement of claim, the Respondent denied the Claimant's claim and pleaded:-
- a. that termination of the Claimant was due to termination of contract between the Respondent and a third party.
 - b. that the Claimant was given a fair hearing and notice vide a letter dated 1st December 2016.
 - c. that termination was lawful and fair, and was due to factors beyond the Respondent's control.
6. When the matter came up for hearing on 17th May 2022, the Respondent did not attend Court, though shown to been served with a hearing notice. The Claimant testified and adopted his filed witness statement dated 6th July 2020 as his testimony. He also produced in evidence the four documents listed on his list of documents dated 14th June 2017. Documents produced in evidence included the Claimant's payslips for the months of February and March 2016, and the Claimant's NHIF statement/ data summary.
7. The evidence presented by the Claimant was not controverted, and stands unchallenged as the Respondent did not testify in defence. It was stated as follows in the case *Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others -nairobi*[milimani] Hcc No. 1243 Of2021:-
- “it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”
8. The Claimant pleaded and testified that he was employed by the Respondent for a period of thirteen months, and that his employment was unlawfully and unfairly terminated, without notice and without being given an opportunity to be heard. This evidence stands unchallenged.
9. Issues that present for determination, in my view, are as follows:-
- a. whether termination of the Claimant's employment by the Respondent was unfair.
 - b. whether the Claimant is entitled to the reliefs sought.
10. On the first issue, the Respondent was not shown to have issued the Claimant with a termination notice under Section 35(1) (c) of the *Employment Act*, and was not shown to have complied with the



procedural requirements of Section 41 of the said Act. Termination of the Claimant's employment by the Respondent was procedurally unfair. I so find and hold.

11. On the second issue, and having found that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of seven months salary as compensation for unfair termination of employment. That is ksh. 13,095X7=91,665.
12. On the claim for unpaid house allowance, the Claimant exhibited copies of his payslip for February and March 2016. The payslips do not show that the Claimant's monthly salary of ksh. 13,095 including house allowance. Further, no evidence was presented to the Court to show that the salary paid to the Claimant was consolidated to include an element meant to pay rent as contemplated in Section 31(1) (2) (a) of the *Employment Act*. The claim for ksh. 25,535.25 being unpaid house allowance is allowed.
13. The claim for ksh. 13,095 being unpaid leave for one year is allowed. The Claimant pleaded and testified that he was in the Respondent's employment for thirteen months. The claim for ksh. 3,300 being leave travelling allowance was not proved, and is declined.
14. The claims for public holidays and overtime, which are in the nature of special damages, were not specifically pleaded and were not proved. The same are declined. The claim for severance pay is declined as termination of the Claimant's employment was not on account of redundancy pursuant to Section 40 of the *Employment Act*.
15. The claim for unremitted NSSF deductions is declined. Once deducted from an employee's salary, statutory deductions cease to be the employee's entitlement. They become entitlements of statutory bodies for which the deductions were made, in this case the NSSF, which has elaborate legal mechanisms to force remittance by an employer.
16. Finally, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Compensation for unfair termination of employmentksh. 91,665
 - b. Unpaid house allowance.....ksh. 25,535.25
 - c. Unpaid leave for one year.....ksh.13,095Total ksh.130,295.25
17. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
18. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



.....for Claimant

..... for Respondent

