



**Natabona v Tick Security Services Ltd (Cause 238 of 2016)
[2022] KEELRC 1103 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 238 OF 2016**

**AK NZEI, J
JUNE 30, 2022**

BETWEEN

JOHN NATABONA CLAIMANT

AND

TICK SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. The Claimant instituted the claim herein vide a Memorandum of Claim dated 28th September 2015 and filed in Court on 29th March 2016. The Claimant pleaded that he was employed as a night security guard/watchman on 1st July 2014 and retained uninterrupted employment until 12th May 2015. That the Claimant's starting salary was Ksh.4,500 per month and that this was increased from April 2015 to Ksh. 6,500 per month.
2. The Claimant further pleaded that in May 2015, the Respondent's Manager, Mr. Nguzo, instructed the Claimant to leave work and go home until such time when the Respondent would recall him. That the Respondent did not recall the Claimant back to work despite repeated visits by the Claimant to the Respondent's Manager's Office, prompting the Claimant to institute the suit herein.
3. It was the Claimant's further pleading that termination of the Claimant's employment was wrongful, unlawful, unfair, unprocedural and abrupt and was in contravention of labour laws as no notice was served and there was no discussion or dialogue between the Claimant and the Respondent prior to the termination. That the Respondent refused to pay the Claimant's terminal dues despite demand having been made.
4. The Claimant further pleaded that he was underpaid during the period of employment, and worked overtime (15 hours per day) (6pm to 9am), which is 3 extra hours per day and worked seven days a week, and no overtime payment was made to him. It was the Claimant's further pleading that he was not issued with a contract of employment and was not issued with a certificate of service upon termination.



5. The Claimant prayed for payment of terminal dues based on the 2015 Wages Order and prayed for:-
 - a) One month salary at ksh.12,221.10 (plus 15% thereof being house allowance).....ksh.14,176.48
 - b) Unpaid house allowance for 10 months in the sum of ksh. 16,357.55
 - c) Payment in lieu of 43 rest days, being one rest day in every seven days worked for the period 1/7/2014 to 17/5/2015 ksh.22,514.80
 - d) Payment in lieu of ten (10) public holidays worked (whose particulars the Claimant pleaded).....ksh.5,236
 - e) Overtime at the rate of 3 hours daily during the period of employment (particulars were pleaded).....ksh.139,924.80
 - f) Underpayment of dues using the 2013 and 2015 statutory wage guide for night watchman (particulars whereof the Claimant pleaded) ksh.64,757.51
 - g) Payment in lieu of annual leave accrued on a pro-rata basis ksh. 10,262
 - h) Maximum compensation for wrongful termination of employment (ksh.176.48x12) ksh.170,117.76
6. The Claimant also prayed to be issued with a certificate of service and to be paid costs of the suit and interest at Court rates.
7. The Respondent filed a response to the Claimant's claim on 8th March 2018, dated 5th March 2018. The Respondent admitted having employed the Claimant as a night security guard/watchman, but pleaded that the Claimant was employed on casual basis on 13th August 2014 under a renewable three months contract upon successful review with the Respondent, and was earning ksh.6,500 by the time he left.
8. The Respondent pleaded that the Claimant never provided diligent service as he was on various occasions involved in gross misconduct including dissenting duties, reporting to work late and abusive language, and absconded duty after the Respondent transferred him to another station following complaints by the Respondent's clients.
9. The Respondent further pleaded that the Respondent did not terminate the Claimant's employment, but the Claimant walked out of employment.
10. The Respondent pleaded further that the amount (in salary) paid to the Claimant was agreed between the Claimant and the Respondent and that the Respondent cannot be condemned to pay the employees an amount that is not sustainable and does not promote financial soundness. That the Claimant was issued with a contract of employment which was renewable, and that at the material time, there existed a contract of employment from 11th May 2015 to 11th August 2015, which the Claimant had signed. The Respondent prayed that the Claimant's claim be dismissed with costs.
11. When trial opened on 3rd February 2022, the Claimant adopted his filed witness statement dated 28th September 2015 as his testimony and produced in evidence two of the documents listed on his list of documents dated 28th September 2015. The documents produced in evidence by the Claimant are a letter of (proof of) employment dated 1st July 2014 and a letter by the Labour Officer (Mombasa) to the Respondent dated 19th May 2015. The Claimant further testified: -
 - a) that he was employed by the Respondent on 1st July 2014, earning a monthly salary of ksh.6,500 which was being paid to him through the bank, and that he was on duty every day, working from 6pm to 10.am. the following day.



