



REPUBLIC OF KENYA



KENYA LAW
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**Ikuti v Tuangaze Limited (Cause 2154 of 2017)
[2023] KEELRC 583 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 583 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2154 OF 2017
SC RUTTO, J
MARCH 10, 2023**

BETWEEN

ANTHONY MUTINDA IKUTI CLAIMANT

AND

TUANGAZE LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent as a night security guard with effect from July 5, 2013. That he served with loyalty and diligence until January 27, 2017 when he was unfairly terminated from employment. It is for this reason that the claimant seeks against the respondent the sum of kshs 264,788.10 being one month's salary in lieu of notice, annual leave pay, salary underpayments and compensatory damages for unfair termination.
2. The respondent opposed the claim through its Reply to the Statement of Claim, in which it averred that the claimant ceased to be its employee on December 31, 2016 and became an employee of Chonjo Security Services from January 1, 2017. That together with other guards, the claimant agreed to be transferred to the said Chonjo Security Services which company had been outsourced by the respondent to provide security services. To this end, the respondent denied liability towards the claimant and asked the Court to dismiss the suit in its entirety.
3. The matter proceeded for hearing on October 6, 2022 and both sides called oral evidence.

Claimant's case

4. The claimant testified in support of his case and to start with, adopted his witness statement and supplementary witness statement to constitute his evidence in chief. He further produced the documents filed together with his claim as exhibits before Court.



5. It was the claimant's testimony that he worked for the respondent for 3 years 6 months. That he stopped working for the respondent on January 15, 2017 when his services were transferred to another company called Chonjo Security Services. That in terminating his employment, the respondent did not follow due process and did not issue him with a letter of dismissal. He termed his termination as unjustified and unlawful. That he felt psychologically traumatized by the respondent's action as he had never been involved in any disciplinary issue.
6. That during his employment with the respondent, he was earning a monthly salary of kshs 8,500.00 which was exclusive of house allowance. In this regard, he stated that the said salary was below the minimum wage prevailing at the time.
7. It was the claimant's further evidence that the respondent did not pay him his rightful dues or issue him with a certificate of service.

Respondent's case

8. The respondent called evidence through its Managing Director, Mr Njeru. Similarly, he adopted his witness statement and bundle of documents to constitute his evidence in chief.
9. It was Mr Njeru's evidence that the claimant worked for the respondent from July, 2013 upto December, 2016. That the claimant was earning a monthly salary of kshs 12,500/=. That he used to receive kshs 8,500/= through his bank account while he would collect kshs 4,000/= from a shop where he was stationed at. That this was the arrangement between the claimant and the respondent every month. That therefore, the claimant was not being honest as he was paid the said kshs 4,000/= every month through the shop.
10. Mr Njeru further told the Court that in a meeting held on November 30, 2016, with the claimant and two other guards, he communicated the management's decision to outsource the security function. That the meeting was also attended by two operations staff and the Director of Chonjo Security Services, Mr Elias Njeru. That subsequently, the claimant and his colleagues were to continue working for Chonjo Security Services under the same terms. He added that this was good for the security guards as they had prospects of vertical mobility unlike in the respondent company.
11. That the claimants and his colleagues did not have a problem being transferred to Chonjo Security Services, subject to payment of their severance pay for the period worked with the respondent. That therefore, on December 31, 2016, all the three guards including the claimant ceased being employees of the respondent and seamlessly transitioned to Chonjo Security Services as from January 1, 2017. He thus denied the claimant's assertion that he was terminated from employment.
12. That the claimant went for his severance pay on January 25, 2017 in line with the meeting held on November 30, 2016. It was his further testimony that the claimant did not lose even a day of income as he was not terminated.
13. That in the first week of January, 2017 Chonjo Security Services lamented that the claimant was found not to be on duty twice during night supervision and had not given satisfactory explanation for his absence.
14. It was his further evidence that around April, 2017, he received summons from the County Labour Office and following a meeting with the County Labour Officer, by the name Madam Juma, it was established that the claimant had no grounds to pursue any claim against the respondent. That it was further established that the sum of kshs 10,625/= paid to the claimant was erroneous as the respondent was remitting National Social Security Fund (NSSF) dues on account of the claimant.



