



REPUBLIC OF KENYA



KENYA LAW

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**Kasuya v Eveready Security Guards Company Limited (Cause 1965 of 2016)
[2022] KEELRC 13555 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13555 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1965 OF 2016
MN NDUMA, J
DECEMBER 15, 2022**

BETWEEN

ADELAIDE KASUYA CLAIMANT

AND

EVEREADY SECURITY GUARDS COMPANY LIMITED RESPONDENT

JUDGMENT

1. By a Statement of Claim filed on September 23, 2016, the claimant, a security guard, employed by the respondent brought the suit claiming the following reliefs:-
 - (a) One month salary in lieu of notice, kshs 16,000
 - (b) Arrear salary for July 2016, kshs 16,000.
 - (c) Wage underpayment kshs 16,000
 - (d) Compensation for unlawful and unfair dismissal.
2. C W 1 the claimant testified that she was employed by the respondent in February, 2003 initially earning kshs 5,600 per month.
3. That due to her good work, she was promoted to position of in-charge of security at a salary of kshs 14,200 per month. That her fellow counterparts at the time earned kshs 16,000 per month.
4. That on or about July, 2016, she was demoted without cause to position of guard and deployed to Ruiru site from Nairobi.
5. That by the said action she was constructively dismissed. That upon the said constructive dismissal, the respondent failed to pay her terminal benefits as set out in the claim.



6. C W 1 testified that the demotion and transfer caught her by surprise since there was no notice nor adequate time to prepare for the transfer and was not facilitated for the purpose. That she prays to be awarded as set out in the Statement of Claim.
7. The respondent in its amended response to the statement of claim pleaded that the claimant was not dismissed from employment but she had absconded from her duty and only came back to collect her dues.
8. The respondent called R W 1 Benson Wekesa to testify in support of the defence case and adopted a witness statement dated June 19, 2018 as his evidence in chief. R W 1 testified that the claimant was employed as security guard on February 10, 2003.
9. That she was promoted to position of acting assistant security guard. That she had an employment contract. That she was earning kshs 14,500 per month as assistant security guard. That other guards earned less than her as she was a senior guard. That she was not issued with payslip but was on the payroll and was paid vide an ATM.
10. That on August 12, 2016, she was deployed to Ruiru but she absconded duty. That the communication was done vide a letter dated August 12, 2016 to report to Ruiru on August 15, 2016. She was to report for guarding duties. The letter was produced as exhibit 'J'.
11. R W 1 testified that the claimant declined to report to Ruiru. That the respondent called the claimant by phone but she did not respond. R W 1 stated that the respondent did not issue the claimant with a notice to show cause since she was a deserter.
12. That the claimant came back for her dues. That as per exhibit '2' the final dues of the claimant were tabulated including:-
 - (i) Salary for 13 days worked in August, 2016, kshs 6,292.
 - (ii) Prorata leave days for the period February 10, 2016 to August 13, 2016 - kshs 5,88.
 - (iii) Gratuity Service - kshs 67,353

Total kshs 79,453.

Less

30 days salary in lieu of notice – kshs 19,250

Total non- productive days

kshs 20,538

Cap kshs 3.00

kshs 43,595
13. The claimant was also paid Sacco deposit refund of the kshs 119,100 Less the loan balance of kshs 158,384 and other deductions leaving the claimant with asset balance of Kshs minus (-14,260).
14. That the claimant was thus not paid anything since she had a negative balance.
15. R W 1 testified that the claimant earned a salary of kshs 3,875, when she was employed in the year 2003. R W 1 produced a payslip for May, 2003.
16. That in June, 2003, the claimant earned kshs 4,360 basic salary plus overtime.



17. That by year August, 2005, the claimant earned a basic salary of kshs 5,020 which was increased to kshs 5,195 by June, 2006; kshs 5,500 by May, 2008; kshs 7,000 by June, 2009, kshs 8,300 by June, 2010 9,300 by June, 2011, 12,000 by June, 2012, 13,200 by June, 2014- June, 2015 salary was kshs 10,648 and May, 2016, kshs 9,196, July, 2016, kshs 14,500. These payslips are before court.
18. R W 1 produced *Regulation of Wages and Conditions of Employment Order* as from the period 2003 to 2013 to demonstrate that at all material times, the respondent complied with the minimum wage and that the claim for underpayments is unwarranted.
19. R W 1 stated that the claim has no merit and it be dismissed with costs.
20. The parties filed written submissions and the Court has carefully considered them together with the testimony by the parties and has delineated the following issues for determination.
 - (a) Whether the claimant was constructively dismissed or she absconded work?
 - (b) Whether the claimant has proved that she is entitled to the reliefs sought.
21. C W 1, the claimant did not adduce any tangible evidence in support of her claim for constructive dismissal. To the contrary, the claimant stated that she had a very cordial relationship with her employer until she was deployed to Ruiru by a letter dated August 12, 2016 to report by August 15, 2016.
22. R W 1 adduced credible evidence that the claimant resisted the transfer and absconded when she refused to pick calls but only appeared days later to claim her wage.
23. The claimant did not provide any letter to the respondent in response to the transfer letter dated August 12, 2016, either requesting for more time to prepare for the transfer or seeking to be exempted from the transfer.
24. Accordingly, the court is satisfied that the claimant has failed to prove on a balance of probabilities that she was constructively dismissed from work. The claim is found to be without merit and dismissed. The claim for compensation is therefore dismissed.
25. With regard to payment of terminal benefits, the claimant testified that she was underpaid and claimed payment of underpayments. The respondent has successfully rebutted the claim for underpayments by demonstrating that the respondent complied with the minimum wage regulations throughout the tenure of employment of the claimant. The claim for underpayments is without merit and is dismissed.
26. The court is satisfied that the claimant absconded work and is therefore not entitled to payment in lieu of one month notice. Indeed, the respondent deducted from her terminal dues one month's salary in lieu of notice. The respondent was justified to do so in the circumstances of this case.
27. The court has considered the tabulation of terminal dues to the claimant presented before court and is satisfied that the respondent does not owe the claimant any further payment of terminal dues.
28. Accordingly, and in the final analysis, the entire claim lacks merit and is dismissed with no order as to costs considering the long service the claimant had provided to the respondent and her evident low financial state having not received any terminal benefits because the same was applied to defray her dues to the SACCO and the respondent.
29. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 15TH DAY OF DECEMBER, 2022.

MATHEWS N NDUMA



JUDGE

Appearances

Mr Waiganjo for claimant

Mr Muumbi for respondent

****Ekale – Court assistant**

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