



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 927 OF 2017

KENYA NATIONAL PRIVATE

SECURITY WORKERS UNIONCLAIMANT

VERSUS

BABS SECURITY LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant brought the instant suit on behalf of the grievants who it avers were employees of the respondent with effect from 4th February, 2016. That the grievants were unfairly terminated on 24th June, 2016 and any attempts to resolve the matter out of court had yielded no positive results. The claimant seeks on behalf of the grievants underpaid salary, unpaid house allowance, notice pay and compensatory damages.
2. The respondent entered appearance through the firm of Macharia Gakaria & Associates Advocates but did not file any defence hence the matter was undefended.
3. The matter proceeded for hearing on 2nd November, 2021 in absence of the respondent pursuant to Rule 22 of this Court's Rules.

1st Grievant-Patrick Mamai Kilasi

4. The 1st grievant adopted his witness statement and documents filed together with the claim to constitute part of his evidence in chief. The documents were also marked and produced as exhibits before court.
5. As per the 1st grievant's testimony, he was employed on 4th February, 2016 by the respondent and was earning the sum of Kshs 9,500/= every month. That he was unfairly terminated when he asked for his salary which had remained unpaid for two months. That he was chased away by the respondent's Managing Director who also demanded that he returns the company uniform. That subsequently, he approached the claimant union who wrote to the respondent requesting for a meeting. That the respondent was uncooperative hence the dispute was referred to the Ministry of Labour for resolution. That however, the respondent failed to attend any conciliatory meetings hence the conciliator by the name Mrs. P. Iminza, issued a certificate pursuant to section 69 (b) of the Labour Relations Act. The 1st grievant termed his termination as unlawful and unjustifiable hence asked the court to allow his claim as prayed.

2nd Grievant -Joseph Okwi

6. The 2nd grievant also adopted his witness statement and documents filed together with the claim to constitute part of his evidence in chief. It was his testimony that he was initially employed as a security guard and was earning a monthly salary of Kshs 9,500/=. That upon promotion to the position of supervisor, the salary was enhanced to Kshs 12,000/=. That the respondent failed to pay his salary for a period of 2 months and when he went to ask for the same, he was chased away by the respondent's Managing Director who also demanded that he returns the company uniform. That being a member of the claimant union, he reported the dispute with a view to having the same resolved. That the respondent was not cooperative and snubbed a request to have a meeting with the claimant union. That as such, the dispute was escalated to the Ministry of Labour, but the respondent failed to attend any conciliatory meetings hence the conciliator by the name Mrs. P. Iminza, issued a certificate pursuant to section 69 (b) of the Labour Relations Act. According to the 2nd grievant, his termination was unfair and unlawful hence prayed that his claim be allowed.

Submissions

7. The claimant union filed written submissions on behalf of the grievants through which it urged the court to find in their favour as they had proven a case of unfair termination. It was also submitted that the grievants were never given reasons for their termination and neither were

they accorded an opportunity to be heard. The case of **Idris Omar Abdi vs Garissa Water and Sewerage Company Limited** was cited in support of the submissions.

Analysis and determination

8. From the record before me, this court is being called resolve the following questions;

a) **Whether the grievants' termination was unfair and unlawful?**

b) **Whether the grievants are entitled to the reliefs sought?**

Unfair and unlawful termination?

9. The starting point in the determination of this issue is **Section 43(1)** of the Employment Act (Act), which requires an employer to prove reasons for an employee's termination, failure to which such termination is deemed to be unfair. That is not all. **Section 45 (2) (a) and (b)** of the Act, provides that a termination of employment is unfair, if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. Closely related to this provision, is **Section 45 (2) (c)** of the Act, which requires an employer to prove that it complied with the requirements of fair process in undertaking the termination.

10. The specific requirements of what constitutes a fair hearing are stipulated under **Section 41(1)** of the Act which mandates an employer to notify an employee of the intended termination and the reasons thereof in a language he or she understands, in the presence of a fellow employee or a shop floor union representative.

11. The aforementioned is a synopsis of the legal threshold under the Act and which an employer must comply with, for a termination to be deemed fair and lawful. The same can be split into two parts, with the first limb being the justification of reasons for termination, while the second limb constitutes the process applied in terminating the employment of the employee.