15. Mr Njeru concluded his testimony by stating that the claimant has nothing to claim from the respondent as he was promptly paid as agreed and he took all his leave days remaining with a balance of 16 days only.

Submissions

16. It was submitted by the claimant that the respondent failed to discharge its obligations of filing employment records hence cannot purport to put him to strict proof in matters within its knowledge. That the claimant's evidence that he was dismissed and the circumstances leading to his dismissal were clear, consistent and reliable. On this issue, the claimant placed reliance on the cases of Caleb Ochieng Gogo v Oil Seals and Bearing Centre Limited (2021) eKLR and Philemon Oseni Kidavi v Brinks Security Ltd (2018) eKLR.
17. It was further submitted that the claimant had done nothing wrong to warrant his termination. That the respondent blatantly ignored to follow the procedural fairness envisaged under Section 41 of the Employment Act. To buttress his submissions, the claimant cited the cases of Moi Teaching and Referral Hospital v James Kipkonga (2019) eKLR and Kenafri Industries v John Gitonga Njeru (2016) eKLR.
18. On the part of the respondent, it was submitted that the claimant's allegations that his services were terminated, is unsupported. That subsequently, the claimant has not discharged its burden of proof under section 47(5) of the Employment Act. That he who alleges must prove.

Analysis and determination

19. I have considered the issues raised in the pleadings, the evidence on record as well as the opposing submissions and the following issues stand out for determination: -
- a. Whether the claimant was terminated from employment;
 - b. If so, was his termination unfair and unlawful?
 - c. Is the claimant entitled to the reliefs sought?

Whether the claimant was terminated from employment

20. It was the claimant's case that his services were unfairly terminated on January 27, 2017. The respondent has denied this assertion and avers that the claimant ceased being its employee on December 31, 2016 when he was transitioned to another security by the name Chonjo Security Services Limited. That the claimant was thereafter paid severance pay in the sum of kshs 10, 625/=.
21. In light of the above contest, I find it imperative to revisit the provisions of Section 47(5) of the Employment Act, which provides as follows:
- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer." Underlined for emphasis
22. In expounding the import of the above statutory provision, the Court of Appeal had this to say in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR: -

“So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this



foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

23. Therefore, the claimant had the onus of proving that he was indeed terminated from employment by the respondent.
24. In this case, the claimant did not provide any evidence of his termination hence the burden was not discharged. If anything, his evidence was in consonance with the respondent's case that he had been transferred to Chonjo Security Services. It is apparent that the claimant was unhappy with the transfer of his employment as he stated in evidence that he stopped working for the respondent when he was transferred to Chonjo Security Services and that he refused to go.
25. From the record, it was evident that the claimant's services had been transferred to Chonjo Security Services under an outsourcing arrangement it had with the respondent. In this regard, the RW1 exhibited a copy of minutes relating to a meeting he held with the claimant, his colleagues and the representative from Chonjo Security Services. At Min 3/11/16 of the said minutes, it was recorded as follows: -

"He also communicated that the company made a decision to outsource security services to Chonjo Security Services because their experience (sic) in security matters. In addition, he reported to the meeting that staff in security department will seamlessly be moved to Chonjo Security Services and will be retained in their current stations and on existing terms."
26. Further, on record is a Notice to the claimant which reads in part: -

"As discussed and agreed in the meeting held yesterday, we wish to give you notice of termination of your services from Tuangaze Limited to Chonjo Security Services with effect from January 01 2017. In the meantime, we are (sic) payment for your dues will be processed as agreed in the meeting."
27. Further, the respondent exhibited a deployment schedule by Chonjo Security Services which indicates the commencement date as January, 2017. The schedule which provides the names of the guards and their respective stations, names the respondent as the client. The claimant is named as having been assigned to Umoja. Notably, he did not dispute this evidence. It is thus evident that as at January, 2017, he had been absorbed into Chonjo Security Services.
28. What manifests from the foregoing is that the employment relationship between the parties came to an end upon the respondent entering into the outsourcing arrangement with Chonjo Security Services. Therefore, the claimant was not terminated, rather his services were outsourced to Chonjo Security Services.
29. In the case of *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR, the Court of Appeal held as follows with regards to outsourcing: -

"In principle therefore, outsourcing of employees is not illegal or untoward, provided it is carried out in accordance with fair labour practices, and the process adopted is not aimed at rendering an employee redundant."



