



Nyairo v Riley Falcon Securities Services Ltd (Employment and Labour Relations Claim 248 of 2015) [2022] KEELRC 4111 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4111 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CLAIM 248 OF 2015
HS WASILWA, J
SEPTEMBER 29, 2022**

BETWEEN

RICHARD NYASOKO NYAIRO CLAIMANT

AND

RILEY FALCON SECURITIES SERVICES LTD RESPONDENT

JUDGMENT

1. By a memorandum of claim dated December 4, 2015 the claimant sued the respondent for alleged unfair termination and for compensation on the alleged unfair termination. He sought the following reliefs;
 - a) One-month salary *in lieu* of notices.
 - b) Underpayments.
 - c) Normal overtime.
 - d) Public holidays.
 - e) Leave for 1 year, 4 months.
 - f) Compensation for unfair termination.
 - g) Costs.
2. The claimant avers that he was employed by the respondent as a security guard on December 5, 2013, earning a basic salary of Kshs 7,916 and house allowance of Kshs 1,188 adding up to Kshs 9,104.
3. Initially, the claimant was based in Nakuru town but later was deployed to Kenya Commercial Bank at Naivasha, where he worked as both day and night guard reporting at 6am to 6pm and 6pm to 6am during day and night respectively, clocking 4 hours' overtime on either time worked. He stated



further that the he worked from Mondays to Sunday without any rest days or leave from the time of employment till termination on April 14, 2015.

4. According to the claimant, a night guard as per legal notice number 197 of 2013, is to be paid a daily wage of Kshs 487.90 while a day guard is to be paid Kshs 432.40. He stated that he used to work half of the month as night guard and the other half as day guard.
5. The circumstances leading to his termination is that, on the April 14, 2015 at around 4pm, while he was preparing to report to work as a night guard, he received a call from unknown person alerting him that he had been replaced and directing him to report to Nakuru office immediately. The claimant reported first to his place of work in Naivasha and indeed he had been replaced by a person know as Mr Njunge.
6. The claimant states that since, he could not reach Nakuru at that time, he requested the operation manager of KCB bank to assist him with his phone , which he called his branch manager at Nakuru and inquired on the replacement issue. It is stated that the manager at Nakuru branch confirmed the replacement but did not address his job status.
7. The following day the claimant proceeded to Nakuru office to seek for an explanation on the issue, instead the respondent's manager ordered the claimant to surrender his uniform as he had been fired. The claimant obeyed the orders of the manager and surrendered his uniform as directed.
8. He contends that, he was not given reason for the termination, neither was he subjected to any hearing as such that the termination was unfair.
9. The respondent entered appearance and filed a reply to defence on September 23, 2015 denying all the contents of the claim and instead asserts that the claimant was dismissed from employment for refusing to report to his new station and when served with a notice to show cause he adamantly refused to attend the disciplinary hearing.
10. The respondent thus urged this court to dismiss the claim with costs to the respondent.

Hearing.

11. The claimant testified as CW-1 and adopted his witness statement filed on March 22, 2016 and in addition stated that he was terminated by the respondent without any reason. He testified that he inquired from his manager on the reason for dismissal but the said manager sent him away. Upon the said termination, he stated that he was not subjected to any disciplinary process, neither was he paid his terminal dues. He stated that he was dismissed on April 14, 2015 and was surprised to see the letter of termination dated April 27, 2015, which he stated that he was not served.
12. Upon cross examination by Baxton Advocate, the claimant testified that he never received any notice to show cause letter. He testified that he received a call from someone he later learnt was called Njunge, that he had replaced him and upon calling the manager he refused to pick his call. He stated that the payslip of January, 2014 shows that he was paid overtime. He added that he worked from 6pm to 6am.
13. On re-examination, the claimant testified that he was not paid overtime and urged the court to order the respondent to pay him the said overtime.
14. The respondent's Branch Manager, Peter Olima, testified as RW-1 and adopted his statement of March 9, 2016 and produced document of September 23, 2015 as respondent's exhibit 1-6 respectively. In addition, the witness testified that the claimant worked on a fixed term contract that run from April 20, 2014 to April 25, 2015, therefore that the termination came to end on expiry of the contract.



