



REPUBLIC OF KENYA



KENYA LAW
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**Okwangaise v Spur Security Services Limited (Cause 1681 of 2015)
[2023] KEELRC 3203 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3203 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1681 OF 2015
MA ONYANGO, J
NOVEMBER 30, 2023**

BETWEEN

KIZITO EKWARO OKWANGAISE CLAIMANT

AND

SPUR SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. *Vide* a Memorandum of Claim dated 17th September, 2015 as amended on 11th March 2019 the Claimant seeks the following remedies against the Respondent:
 - a. A declaration that the Respondent's actions to terminate the Claimant from his employment were unlawful, unfair and inhumane.
 - b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
 - c. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling to Kshs. 682,267.29/=
 - d. Interest on the award from the date of filing suit till payment in full.
 - e. Cost of this suit plus interest thereon.
2. The Respondent filed a Statement of Response denying all averments in the Memorandum of Claim.
3. At the hearing the Claimant testified on his behalf as CW1 while the Respondent called two witnesses, Samuel Muholi, RW1 and Elijah Waiyaki, RW2. The parties thereafter filed written submissions.



Claimants Case

4. The Claimant's case is contained in his Amended Memorandum of Claim, evidence adduced in court and written submissions.
5. It is the Claimants case that he was employed by the Respondent, a private security company, a security guard on 3rd March 2010. He worked for the Respondent until 3rd September, 2012 when he was sent on compulsory leave. His last salary was Ksh.4500 per month.
6. The Claimant avers that he was a member of Kenya Union of Commercial, Food and Allied Workers which filed a suit against the Respondent at the Industrial Court, the predecessor of the Employment and Labour Relations Court over underpayment of salary. The court issued orders compelling the Respondent to pay the employees, including the Claimant, the difference between the salary they were paid and the statutory minimum wage and all previous underpayments.
7. The Claimant avers that it is the judgment of the court that caused the Respondent to send him on compulsory leave for 3 months. That upon resuming duty at the expiry of the 3 months he was told to go back home and wait until the Respondent called him back. That he was never called back to work. That while on compulsory leave he was not paid salary.
8. Under cross examination the Claimant stated that his employment was verbal and he was originally paid in cash but later he was paid through family Bank at Yaya Centre. The Claimant stated that he signed a leave form when he was sent on compulsory leave. The approval of the leave indicated that he was on off days until further notice even though he had filled a leave form for 21 days leave.
9. The Claimant stated that the underpayments he was seeking in this suit were for the period after the period covered by the earlier suit that was filed by this union in 2016 which were up to December 2010. He testified that he was still underpaid after the judgement in the suit filed by the Union.

Respondent's Case

10. RW1 testified that he was employed by the Respondent as a security guard and rose through the ranks to the position of Operations Manager.
11. In his witness statement dated 23rd September, 2022 which he adopted as his evidence, RW1 stated that he did not know the Claimant. At the hearing he stated he could not recall if the person who appeared in court was the Claimant.
12. RW1 stated that the leave forms filed by the Claimant were genuine but the signatures in the leave forms were not his. He denied sending the Claimant on compulsory leave.
13. Under cross examination RW1 stated that he did not have employment records as he had left employment of the Respondent almost 10 years prior to the date he was testifying in court.
14. He testified that the Claimant's salary was Ksh.4500. That the Claimant was not housed or paid house allowance by the Respondent. That for work done on public holidays the Claimant was given an alternative day off. That the Claimant worked from 6 am to 6 pm or from 6 pm to 6 am and was not paid overtime. He testified that he could not confirm if NSSF was paid as that was the responsibility of the accountant.
15. RW2 adopted his witness statement dated 23rd September 2022 in which he stated that he was a marketing officer for the Respondent from the year 2006 and he did not know the Claimant.



16. Under cross examination he stated that he never saw the Claimant while at work. That his work involved visiting guards at their work stations. He stated he did not know the station in which the Claimant worked. He stated that the leave forms produced by the Claimant were not genuine. He further stated that he had not filed any employment records for the period when the Claimant was in employment. He denied that the Claimant's employment was terminated.

Submissions

17. In his written submissions the Claimant relied on the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR and stated it was the duty of the Respondent to prove valid reason for termination of the Claimant's employment as provided in section 43 of the *Employment Act* which it failed to do. That the Respondent further failed to prove fair procedure in terms of section 41 of the *Employment Act*.
18. The Claimant further relied on the cases of *Walter Ogal Anuro v Teachers Service Commission* and *Kenya Union of Commercial, Food and Allied Workers v Meru North Farmers Sacco Limited*.
19. It was submitted that the Claimant was entitled to pay in lieu of notice, house allowance, untaken leave, public holidays, overtime and underpayments. It was also submitted that the Claimant is entitled to compensation for unfair termination.
20. For the Respondent it was submitted that the Claimant was an employee of the Respondent but his services were never terminated.
21. It is submitted that the leave forms filed by the Claimant show that he took annual leave. That there is no evidence that he was sent on compulsory leave.
22. On the prayers, the Respondent submitted that the Claimant is not entitled to notice as his employment was not terminated by the Respondent. That he has not proved he is entitled to house allowance; that he went on leave as is evident from the Claimants documents at pages 6 – 8 and that underpayments were already awarded and paid by the Respondent as pleaded in paragraph 4 and 5 of the Claim.
23. On public holidays the Respondent submitted the same was compensated by an alternative day off: that the claim for overtime has not been proved; that Gratuity/service pay is not payable as the Claimant was a member of NSSF and that the prayer for loss of income and trauma are strange. Further, the Claimant did not prove that he suffered any trauma or loss of income.

