



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 222 OF 2016

EDWARD WAKA OSARE.....CLAIMANT/RESPONDENT

-VERSUS-

INTER SECURITY LIMITED.....RESPONDENT/APPLICANT

JUDGEMENT

1. The claimant filed this claim on the 8th June, 2016 alleging to have been unfairly terminated and sought to be compensated for the unfair termination.
2. He avers that he was employed by the Respondent in August, 2014 as a night watchman earning a salary of Kshs. 7,500 without house allowance.
3. That he performed his duties faithfully till the 2nd January, 2016 when he was informed by his supervisor that his duties were no longer required and advised to proceed on his annual leave till 2nd February, 2016.
4. Upon reporting on the 2nd February, 2016 he was turned away and told to report on 11th March, 2016 and upon reporting on the 11th March, 2016 he was informed that there was no duties for him in the company.
5. The claimant avers that he was underpaid as he ought to have been paid Kshs. 10,116 and Kshs 11,330 as per regulation of wages amendment Order of 2013 and 2015 respectively.
6. He states that he was dismissed from employment without prior Notice or reason therefore, and that the termination was done unprocedurally and contrary to section 41 and 43 of the Employment Act.
7. The claimant therefore prays for the following reliefs; -
 - a. **This Honourable Court do order the Respondent to pay the Claimant Kshs. 11,330 as payment in lieu of notice.**
 - b. **This Honourable Court do order the Respondent to pay the Claimant Kshs. 11,330 as his payment in lieu of annual leave not taken.**
 - c. **This Honourable Court do order the Respondent to pay the Claimant Kshs.65, 676 as underpayment of wages for the period between August 2014 and March 2016.**
 - d. **This Honourable Court do order the Respondent to pay the Claimant Kshs. 32,351 as unpaid House Allowance.**
 - e. **This Honourable Court do order the Respondent to pay the Claimant Kshs. 78,848 being overtime payment for the rest days worked.**
 - f. **This Honourable Court do order the Respondent to pay the Claimant Kshs. 17,738 being Overtime payment for the holidays worked.**
 - g. **This Honourable Court do order the Respondents to pay the claimant Kshs. 135,960 as 12 Months compensation for unfair termination.**

h. This Honourable court do order the Respondents to bear the costs for this suit as provided under Sec 12 (1) of the Employment and Labour Relations Act.

i. This Honourable court do make further orders as it shall deem fit as provided for under Section 12 (3)(viii) of the Employment and Labour Relations Act.

8. The respondent filed a notice of appointment of Advocate on the 7th December, 2016 and a response to claim on the 19th December, 2016. The Respondent admitted employing the claimant in August, 2014 on casual basis depending on availability of work at an agreed salary of Kshs. 7,500 per month.

9. It is the Respondent 's case that the claimant was extremely irresponsible and occasionally reported to work drunk and sometimes in December, 2015 he reported to work drunk and smashed window panes at his station forcing the Respondent to send him back home.

10. The respondent denied asking the claimant to go for annual leave and that his employment was no longer tenable in light of his destructive tendencies.

11. It is contended that the claimant was a casual employee who was paid for days worked. that he never worked during public holidays and was entitled to one rest day.

12. The Respondent then stated that the claimant was a casual employee and was therefore not entitled to notice before termination.

Hearing.

13. The claimant testifies as CW-1 and stated that he was employed by the Respondent as a night guard at a monthly salary of Kshs.7, 500. That he reported to work every day at 6pm to 6am seven days of the week without any rest. He testified further that he was send on annual leave on 2.1.2016 and later dismissed from employment on the 11.3.2016. he denied the allegation by the Respondent that he always reported to work drunk and prayed for the claim to be allowed as prayed.

14. Upon cross examination, CW-1 testified that that he was not a casual employee but an employee on a 2 year contract. That he signed the contract and the copy taken to Nairobi without any copy left for him. That he worked 12 hours a day every day of the week without any rest day. He denied going to work drunk or breaking the window panes as alleged. He testified that he worked well with his colleagues. That he was advised by his supervisor Mr. Ondimu to proceed on leave and on reporting back to work he was turned back till 11th March, 2016 only to be informed that his services were no longer needed. His termination was not preceded by Notice or disciplinary hearing.