15. Upon cross examination by Maragia Advocate, the witness testified that the claimant worked for more than a year as he was employed in 2013 and dismissed in 2015. He testified that prior to termination, the letters of April 20, 2015 and April 27, 2015, were served upon the claimant on his last known postal address being Po box 814 Kisii and the letter of April 10, 2015, was send to him on his last stations postal address being 14639 Nakuru.
16. Upon further cross examination, the witness testified that the notice of change of assignment is dated 16/3/2015, which the claimant was informed via a phone call to go pick which he refused. He confirmed that there are no minutes of the alleged disciplinary hearing, neither have they produced a copy of the muster roll before this court. He admitted that he did not have any records of the claimant going for leave. He also confirmed that the claimant worked for 12 hours a day and stated that payslips showing 'O' represent overtime pay and when none was appearing on the payslip, it meant that the claimant did not earn any overtime that month.
17. On re-examination, RW-1 testified that the claimant was employed on December 5, 2013 on a contract of one year. He applied for a renewal in April, 2014 which ran up to April, 2015. He stated that the address of service used to serve the change of assignment was on the claimant's previous work station.

Claimant's Submissions.

18. The claimant filed his submission on the June 20, 2022 and supplementary submissions on August 4, 2022. In the submission, the claimant argued that the payslips attached dated December, 2013, is a clear indication that he was employed by the respondent.
19. On whether he was terminated or deserted employment, the claimant submitted that the respondent's allegation that his assignment had changed and the communication made via post office on April 10, 2015 is far from the truth because at that time the claimant was still working for the respondent and if there was any letter, they ought to have delivered it to him. On the subsequent letters of 20th and April 27, 2015, the claimant argued that they are both inconsequential having being send after his termination.
20. It is argued that the posting of letters of 20th and April 27, 2015 to the claimant's postal address insinuates that the claimant deserted work, which respondent is tasked with finding out the claimant's whereabouts and reporting the desertion to the labour office, which none was done by the respondent rubbishing the claim of desertion.
21. It was submitted further that the allegation that the letter of change of assignment was send to the claimant was not proved since neither the said letter was exhibited not certificate of postage to demonstrate the respondent allegation, in any case that since the claimant was still working for the respondent there was no need of posting a letter to Kisii when he was within reach.
22. On the allegation that the claimant's contract came to an end by effluxion of time, it was argued that the respondent never raised the said claim in its response to claim as such cannot raise it at submissions stage.
23. In conclusion, it was submitted that the claimant has proved his case on a balance of probability and urged this court to allow the claim as prayed.



Respondent' Submissions.

