



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.969 OF 2016

(Before Hon. Justice Ocharo Kebira)

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

VERSUS

BOARD OF TRUSTEES SALVATION ARMY KAWANGWARE CORP.....RESPONDENT

JUDGMENT

1. The Claimant herein is a trade union registered pursuant to the provisions of section 19 of the Labour Relations Act, 2007 it brought this claim against the Respondent on behalf of one of its members, Musa Imbuye (the grievant) against the Respondent seeking for the following reliefs:

- (i) A declaration that the Respondent's action to summarily dismiss the Grievant from employment was illegal, unlawful, unfair and inhumane.
- (ii) One month's salary in lieu of notice Kshs. 12,221 – in accordance with the minimum Wage Order of 2015.
- (iii) Underpayment of wages Kshs. $10,912 - 6000 = 4,912 \times$ Kshs. 117,888.
- (iv) Unpaid house allowance Kshs. $10,912 \times 15/100 = 1,636 \times 5$ years
- (v) Unpaid standard overtime Kshs. $10,912 \times 87 \text{ hours} \times 1.5/225 = 6,328 \times 24 \text{ months} =$ Kshs. 151,892.
- (vi) Leave Kshs. $12,221 \times 5 =$ Kshs. 61,105.
- (vii) 12 months salary in compensation for unfair dismissal.
- (viii) Certificate of service.
- (ix) Punitive damages.
- (x) An order for the Respondent to pay the Claimant costs of this claim plus interest thereon.

2. Upon being served with summons to enter appearance, the Respondent did not file a memorandum of appearance and a response to the Claimant's claim. The matter proceeded for formal proof.

3. The formal proof was conducted on the 7th December 2021. The Grievant testified in court. He urged the court to adopt his witness statement dated 26th May 2016 as his evidence in chief, and the documents that were filed under the list of documents of the even date as his documentary evidence.

4. He testified that he started working with the Respondent in January 2005. His salary being Kshs. 6000. He worked with the Respondent as a security guard for 10 years.

5. The Grievant contended that on or about February 2015, his employment with the Respondent was terminated. The Respondent did not

pay him his terminal dues.

6. The Grievant asserted that the Kshs. 6,000 that he was being paid by the Respondent was below the minimum wages that were prescribed during the material times. He was never paid house allowance, overtime compensation, and compensation for those public holidays on which he worked.

7. After the dismissal, he reported the matter to his union, and the union through its letter dated 25th March 2015, addressed to the Respondent, requested the latter for a meeting on the 2nd April 2015, letter which it refused to sign in acknowledgement of receipt.

8. The Claimant got constrained to report a dispute to the Ministry of labour vide a letter dated 17th June 2015. Consequently, the Ministry appointed a conciliator, through its letter dated 2nd July 2015.

9. Despite multiple invitations, the Respondent refused to attend the conciliation meetings as were scheduled by the Ministry. On the 30th September 2015, the conciliator issued a certificate pursuant to the provisions of section 69 of the Labour Relations Act to the effect that the conciliation was unsuccessful.

10. It was contended that the termination of the Claimant's employment by way of summary dismissal was unlawful and unjustified. He was not afforded an opportunity to be heard and there were no lawful grounds for the dismissal.

11. That the dismissal was in a manner that was counter to good labour practices and the principles of natural justice.

Determination

12. Section 43 of the Employment Act, places a duty upon the employer, in a matter like the instant one, to prove the reason for the termination of an employee's employment. Absence of the prove leads to a conclusion that the termination is unfair in terms of section 45 of the employment Act. Prove flows from evidence of a party. The Respondent did not present any witness to provide any evidence as regards the termination and the reason(s) for the termination. It is therefore not difficult for this Court to come to a conclusion that the Respondent did not discharge the burden under the provision. Consequently, the dismissal of the Claimant from employment was substantively unfair.

13. The Grievant's evidence to the effect that the dismissal was without a valid reason was not challenged.

14. Section 41 of the Act provides for a procedure that an employer who wants to dismiss an employee or terminate an employment contract, must adhere to. It has been held numerously that the procedure is mandatory. Too, the burden of proof that the procedure was followed lies on the employer, and a default in prove will result to the termination or dismissal being deemed unfair pursuant to the provisions of section 45.

15. This statutory burden, only gets discharged if the employer demonstrates that the employee was informed of the employer's contemplation to terminate his or her employment, or summarily dismiss him/her and the grounds forming basis for the contemplation, (the information component), that the employer allowed the employee and any person chosen by him pursuant to section 41 to make a representation on the grounds, (the hearing component), and consider the representations so made, before making a decision, (the due consideration component).