- b) that no statutory deductions were made from his salary.
 - c) that his employment was terminated by the Respondent on 12th May 2015 after the Claimant requested the Respondent to raise his salary in view of the many hours that he was working, and as a result the Claimant and the Respondent's Manager, Mr. Nguzo, disagreed.
 - d) that the Respondent's manager verbally told the Claimant not to go back to work at the company, and did not give him the reasons for the termination, and that the Claimant was not taken through any disciplinary proceedings, and was not given an opportunity to be heard.
 - e) that the Claimant sought the Labour Officer's intervention, but in vain, and that the Claimant's attempts to talk to the Respondent so that he could go back to work were also in vain.
 - f) that the Claimant was not paid any terminal dues. That no overtime pay for extra hours worked was paid, and no payment in lieu of leave was paid, though the Claimant did not take any annual leave.
 - g) that the Claimant denied the occurrence of any incident at his place of work involving him, and denied using bad language.
 - h) that all that the Claimant did was to say that salary being paid to him by the Respondent was little.
12. Cross-examined, and re-examined, the Claimant testified:
- a) that the overtime hours worked changed from day to day, depending on the time his reliever arrived, but was always 6pm to between 9am and 10am the following day.
13. The Respondent called one witness, one Paul Nguzo (RW-1), the Claimant's Manager. The witness adopted his witness statement dated 16th March 2020 as his testimony and produced in evidence the documents listed on the Respondent's list of documents dated 25th February 2020. The witness further testified: -
- a) that the Respondent did not terminate the Claimant's employment, but the Claimant refused to go on transfer when he was transferred.
 - b) that the Respondent contacted the guarantors furnished by the Claimant when he was employed, and told them to tell the claimant to report to work, but he did not; only to go back with a letter from the Labour Office, dated 19th May 2015.
 - c) that the Respondent responded to the Labour Officer's letter and stated that the Claimant should go back to work, be paid and get assigned where he had been transferred to.
 - d) that the Claimant was paid salary for the month of May 2015, and he signed of it (Respondent's exhibit no. 2).
14. Cross-examined, RW-1 testified that he had nothing to show that he went to the Labour Office, that he only took his letter to the Labour Office.
15. The Respondent (RW-1) further told the Court that he had nothing to show that the Claimant had been transferred, and had no letter introducing the Claimant to a new station of work.



16. Re-examined, RW-1 clarified that the Claimant's exhibit no.1 was a letter issued to the Claimant by the Respondent to facilitate his movement, after the Respondent withdrew and retained the Claimant's identity card.
17. Parties did not file a joint statement of agreed issues. In my view, issues that emerge for determination are as follows: -
 - a) whether the Claimant was employed by the Respondent on 1st July 2014.
 - b) what was the status of the Claimant's employment.
 - c) whether the Claimant's employment was terminated by the Respondent.
 - d) whether the Claimant can complain that his employment was unfairly terminated.
 - e) Whether the Claimant is entitled to the reliefs sought?
18. On the first issue, the Claimant pleaded and testified that he was employed by the Respondent on 1st July 2014, and produced as his exhibit no. 1 a letter (interim letter for retaining Government identification) issued to him by the Respondent on 1st July 2014. The purpose of this document was to notify all that the Claimant had been employed by the Respondent, and that the Respondent had taken and retained the Claimant's National Identity Card. The Respondent's witness (RW-1) confirmed this position when he testified that the purpose of the said letter/document was to facilitate the Claimant's movement after the Respondent withdrew and retained the Claimant's identity card. The document confirms that the Claimant was employed by the Respondent.
19. The allegation by the Respondent that the Claimant was employed by the Respondent on 13th August 2014 is irreconcilable with the Claimant's exhibit no. 1, whose validity and authenticity the Respondent (RW-1) confirmed. The said document confirmed that the Claimant was employed by the Respondent on 1st July 2014.
20. Further, the Respondent did not explain what relationship existed between the Claimant and the Respondent between 1st July 2014 and 13th August 2014. The Respondent did not demonstrate that any valid contract of employment was signed between the Claimant and the Respondent on 13th August 2014 pursuant to Section 9(3) (b) of the Employment Act. RW-1 testified, under cross-examination, that the Claimant thumb printed the contract. Under Section 9(3) of the Employment Act, such thumb printing should have been witnessed by a person other than the employer. On a balance of probability, it is my finding that the Claimant was employed by the Respondent on 1st July 2014.
21. On the second issue, the Respondent did not dispute the fact that the Claimant worked continuously from 1st July 2014 to 12th May 2015, for a period of over ten months. The Respondent however maintained that the Claimant was employed as a night security guard on casual basis.
22. Section 37 of the Employment Act provides: -
 - "(1) notwithstanding any provisions of this Act, where a casual employee: -
 - (a) Works for a period or a number of continuous working days which amount in aggregate to the equivalent of not less than one month, or
 - (b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days



amounting in the aggregate to the equivalent of three months or more,

The contract of service of the casual employee shall be deemed to be one where, wages are paid monthly and section 35(1) (c) shall apply to that contract of service.”

