



REPUBLIC OF KENYA



KENYA LAW
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**Wambua v Open Hire (Cause 691 of 2015)
[2022] KEELRC 12708 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 691 OF 2015**

M MBARŪ, J

MAY 12, 2022

BETWEEN

ALBANUS MBONDO WAMBUA CLAIMANT

AND

OPEN HIRE RESPONDENT

JUDGMENT

1. The respondent employed the claimant on January 12, 2012 as a night guard earning a wage of ksh 6, 000 per month until March 1, 2016 when his employment was terminated while earning ksh 8, 700 per month.
2. The claim is that employment terminated without notice, reason or payment of terminal dues. The claimant is seeking the following dues;
 - a. Salary deductions for 3 months ksh 6,650;
 - b. Notice pay ksh 8,700;
 - c. Leave for 4.2 years ksh 29,511;
 - d. Service pay ksh 21,079;
 - e. Work during public holidays for 4 years ksh 26,768;
 - f. Off days for 50 months ksh 66,920;
 - g. Overtime pay ksh 385,800;
 - h. House allowances for 50 months ksh 65,250;
 - i. Compensation; and



- j. Costs.
3. The claimant testified that for the duration of his employment with the respondent he did not take annual leave and no payment in lieu thereof. The respondent failed to pay for his NSSF and work hours were 6pm to 6am every day of the week without a rest day or taking a public holiday.
 4. The claimant testified that On January 28, 2015 he left work and locked all doors and the supervisor Mr Kioko confirmed and the handover was done but in the evening, he was told that a glass was broken and wires stolen. They had inspected the premises with Kioko and confirmed everything was in order but the employer directed that the loss would be deducted from his salary until paid in full.
 5. Another house was broken into while the claimant was absent from work. Kioko did an inspection and later called the claimant who found the police on site and he was arrested. A senior officer of the respondent later said it was an inside job and the claimant was returned to work and made to pay for the loss. He called the director Mr Kariuki and complained that the deduction from his wage was unfair since he had done his job well and there was no evidence that he was involved in the break-in but instead he dismissed him from his employment which was unfair and his claim should be paid.
 6. In response, the respondent's case is that the claimant worked under the property manager Joy Mukami but he absconded duty and left his employment without notice after conducting himself in a manner that was insubordinate to the manager. There was no termination of employment as alleged.
 7. The claimant absconded duty and therefor notice pay is not due. He as paid for days worked.
 8. The respondent had employed two night guard for them to work in shifts from 6pm to midnight and midnight to 6am and there was a day guard. The claimant enjoyed his off day from time to time and the claims made should be dismissed with costs.

The respondent filed leave application forms.

9. In evidence, the respondent called Joy Mukami who testified that she was the manager and supervised the claimant but since the year 2012 the claimant had problems of thefts and complaints by clients and where he guarded it was not secure.
10. Ms Mukami also testified that for the losses incurred by the respondent due to the claimant caused at his work station, he agreed to a deduction from his wages. There was a first incident and the claimant paid for the loss. On the 2nd incident, the police were called and established that the claimant was involved in breach of security. The claimant had allowed matatus to park at the property site and he would be charging for such service which led to conflict of interest.
11. The claimant then absconded duty and left work on his own volition. He was paid his dues.
12. At the end of the hearing, both parties filed written submissions. These are put into account.

Determination

13. As noted above, the only work record filed by the respondent is the leave application forms for the claimant for March, 2015 for 7th to 9th March;

July, 2015 on 6th to 8th July;

August, 2015 for 5th to 8th August;

August, 2014 for 29th to 31st September;

June, 2014 for 5th to 7th July;



December, 2015 for 18th December;

A total of 11 day.

14. The claimant on his own accord filed the check list for November, 2012; June, 2013 and March, 2013. The check list show the work hours for 7pm to 6.30am, 6pm to 6.30am and 6pm to 6am respectively.
15. The duty to file work records rests with the employer pursuant to section 10(6) and (7) of the Employment Act, 2007 (the act) and once proceedings are filed with the court, the employer is required to file them. Without the employer complying with such legal duty, the court is left with the evidence of the employee.
16. An employee who has absconded duty or fails to attend work as directed by the employer, commits gross misconduct and liable to summary dismissal save, the employer should allow the employee to attend and respond to any matter leading to such sanction. The respondent's witness Ms Mukami testified that the claimant absconded duty and left work on his own volition. There is however no matter of the respondent calling the claimant back to work and his failure to attend. To leave the employee at large as the respondent did was to abdicate its duty vested in law pursuant to section 44 and 41(2) of the Employment Act, 2007. The employer has a duty to terminate employment and give the employee the reasons leading to termination of employment and where the employee fails to attend, the employer is secured by such notice, which is missing in this case.
17. Notice pay is due in this instance at the last paid wage of ksh 8, 700.
18. On the claim for leave for 4.2 years, save for the 11 days the claimant applied for, there is no evidence that the respondent allowed the claimant to enjoy his rights under section 28 of the act. Such is due at ksh 29, 511.
19. On the claim for service pay, there is no payment statement filed by the respondent to demonstrate compliance with section 35(5) and (6) of the act. Service pay is due for the 4 full years served at 15 days' pay for each year all at ksh 17, 400.
20. Claim for work during public holidays, these are official and gazetted days which are not chronologised. The claim is declined.
21. Off days are a legal entitlement and the claimant has not factored the annual leave days allocated and the 11 days taken. To claim for the entire period worked is to seek unjust enrichment.
22. Overtime is claimed on the basis that the claimant worked for 12 hours each day. In the protective security industry, under the wage orders, guards are allowed to work for 10 hours each day with a rest day. The claimant is seeking for overtime for 4 hours daily for the entire period of employment and has failed to factor the wage orders, the annual leave allocated and off days. It is not humanly possible that he worked overtime for the entire period of employment.
23. On the claim for house allowance, this is due pursuant to section 31 of the Act. The respondent failed to file any record that the claimant enjoyed housing or was given a housing allowance. Under the wage orders, on the paid wage, a house allowance is due at 15% all at ksh 65, 250.
24. The other claim is that the claimant suffered wage deductions without good cause. A wage deduction must abide the provisions of the law and for good cause. The respondent has not attached any reasonable cause, record, consent by the claimant allowing a deduction from his wage as required under section 17 and 19 of the Act. The sum of ksh 6, 650 is due.

On the dues assessed above, the claimant is adequately compensated.



25. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a. Notice pay ksh 8,700;
 - b. Leave pay ksh 29,511;
 - c. Service pay ksh 17,400;
 - d. House allowance ksh 65,250;
 - e. Wage deducted ksh 6,650;
 - f. Each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