15. The Respondent called one witness, Isaac Okuiru (RW-1), the director of the Respondent who adopted his witness statement dated 2.7.2020. RW-1 testified that the claimant was employed in August, 2014 till December, 2015 and was working as a casual employee. He avers that the claimant was paid overtime when due. He contended that the claimant being a casual employee was not entitled to leave. He then testified that the claimant used to report to work late and drunk. It is averred that the claimant worked 6 days in a week and if work was available he could work for 7 days but received compensation for the same. He admitted that he did not issue any notice before dismissal on the basis that the claimant was a casual employee.

16. Upon cross examination, RW-1 testified that he does not have any employment records for the claimant and that he did not issue the claimant with any notice before termination.

Claimant's submissions.

17. It was submitted for the claimant from the onset that the claimant was not a casual employee as per the definition given to casual employee under section 2 of the Employment Act. It was argued that the claimant was employed continuously for a period of 1 year 7 months and paid monthly. In this they cited the case of **Harrison Meshack Lusimbo V Mareba Enterprises Limited[2013] eklr** and the case of **Geoffrey Shakwia & 17 others Vs Nnachang Foreign Engineering Limited[2015] eklr** and submitted that when the claimant worked for more than a month, the employment status converted as per section 37(1) of the Employment Act.

18. On whether the termination was unfair, it was submitted that the claimant was dismissed from employment without notice or following due process, which termination was unfair and illegal under section 45(4)(b) of the Employment Act.

19. The claimant then submitted that they have established on a balance of probability that the termination was unfair and urged this Court to allow the claim as prayed.

Respondent Submissions.

20. The Respondent on the other hand submitted that the claimant was a casual employee who was paid on a daily basis and worked on need basis therefore did not work continuously as pleaded. It was argued that the employment status of the claimant remained casual and never converted as provided for under section 37 of the Employment Act. It was further argued that there was no contract of employment produced before this Court or any evidence to back up the claimant's claim of regular employment.

21. On whether the claimant was unfairly, terminated, it was submitted that the claimant was employment on availability of work basis and at the material time the respondent did not have work to offer. It was argued further that the claimant exhibited uncouth behavior making it more difficult to contract him when work was available informing the Respondent's decision not to call him any more when they got work.

In addition it was submitted that the claimant destroyed the Respondent property by breaking the window panes that further informed his termination summarily. In this they cited the case of **Thomas Sila Nzivo Vs Bamburi Cement Limited [2014] eKLR**.

22. Accordingly, it was submitted that the claimant could not be issued with a termination Notice as he was a casual employee.

23. The Respondent then urged this court to dismiss the claim with costs as the claim does not disclose a cause of action against it.

24. I have examined all evidence and submissions of the parties herein. From the evidence submitted by the claimant he was terminated for no apparent reason. The respondents aver that he was terminated for occasionally coming to work late and drunk.

25. The respondents were obligated to prove this aspect by production of their master roll to show the times he reported which they didn't.

26. They also averred that he came to work drunk and indeed no evidence was called to prove this.

27. In essence the reasons for the termination of the claimant were not proved nor established. There is also no indication that the claimant was subjected to any formal disciplinary process. The respondents averred that there was no formal disciplinary process because the claimant was a casual.

28. Indeed the issue of the claimant being a casual was not established because no master roll was ever produced.

29. In the circumstances of the case I find the dismissal of the claimant unfair and unjustified in terms of Section 45 (2) of the Employment Act 2007 which states as follows;

“45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

1. In terms of remedies, having found the termination of the claimant as unfair and unjustified and having established that the claimant was bundled out of the respondent's employment without any notice, no hearing and without any notice, nor hearing and without cushioning him for any financial embarrassment I find the compensation of 10 months' salary payable to him.

= 10 x 11,330 = 113,300/=

2. I also find that he is entitled to payments of underpayment of salary as per the wages guidelines as pleaded for kshs.65,676/=.

3. I also award him the unpaid house allowance as pleaded for kshs.32,357/=.

4. As for payment of overtime I find the same not established as no master roll was produced and there is no indication that the claimant sought for the production from the respondent and was denied.

5. I also award claimant 1 month's salary in lieu of notice.

= 11,330/= and also 1 year leave = 11,330/=

TOTAL awarded = 233,987/=

Less statutory deductions

6. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Fred