23. The import of the foregoing statutory provision in relation to the present case is that after serving for a continuous period in excess of ten months, the Claimants casual employment was converted to that of a term contract employee. I so find and hold.
24. On the third issue, the Claimant pleaded and testified that his employment was terminated by the Respondent. On the other hand, the Respondent pleaded and testified that the Claimant left employment after he refused to be transferred to a new work station. The Respondent did not, however, demonstrate that the Claimant was at any given time transferred from one work station to another. On his part, the Claimant pleaded and testified that upon being informed by the Respondent’s Manager (RW-1) that he would be transferred to a new station, he requested the Respondent’s manager to reconsider the transfer, but was replaced at his station of work and told by the manager to go home until such a time when the Respondent would call him back. That he went home and waited to be called back to work, but in vain. It was the Claimant’s further testimony that he reported the matter to the Labour Officer, but this again, was in vain. He produced in evidence a letter written to the Respondent by the Labour Officer on 19th May 2015. The Respondent (RW-1) admitted having received the Labour Officer’s said letter.
25. RW-1’s testimony that he wrote back to the Labour Officer stating that the Claimant should go back to work, report to a new work station and get payment of his dues was not backed up by any proof. No copy of the alleged letter to the Labour Officer was produced in Court. I reject this allegation by RW-1.
26. Further, the Respondent’s (RW-1’s) testimony that the Respondent contacted the Claimant’s guarantors and told them to tell the Claimant to go back to work was not proved. The Respondent did not give particulars of such guarantors and did not tell the Court how they were contacted, whether by phone, email, mail etc. No proof of such contact was produced in Court. It is my finding that the Claimant proved, on a balance of probability, that his employment was terminated by the Respondent.
27. On the fourth issue, the Claimant was employed by the Respondent on 1st July 2014, and retained continuous employment until 12th May 2015. The Claimant was in employment for slightly over ten months. Section 45 (3) of the [Employment Act](#) 2007 provides: -
 - “(3) an employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”
28. The Claimant, having been in employment for a period less than thirteen months immediately before the date of termination, has no right to complain that he was unfairly terminated. The claim for compensation for unfair termination of employment cannot be entertained, and is declined.
29. Before delving into the fifth issue, I will address the issue of the Claimant’s monthly wages before termination of his employment on 12th May 2015. The Claimant pleaded at paragraph III (K) of the memorandum of claim that he was continuously underpaid by the Respondent throughout the period of his employment. The Claimant stated at paragraph III(O) (i) of the Memorandum of Claim that



under the 2015 Wages Order, his monthly salary ought to have been ksh.12,221.10 plus 15% thereof being house allowance, a total of ksh. 14, 176.48.

30. Legal notice No. 117 of 2015, Regulation of Wages [general] [amendment] Order 2015 provided for a watchman's monthly wage in Nairobi, Mombasa and Kisumu at ksh. 10,954.70, excluding housing allowance. On the other hand, Legal Notice No. 197 of 2013, Regulation of Wages [general] [amendment] Order 2013 provided for a watchman's monthly salary at ksh. 9,780.95, excluding housing allowance. Both parties were in agreement that the Claimant was earning ksh. 6,500. This means that the Claimant was, from July 2014 to April 2015, underpaid by 3,280.95 plus ksh. 1,467 (15% of ksh. 9780.95) being housing allowance, a total of ksh. 4,747.95 per month from July 2014 to April 2015. Salary for the month of May 2015 ought to have been paid pursuant to Legal Notice No. 117 of 2015, that is ksh. 10,954.70 plus housing allowance, a total of ksh. 12,598. There was an underpayment of ksh. 6,098 in the month of May 2015.
31. On the fifth issue, the Respondent did not dispute the Claimant's claim for overtime, and did not rebut the Claimant's evidence on that claim. Further, the Respondent did not rebut the Claimant's evidence on his claim for holidays worked as pleaded and particularized by the Claimant. The claim for payment on unclaimed rest days and Claimant evidence thereon was also not rebutted by the Respondent.
32. The claim for one monthly salary in lieu of notice is allowed at ksh. 12,598. The Respondent did not demonstrate that any notice was served on the Claimant.
33. The claim for ten months underpayment of dues is allowed at ksh.38,907.50
34. The claim for unpaid housing allowance for ten months is allowed at ksh. 16,357.55 as prayed. The claim for unclaimed rest days is allowed at ksh. 22,514.80 as prayed.
35. The claim for payment in lieu of public holidays, which was elaborately pleaded and demonstrated by the Claimant with no rebuttal by the Respondent, is allowed at ksh. 5,236 as prayed.
36. The claim for overtime was specifically pleaded and particularized and evidence thereon was not rebutted by the Respondent. The same is allowed at ksh. 139,924.80 as prayed.
37. The Respondent did not dispute the Claimant's claim for payment in lieu of accrued leave days and the claim is allowed at ksh. 10,262 as prayed.
38. Ultimately, judgment is hereby entered for the claimant against the Respondent as follows:-
 - a) One month salary in lieu of notice ksh. 12,598
 - b) Ten months underpayment of salary/dues ksh. 38,907.50
 - c) Unpaid housing allowance ksh. 16,357.55
 - d) Payment in lieu of public holidays ksh. 5,236.00
 - e) Unpaid overtimeksh. 139,924.80
 - f) Payment in lieu of unpaid leave accrued ksh. 10,262.00
 - g) Payment in lieu of unclaimed rest days ksh. 22,514.80Total ksh. 245,800.65
39. The Respondent shall issue the Claimant with a Certificate of service pursuant to Section 51(1) of the [Employment Act](#) within thirty days.



40. The Claimant is awarded costs of suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

.....for Respondent