24. The respondent submitted that section 47(5) of the *Employment Act* places the burden of proof on the claimant as was aptly reinforced in *Cooperative Bank of Kenya Limited V Banking Insurance and Finance Union(K)* [2017] eKLR.
25. It was submitted that the claimant had been served with a notice for reassignment of duties dated April 10, 2015, which he failed to honour by April 20, 2015, informing the respondent action of sending the claimant notice to show cause through his last know postal address and a subsequent termination letter on April 27, 2015. The respondent further argued that the termination letter of April 27, 2015 was not of any consequences, in light of the fact that the claimant's contract expired on April 26, 2015 by effluxion of time. To support his argument the respondent relied on the case of *Trocaire V Catherine Wambui Karuno* [2018] eKLR where the court held that:-
- “It is clear from the evidence on record that the respondent's employment was governed by fixed term contracts. As aptly observed by Lord Denning MR in *British Broadcasting Corporation vs Ioannou* [1975] 2 All ER 999 such a contract binds parties for the term stated in the agreement. In our view, the duration for the third contract was expressly stipulated therein, that is, for a period of four months running from March 1, 2014 up to June 30, 2014. To us the fact that there were earlier expressions by the appellant to extend the contract for a further period of at least two years did not give rise to a legitimate expectation that the contract would be extended for such duration as suggested by the respondent. This is because as this court expressed in of the *Registered trustees Presbyterian Church of East Africa & another vs. Ruth Gathoni Ngotbo- Kariuki* [2017] eKLR fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry It was argued that the claimant at one point states that he was terminated on April 14, 2015 and at another point that he was terminated on April 15, 2015, which is contradictory, which contradictions should be construed against him and affirm that indeed he was not terminated on the said dates. Furthermore, that the respondent produced employment contract showing that indeed the claimant was under a fixed term contract and not on verbal agreement as pleaded by the claimant.”
26. On the relief sought, it was argued that since, the claimant's employment was to come to an end on the April 26, 2015 and in the event the court is inclined to award the claimant any compensation, to allow payment of the balance of the remainder of contract, that is 10 days' pay as compensation. On the claim for leave days, the respondent submitted that the claimant has not tabled any evidence to justify the same as provided for under section 107 and 109 of the *Evidence Act* in any case that clause 5.1 of the employment contract mandates the claimant to make such claim within the year which the said sum accrued failure to which the claim shall be deemed forfeited.
27. On the underpayment claim, the respondent submitted that the claimant was paid Kshs 10,992 being salary of Kshs 7,916, house allowance of Kshs 1,180 and bonus pay of Kshs 1,896. The regulations of wages legal notice subsisting at the time provide for day guard pay of Kshs 9,024.15 and a night guard pay of Kshs 9,570.15. Therefore, that the claimant's pay was over and above what the law provided for, as such he is not entitled to the underpayment sought.
28. On the overtime pay claim, the respondent argued that clause 8.1 of the employment contract provided that the gross pay received was inclusive of the overtime pay, as such the relief is not deserving. In any case that the payslip produced shows that the claimant was paid overtime pay and the months without



overtime is a demonstration that overtime was not earned. Additionally, that all public holidays worked were compensated as appearing in the payslips.

29. In conclusion, the respondent submitted that the claimant's employment terminated on the April 26, 2015 by effluxion of time and urged this court to disallow the reliefs sought in the claim.
 30. I have examined all evidence and submissions of the parties herein. The claimant was employed vide an agreement dated April 26, 2014 on a fixed term contract which was to run for 1 year.
 31. The claimant has not objected to this. The claimant was then terminated after this.
 32. In their defence, the respondents have indicated that the claimant was terminated for failure to report to his new station of work and further that when a notice to show cause was served upon him, he adamantly refused to attend the hearing hence his termination.
 33. The respondent produced two letters dated 27/4/2015 and April 20, 2015 which are the summary dismissal and show cause letter respectively which the claimant denied ever receiving.
 34. The respondents have also averred that that claimant refused to report to his new station of assignment but they have not proved serving the claimant with the said letter which letter was sent to Nakuru whereas the claimant was in Naivasha. The claimant denied receiving the letter in question.
 35. The respondents never also invited the claimant for any disciplinary hearing and therefore their allegation that he was terminated for refusing to report to a new station fails as envisaged under section 41 of the Employment Act.
 36. The respondents have not demonstrated that they had valid reasons to dismiss the claimant.
 37. I find the claimants dismissal was unfair and unjustified and I find for claimant and award him as follows;
 1. 1 Month's salary *in lieu* of notice = 11,043.60/=
 2. Underpayment of wages as pleaded = 31,065.60/=
 3. Leave for 1 year and 4 months as pleaded = 12,986.40/=
 4. 10 months salary as compensation for the unfair and unlawful dismissal.
= 10 x 11,043.60 = 110,436/=Total Awarded = 165,531.60/=
- Less statutory deductions
5. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Maragia for claimant – present

Kaminza for Respondent – present

Court Assistant – present