12. As regards, substantive justification, an employer is required to prove the reasons for an employee's termination. Such reasons must be fair and valid. As indicated herein, the respondent did not tender any defence nor participate in the trial, hence no reasons were given for the grievants' termination. According to both grievants, the termination was occasioned by their demand for salary which had remained unpaid for 2 months. This fact was not refuted as the respondents did not defend the claim.

13. Most of all, the respondent bore the legal burden to prove that there were reasons for the termination of the grievants' employment and that such reasons were fair and valid. Ultimately, it was upon the respondent to rebut the assertions by the grievants by proving that there were reasons for their termination, but it failed to do so.

14. In the circumstances, the burden placed on the respondent by sections 43 (1) and 45(2) (a) and (b) of the Act was not discharged at all.

15. As regards the second limb of fair hearing, there is no evidence or suggestion from the respondent's end that it complied with the provisions of sections 45(2) (c) read together with section 41 of the Act. This is on the basis that no defence was tendered hence I take it that no such procedure towards according the grievants a fair hearing was undertaken.

16. The total sum of the foregoing is that the termination of the grievants cannot be said to be lawful and fair in terms of sections 43(1), 45(2) and 47(5) of the Act and I so find and hold.

17. Having found as such, what remedies then, avail to the grievants?

Reliefs

Compensatory damages

18. As the court has determined that the grievants' termination was unfair and unlawful, each is awarded compensatory damages equivalent to four (4) month's gross salary. This award has been informed by the length of the employment relationship.

One month salary in lieu of notice

19. Each grievant is also awarded one (1) month's salary in lieu of notice pursuant to the provisions of section 35 (1) (c) of the Act.

Unpaid salary

20. I further award the grievants unpaid salaries for the months of May and June, 2016, as their claim to that end was not controverted.

Underpaid salary

21. The claimant union has further averred that the grievant's salary was underpaid contrary to the minimum wage order. From evidence, the grievants were stationed within Nairobi, hence pursuant to Legal Notice No. 116 of 2015, which prescribed the applicable minimum wage

payable to various categories of employees, they were entitled to a monthly basic salary in the sum of **Kshs 12,221.10**. This therefore confirms the grievants assertion that their salary was underpaid to the tune of **Kshs 2,721.10** per month.

Unpaid house allowance

22. The claim for house allowance also succeeds, as the Legal Notice No. 116 of 2015 expressly provides that the minimum wage payable is only in respect of basic salary and is exclusive of house allowance. This is also founded on the provisions of **section 31 (1) of the Employment Act** which provide as follows:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

23. The Court of Appeal in the case of **Grain Pro Kenya Inc. Ltd vs Andrew Waithaka Kiragu [2019] eKLR** determined the rate payable in house allowance as follows; **“To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent.”** This rate is also in tandem with the General Wages Order.

Orders

24. Accordingly, Judgment is entered in favour of the grievants as follows;

1st Grievant

- (a) **Compensatory damages in the sum of Kshs 48,884/= which sum is equivalent to 4 months gross salary.**
- (b) **One month’s salary in lieu of notice being Kshs 12,221/=.**
- (c) **Salary for May and June, 2016 being Kshs 24,442/=.**
- (d) **Underpaid salary for 3 months being Kshs 8,163/=**
- (e) **Unpaid house allowance being Kshs 9,165.75/=**
- (f) **The total award is Kshs 102,875.75.**
- (g) **Interest on the amount in (f) at court rates from the date of Judgement till payment in full.**

2nd Grievant

- (a) **Compensatory damages in the sum of Kshs 48,884/= which sum is equivalent to 4 months gross salary.**
- (b) **One month’s salary in lieu of notice being Kshs 12,221/=.**
- (c) **Salary for May and June, 2016 being Kshs 24,442/=.**
- (d) **Underpaid salary for 3 months being Kshs 8,163/=**
- (e) **Unpaid house allowance being Kshs 9,165.75/=**
- (f) **The total award is Kshs 102,875.75.**
- (g) **Interest on the amount in (f) at court rates from the date of Judgement till payment in full.**

25. The grievants shall also be entitled to the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant	Ms. Wanyama
For the Respondent	No appearance
Court Assistant	Barille Sora

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