30. Further, in the case of *Kenya Union of Commercial Food and Allied Workers v Jamii Distributors E.A Limited* [2021] eKLR, it was held that: -

“Labour Outsourcing is gaining popularity with most organizations across the world opting for it. Of course, there has been resistance and suspicion about it but this has not prevented it from gaining ground. It is at the discretion of an organization, when it comes to restructuring their business operations in order to sustain profitability and remain competitive. Usually, a Court will not interfere with management discretion on how to conduct its operations provided they are aligned with the relevant Labour laws and regulations.”

31. In this case, the respondent stated that the employees whose services had been outsourced to Chonjo Security Services were to serve under the same terms of employment hence the outsourcing was without loss of benefits. Further, the said employees were also paid severance pay and with regards to the claimant, he was paid kshs 10,650/=. This was evidenced by a bank statement which reflects a debit in favour of the claimant on January 27, 2017.

32. It is also notable that despite the claimant’s contention that the terms under Chonjo Security Services were less favourable, in that they would be paid less salary without NHIF and NSSF, there was no evidence from his end to this effect. If anything, is apparent that he did not last a month at Chonjo Security Services hence one wonders the basis of his information.

33. In light of the foregoing, I do not find anything to show that the claimant was irregularly or improperly outsourced to Chonjo Security Services. On the converse, it would appear that it was him who was not keen to join Chonjo Security Services hence opted out of the arrangement.

34. In total sum, it is my finding that the claimant was not terminated but his services were outsourced to Chonjo Security Services.

35. Having found as such, it is not logical to determine the second issue as it falls by the wayside.

Reliefs?

36. As the Court has found that the claimant was not terminated from employment, the claim for compensatory damages and notice pay collapse.

37. With regards to leave, the respondent admitted in his witness statement that the claimant was entitled to 16 days leave. This is also in tandem with the leave record exhibited by the respondent dated December 8, 2016. It is therefore the Court’s finding that the claimant is entitled to the same.

38. With regards to the underpayments, the claimant stated that he was paid kshs 8,500/= as monthly salary while the respondent stated that the claimant was earning the sum of kshs12,500/=. That claimant would be paid kshs 8,500/= through his bank account and would later collect kshs 4,000/= at the shop where he was stationed at.

39. Despite this assertion, there was no evidence from the respondent’s end to prove that the claimant collected the said kshs 4,000/= in cash from the said shop. Indeed, there was no evidence in whatever form or manner proving acknowledgment of receipt of the money by the claimant. Afterall, it was part of his salary hence there must have been a paper trail to evidence payment. In the event the money was paid as claimed by the respondent and no record was maintained to that effect, then the same was quite imprudent if not casual, on the respondent’s part. In absence of evidence that the claimant actually received the said kshs 4,000/= every month, I cannot help but find that as per the record,



the claimant was paid a monthly salary of kshs 8,500/= as opposed to kshs 12,500/=. Thus, was the claimant underpaid?

40. The claimant was employed from July 5, 2013. From the evidence presented, he was stationed within Nairobi, hence pursuant to Legal Notice No. 197 of 2013, which prescribes the applicable minimum wage payable to various categories of employees at the time, he was entitled to a monthly basic salary in the sum of Kshs 10,911.70. The salary payable was later reviewed upwards to kshs 12,221.10 through Legal Notice No. 116 of 2015, which came into operation on May 1, 2015. This therefore confirms the claimant's assertion that his salary was underpaid and he is entitled to the balance.

Orders

41. In the final analysis, the claim partially succeeds and the claimant is awarded:-
- a. Underpaid salary from July 5, 2013 to April 30, 2015 for 24 months being (kshs 10,911.70-kshs 8,500) Kshs 57,880.80; and from May 1, 2015 to December 31, 2016 for 20 months being (kshs 12, 221.10-kshs 8,500) kshs 74,422.00.
 - b. Unpaid leave days being kshs 6,517.86
 - c. The total award is Kshs 138,819.86.
 - d. Interest on the amount in (c) at court rates from the date of Judgement until payment in full.
 - e. The claimant shall also have the costs of the suit.
42. The respondent shall also issue the claimant with a certificate of service within 30 days from the date of this Judgment.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of March, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr Njuguna

For the Respondent Mr Njeru (In person)

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO



JUDGE

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