Analysis and Determination

24. Having considered the pleadings and evidence on record the issues for determination are whether the Claimant's employment was unfairly terminated by the Respondent and if he is entitled to the remedies sought in his Memorandum of Claim.
25. It was the Claimant's case that he was sent on compulsory leave and never allowed to resume duty after a court decision filed by the Kenya Union of Commercial Food and Allied Workers which was in favour of the employees, the Claimant included.
26. RW1 denied sending the Claimant on compulsory leave while RW1 denied any knowledge of the Claimant. However, in the submissions it is admitted that the Claimant was an employee of the Respondent but went on normal annual leave, not compulsory leave.



27. The leave forms filed by the Claimant as documents (i), (ii) and (iii) of the verifying affidavit at Document (i) is the application for annual leave of 21 days dated 3rd September, 2012.
28. In the approval of leave at Document (ii) the Claimant's annual leave of 21 days was approved in an off-duty pass slip dated 3rd September, 2012. There is no indication of the date the Claimant was to start or end the leave.
29. According to the Claimant he was directed to take the leave after the court decision and was told to go for 3 months. When he reported back he was told to continue with the leave until he was called back.
30. The Respondent neither produced documents to clarify the situation not explained the reason why the application for annual leave was approved in an off-duty pass slip without any indication of the date the Claimant was to report back to work.
31. There was no evidence adduced by the Respondent to controvert the averments of the Claimant that he was sent on compulsory leave as a consequence of having been one of the beneficiaries of a court decision.
32. There was no allegation that the Claimant absconded duty, both witnesses of the Claimant opting to deny any knowledge that the Claimant ever worked with the Respondent.
33. Under section 10(6) as read with 10(7) of the *Employment Act*, it is the duty of an employer to keep and produce documents to controvert the allegations of an employee failing which the burden of proof shifts to the employer.
34. In this case, the Respondent failed to rebut the evidence of the Claimant that he was sent on compulsory leave for participation in a court case that was decided against the Respondent.
35. Section 46 of the *Employment Act* provides that taking disciplinary action against an employee for filing a complaint or suit against an employer is unfair labour practice and any termination arising therefrom is an unfair termination.
36. I therefore find that the Respondent unfairly terminated the Claimant's employment as a consequence of the court case. I further find that the Claimant was sent on compulsory leave and never allowed to resume duty.

Remedies

Pay In Lieu Of Notice

37. Having found that the termination of the Claimant's employment was unfair, he is entitled to pay in lieu of notice which I hereby award him. I award him Kshs. 11,007.36 being the consolidated wage at basic minimum wage of Kshs. 9571.62 plus 15% house allowance.

House Allowance

38. The Claimant was not paid house allowance as admitted by RW1. He is entitled to the same. The statutory minimum pay having been Ksh.9571.62 at the material time, the house allowance at 15% of basic pay was Kshs. 1435.75 as provided in the *Regulation of Wages (General) Order*. I award the Claimant Ksh.34,457.83 as claimed being house allowance for the 2 years that he worked for the Respondent.



Annual Leave

39. The Claimant testified that the compulsory annual leave was unpaid. This was not rebutted by the Respondent. I therefore award him annual leave for the entire period he worked with the Respondent being 2 years.
40. Annual leave entitlement being 21 days per year, the Claimant was entitled to 42 working days. The proper tabulation is salary divided by 26 working days x 42 leave days. I award the Claimant Kshs. 15,461.90.

Public Holidays

41. The Claimant testified that he worked on all public holidays and was not paid overtime. The Respondent did not prove that the Claimant was given alternative leave days whenever he worked on public holidays as pleaded. I therefore award the Claimant 11 public holidays per year for 2 years being 22 public holidays at double the daily rate of pay as provided in the *Regulation of Wages (Protective Security Services) Order* at Kshs.16,198.80.

Underpayments

42. RW1 admitted that the Claimant was paid Ksh. 4500 per month instead of the statutory minimum rate of Ksh.9571.62. He is thus entitled to the difference between the statutory minimum rate of pay and the salary he was paid being $(9571.62 - 4500) = 5071.62 \times 29$ months being Ksh 147,076.98 which I award him.

Off Days

43. The Claimant is awarded off days not taken during the period he worked for the Respondent at double rate of pay as prayed in the sum of Ksh.61,258.37.

Overtime

44. RW1 stated that the Claimant worked for 12 hours daily. The Regulation of Wages (Protective Security Services) Order provides for a maximum of 52 working hours per week. Having worked for 6 days at 12 hours per day, the Claimant worked for 72 hours per week. He therefore worked an extra 3.2 hours daily and not 4 hours as prayed. The Claimant is therefore entitled to 20 hours per week for 52 weeks a year for 2 years at being 2080 hours at 1.5 times the hourly rate. I award him Kshs. being Kshs. 172,289.81 as claimed.

Compensation

45. Having been unfairly terminated, the Claimant is entitled to compensation. Taking into account all the circumstances of this case especially the factors set out under Section 49 (4) of the *Employment Act*. I award the Claimant 4 months salary as compensation in the sum of Ksh.44,029.50 $(11,007.36 \times 4)$

Costs

46. The Respondents shall pay the Claimants costs of this suit.
47. Interest shall accrue from the date of judgement.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2023.

M. ONYANGO



JUDGE