16. The Grievant testified that the procedure was not followed. The Respondent did not present any evidence, to show that the procedure was followed and controvert the Grievant's evidence.

17. To this end, I find that the dismissal of the Claimant from his employment was both procedurally and substantively unfair.

18. Section 49 (1) (c) of the Employment Act bestows upon this Court authority to grant a compensatory relief in favour of an employee in a situation like is the instant matter where the dismissal of him from employment has been found to have been unfair. The grant is discretionary, the extent of the grant depends on the circumstances of each matter and consideration of the factors stipulated in section 49 as they relate to the matter. Considering the dismissal was without, adherence to the statutory procedure, and substantive justification, the Respondent's attitude pre-filling of this matter, that did not enable an amicable settlement; that the Claimant did not in any manner contribute to the dismissal; and the length of period the he had served the Respondent, I am inclined to conclude that he is entitled to the relief to the extent of 10 months' gross salary, therefore Kshs. 60,000.

19. The Claimant invites this Court to apply in computation of the extent of the award the minimum wages, in accordance with the minimum wage Order of 2015, Kshs. 12,221. Considering the provisions of section 48 of the Labour Institutions Act, I am persuaded to apply the amount. I am persuaded that the Kshs. 6,000 the Claimant was earning was an underpayment.

20. Under this head, I award the Claimant compensation to an extent of 8 months' gross salary, considering the factors, I have mentioned herein before. Therefore Kshs. 97,768.

21. The employment relationship that was between the Claimant and the Respondent, was one terminable by a notice contemplated under section 35 (c) of the Act. The Claimant was not given the notice. He is therefore entitled to one month's salary in lieu of notice, Kshs. 12,221.

22. The Claimant alleged that he was all through paid a salary that was below that which was at all material times prescribed by the Minister. Section 48 of the Labour Institutions Act, makes it an offence punishable in a criminal court for an employer to pay an employee salary

below the prescribed by the applicable Minimum Wage Orders. The provision also gives courts of law a platform to order compensation for the difference between what the employee was paid, and that which he ought to have, had the employer complied with the Wage Orders Stipulations.

23. The order for compensation can only be made with sight of the provisions of section 90 of the Employment Act. The sections provide for limitation of time for claims among others such as the Claimant's herein. I can only make an award for a period of 3 years not the five that the Claimant has sought. Therefore Kshs. 176,832.

24. The Claimant made a further claim for unpaid house allowance, asserting that all through he was not paid the allowance. His evidence was not controverted. He contended that he was entitled to a monthly house allowance of Kshs. 1,636. Section 28 of the Employment Act, confers the employee with a statutory right to a payment of house allowance, and upon the employer an obligation to pay or give reasonable accommodation to the employee. By reason of this premise, I find the Claimant entitled to unpaid house allowance for a period of 3 years. Therefore Kshs. 58,896.

25. The Claimant has sought for what he terms as "standard overtime" amounting to Kshs. 151,872. This is a claim that was just "thrown" to court. I see no evidence in support of the same or that can make it possible for court to understand what it is all about. I decline to award the same.

26. The Claimant's claim for unpaid leave is not challenged. However, without losing sight of the provisions of section 90 of the Employment Act, I can only order payment of the same for a period of 3 years prior to filing of the suit, Kshs. 36,663.

27. The claim for punitive damages stands on a very loose ground. It is not supported by facts or evidence. It has to meet the fate of rejection. It is hereby rejected.

28. Under section 51 of the Employment Act, an employee who has been dismissed from employment or whose contract of service has been terminated is entitled as of right to a certificate of service, upon the dismissal or termination. The Grievant in this matter is entitled to the certificate.

29. Consequently, Judgment is entered in this matter in the following terms:

a) A declaration that the dismissal of the Grievant from his employment was procedurally and substantively unfair.

b) That the Respondent is condemned to pay the Grievant;

(i) Kshs. 97,768, being compensation pursuant to the provisions of section 49 (1) (c) of the employment Act.

(ii) Kshs. 12,221, being one month's salary in lieu of notice.

(iii) Kshs. 176,832, being accumulated salary underpayment for a period of 3 years.

(iv) Kshs. 58,896, being compensation for untaken unpaid leave.

(v) Costs of this suit.

(vi) Interest at court rates on the sums above from date of this Judgment till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI

THIS 12TH DAY OF JANUARY, 2022

OCHARO KEBIRA

JUDGE

Parties absent.