



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1700 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DAVID NYABUTO MOGARA.....CLAIMANT

VERSUS

SPUR SECURITY SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim dated 26th April, 2017 and he filed an affidavit of service dated 23rd April, 2018 attesting to the effect that he served the statement of claim on the Respondent.

2. The Respondent did not file response and so the case proceeded undefended.

CLAIMANT'S CASE

3. The court considered the claim as well as the affidavit of support of the claim. The Claimant's submissions were also considered.

4. Claimant says he was employed as a security guard by the Respondent at a salary of Kshs.7,000/= per month. He says he was employed on 13th March, 2014.

5. He says on 12th February, 2016 he was wrongfully and unfairly terminated.

He says he was constructively dismissed as the Respondent refused to respond to Claimant's inquiries thus forcing him to resign. The inquiries were about underpayment of his salary contrary to Regulations of Wages (General Amendment Order 2015).

6. He says that as a result of the said unexpected termination he found himself unemployed with outstanding wages, pay in lieu of notice and severance pay as well as aggravated damages.

7. He now claims for damages amounting to Kshs.313,165.36 as more particularized on paragraph 19 of the statement of claim plus compensation equivalent to 12 months totalling Kshs.146,653/20.

ISSUES FOR DETERMINATION

8. (i) was Claimant unlawfully terminated?

(ii) is he entitled to the claims prayed?

DECISION

9. The Claimant says he worked for the Respondent as a security guard from 13th March, 2014 till 12th February, 2016. He was earning a salary of Kshs.7,000/= and on inquiring about his low pay the Respondent did not respond to him.

10. He says he resigned as he was forced to consider his employment as terminated since the Respondent never reviewed his salary. He considers himself to have been constructively dismissed.

11. The Respondent not having defended the claim means the claim by the Claimant is uncontroverted and is bound to be considered by the court. The Claimant says his salary was below the wages regulation order and the Respondent refused to address the issue when Claimant raised it time and again.

In situations of constructive dismissal the court found in the case of **COCA COLA EAST AND CENTRAL AFRICA VS MARIA KAGAL LIGAGA (2015) eKLR** that what was relevant was the Applicant's (Employer) conduct not the Respondent.

So the court went further to find that the Respondent's letter of termination was a clear testimony that there was no acquiescence to the state of affairs she found herself in. It was found that on the said letter the Respondent explicitly stated she was forced by circumstances to terminate the employment relationship.

12. In this case unfortunately the letter of resignation has not been produced and the Claimant only attached the Respondent's letter acknowledging the resignation letter.

For reasons best known to the Respondent he did not file a response and also did not defend his suit. The claim is therefore uncontroverted and under the circumstances, I find a case of constructive dismissal has been proved in view of the fact that the Respondent did not endeavour to defend the suit.

13. Having entered judgment in favour of the Claimant I proceed to make the following awards;-

(a) One month salary in lieu of notice Kshs.12,221.10.

The said wages is in harmony with the regulations of wages (general amendment order) 2015.

(b) Unpaid house allowance as the same is not proved by the Respondent it is allowed Kshs.36,139.67.

(c) Unpaid overtime. No specific particulars and so is not proved is declined.

(d) Wage underpayment Kshs.93,930.30.

(e) Unpaid leave granted in view of the fact that Respondent did not prove he gave him leave Kshs.12,221.10.

(f) Unpaid public holidays Kshs.12,803.06.

(g) Service pay as no proof any money was remitted to NSSF. Kshs.6,110.55.

(h) Salary compensation equivalent to 2 months considering the period Claimant worked for the Respondent. The same is awarded for wrongful termination due to constructive dismissal Kshs.24,442.20.

The Claimant is awarded costs as well as interest at court rates from the date of judgement until final payment.

14. The final award is Kshs.197,867.98.

Orders accordingly.

Delivered, dated and signed in Nairobi this 18th day of March, 2022.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE