



**Kenya National Private Security Workers Union v Berdma Security Services Limited
(Cause E018 of 2022) [2023] KEELRC 1455 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E018 OF 2022
MA ONYANGO, J
JUNE 15, 2023**

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

JUDGMENT

1. The Claimant is a trade union registered under the *Labour Relations Act* to represent employees in the private security sector.
2. The Respondent is described in the Memorandum of Claim as one of the private security companies operating its business in Eldoret and also in Kenya at large.
3. The Claimant therefore the appropriate trade union for the employees of the Respondent.
4. The claim herein was instituted by the Claimant on behalf of the Grievant Jackson Kiplagat Biwott, referred to in the Claim as an employee of the Respondent and a member of the Claimant Union.
5. The Claimant alleges that the Grievant was employed by the Respondent in November 2020 as a private security officer at a salary of Kshs. 6000 per month. That the Grievant worked for the Respondent August 2021 when he left employment following refusal of the Respondent to pay his salary for December 2020 and June 2021.
6. It is averred that when the Grievant inquired about the salary he was informed that there was a theft where he was working. The Claimant avers that no report was made to the police and neither was the Grievant asked to write a statement about the alleged incident. The Claimant avers that this was an excuse to deny the Grievant his salary.



7. The Claimant further avers that the Respondent refused to pay the Grievant his annual leave, overtime, public holidays, off duties and underpayment which compensation would amount to Kshs 306,569 as particularized in the Statement of Claim.
8. It was pleaded that the Grievant reported the issue to the Claimant who engaged the Respondent but that the Respondent refused to co-operate. That the Claimant reported a dispute to the Minister for Labour but it was not resolved after the Respondent refused to send a representative to attend meetings called by the conciliator appointed by the Minister of Labour.
9. The Claimant stated that it was after the Respondent failed to attend conciliation meetings that the Conciliator issued a certificate of disagreement to the claimant giving the claimant the go ahead to institute this claim before this court.
10. In the Memorandum of Claim dated 18th July 2022 and filed on 22nd August 2022, the Claimant seeks the following remedies on behalf of the Grievant:

Demand and Prayers.

That, we now request the court to use its powers and order the payment of the grievant/ claimant dues as per the demand listed below.

1. 2 Months salary Ksh.14, 038 X2 Ksh.28, 076/=
2. Underpayment of wages
14,038 — 6000 = Ksh.8, 038 X 12Months Ksh.96,456/=
3. Overtime 14 038 X 4 X12 X26 Ksh.77, 864/= 225
4. Rest days 4 X 677Rate per day X 12Months Ksh.32,496/=
5. Salary for the months of June and July2021= Ksh.14, 038 X 2 =28,076 +3000 of December 2020 + 15% Housing Allowances =2,105 Ksh.33, 181/=
6. 11 days public Holidays X 677Rate per day X 12Months=Ksh.32, 496/=
7. 6000, he was not paid in the months of December and June 2020 =Ksh.6, 000/=
8. Compensation for unfair Labour treatment
9. Cost of the dispute
Grand Total =306,569/=
11. The Memorandum of Claim and Summons to enter appearance were served on the Respondent on 25th August 2022 and affidavit of service sworn to by the process server Mr. Kenneth O. Oduor was duly filed on 23rd September 2022.
12. The Respondent did not enter appearance. It further did not file a response to the Memorandum of Claim.
13. The was certified to proceed as an undefended Claim. At the hearing on 13th April 2023 the Grievant testified as CW1 in furtherance of his case and reiterated the averments in the Memorandum of Claim as already set out herein above.
14. At the close of the Claimant's case, the court directed for written submissions to be filed. The submissions on behalf of the Claimant was filed on 8th May 2023.



Determination

15. I have considered the Memorandum of Claim, the documents annexed thereto, the evidence of CW1 as well as the submissions on record. It is trite that in an undefended claim like this one it is imperative that the Claimant proves the existence of an employer/employee relationship as a preliminary point before delving into proof of the prayers in the Claim.
16. In the case of *Monica Kanini Mutua v Al-Arafat Shopping Centre & another* (2018) eKLR, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.
17. Further, in the case of *Herman Ilangarwa Shidakwa v Armati Security Solutions Limited* (2019) eKLR, the court noted that the Respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the Respondent through bank statements, which fact was not contested by the Respondent. The Court proceeded to make a finding in that case that the claimant had been unfairly terminated.
18. Where the Claimant is a trade union like in the instant case, it must in addition prove that it has locus standi to represent the grievant.
19. Proof of mandate can be by way of a recognition agreement or check-off forms signed by employees. The union may also produce receipts of either membership fees or subscriptions paid directly to the union by members, or membership cards. Section 52 of the *Labour Relations Act* permits an employee to make direct payments to the union. The Section provides as follows:

Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by the constitution of the trade union directly to the trade union.
20. The Claimant has not submitted any evidence to prove that it has recruited the grievant or any employees of the Respondent into its membership to authorize it to represent the said workers.
21. Even if I was to ignore the fact that the Claimant has not proved that it has *locus standi* to represent the Grievant, there is no evidence to prove that the Grievant was ever in the employment of the Respondent. Such evidence can be in the form of documents such as letter of appointment, payslips, payment vouchers, or even a co-worker of the Grievant testifying. Without such evidence the Court cannot make a presumption that the Claimant was in the employment of the Respondent.
22. Further, the Claimant has prayed for monetary compensation that is supposed to be based on salary of the Grievant. Again these can only be awarded upon proof.
23. Had there been proof of the employment relationship the court would have accepted the averments of the Grievant with respect to his salary as there is reasonable presumption that an employee works for wages and is entitled to statutory benefits. Without proof of employment relationship, the Court cannot make such presumptions
24. The Claimant has further not adduced any evidence such as letters of appointment or pay slips to prove that the workers were underpaid. There is further no evidence adduced by the Claimant of non-payment of overtime, public holidays, leave and housing allowances.
25. Coming to the prayers sought by the Claimant, there is no tabulation of the itemized claims. The Court cannot make blanket orders as sought by the Claimant under prayers 1, 2, 3, 4, 5, 6, 8 and 9.



26. For the foregoing reasons I find that the Claimant has not met the burden of proof as required under section 47(5) of the *Employment Act*. The section provides that in any complaint for unfair termination or wrongful dismissal the burden of proving that the termination or dismissal has occurred shall rest on the employee. the employer's task is only to justify the grounds for termination or dismissal.

27. The Claim herein therefore fails for the reasons given. The same is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 15TH DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

