REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2401 OF 2016

CHARLES MANINGI SHALALA.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGEMENT

In January, 2001 the claimant was employed by the respondent as a guard at a wage of ksh.1,8999 per month. The wage was increased with time and last earning ksh.10, 500 per month.

The claim is that On 6th September, 2016 the respondent terminated the employment of the claimant without notice, hearing or payment of his terminal dues. such was unfair and unlawful and contrary to section 45 of the Employment Act and compensation is due.

The claim is that there were underpayment of wages; unpaid leave, house allowances, overtime, rest days and public holidays.

The claims made are as following;

a) Notice pay Ksh.12,221;

b) Underpayments (2012 to 2015) Ksh.77,300;

c) Unpaid leave (2004 to 2009) Ksh.63,536;

d) Unpaid house allowance (2012 – 2015) Ksh.82,145;

e) Unpaid overtime (2012 – 2015) Ksh.317,661;

f) Unpaid holidays Ksh.21,629;

g) Unpaid rest days Ksh.94,386;

h) Service Ksh.131,940;

i) Refund of uniform Ksh.5,000;

j) Compensation; and

k) Costs of the suit.

The claimant testified that upon employment by the respondent he worked diligently until September, 2016 when he went on leave but upon return his employment was terminated. His brother died and he attended burial. There was a strike while he was at home. He did not participate. Leave ended on 30th September, 2016.

He was issued with letter and notice dated 24th October, 2016. The last wage was paid on 25th October, 2016.

The claimant also testified that his last wage was ksh.10,500 per month. In some years he went on annual leave. He handed over his duties

and was released.

The defence is that the claimant was employed in January, 2001 as a guard last earning Ksh.10,500 per month.

On 5th September, 2016 the claimant together with other employees in claim ELRC Cause No.1930 of 2016 – Zacharia Maroro & 41 others versus Lavington Security Limited and ELRC 2180 of 2016 – Kenya National Private Security Workers Union versus Lavington Security Limited participated in an unsanctioned demonstration leaving their assignments unmanned. Pursuant to section 41 of the Employment Act the claimant was issued with a notice to show cause why his employment should not be terminated and he failed to respond. Due to the nature of service, the claimant handed over his duties forcing the respondent to source for other guards to replace the deserting guards and the claimant.

The defence is also that the claims made should be dismissed. notice pay is not due as this was a case of summary dismissal. There was no underpayment as the respondent wages are paid per the Wage Orders. The claimant took his annual leave and nothing is due. the claim for house allowance is not due as the claimant earned a consolidated wage. there was no proof of public holidays not taken and service pay is secured in the payment of statutory dues. the claimant has not cleared so as to claim for a uniform refund.

Inn evidence the respondent called Joseph Mose Nyagwechi the zonal officer at Kilimani were the claimant had been deployed. On 5th September, 2016 the guards were not on duty as they gathered at the office seeking a salary increase. The respondent was forced to call the police. The claimant was among the demonstrating guards and he left his duty station without a handing over and also refused to attend to his duties. He was issued with a notice to show cause but failed to reply resulting in summary dismissal.

The respondent also called Samuel Obaga the human resource officer and who testified that the claimant participated in an unprotected strike and then refused to resume duty. On 5th September, 2016 he was issued with a notice to show cause and he refused to reply. He had left his night duties without handing over. Whenever there was overtime work, this was paid monthly. Leave days were all spent. The last day at work was on 4th September, 2016.The claims made should be dismissed with costs.

Both parties filed written submissions.

Determination

To the Memorandum of Claim, the claimant attached letter dated 6th September, 2016 being letter of summary dismissal from work pursuant to section 44(4)(a) and (g) of the Employment Act and which allow for summary dismissal for being absent from work and for failure to obey lawful instructions.

The claim is that there was unfair termination of employment upon the claimant taking his leave in September, 2016 and upon return to work, he was not allowed back.

The defence is that on 5th September, 2016 the employees had a sit-in and the claimant was involved. He refused to attend at his duty station and was issued with a notice to show cause why employment should not be terminated. He refused to reply and noting the respondent is in the private security sector, and the claimant failed to respond to the notice issued, he was dismissed from his employment.

The claimant testified that he was a night guard and was on duty in October, 2016 and after working the whole night he had nobody to hand over to as the day guard did not report on duty. He left his duty station.

This evidence is contradicted by the fact that the claimant also testified in September, 2016 he was on leave and upon return, he was not allowed back to work. That he only received his letter of summary dismissal on 24th October, 2016.

As noted above, the claimant filed the letter of summary dismissal. This on its own is evidence that he was issued with letter dated 6th September, 2016. He did not work after such date or in October, 2016 as alleged as he had already been dismissed. on his evidence, the claimant stands out as dishonest and not capable of telling the truth. His evidence cannot be believed.

In any event, the claims made have a cut-off date of 6th September, 2016. This confirms the findings that the claimant was ware at all material times that his employment terminated by summary dismissal on such date.

The court takes it that on 5th September, 2016 the employees of the respondent had a sit-in and the office in Milimani, and seeking salary increase. They refused to resume duty and were all replaced including the claimant.

Industrial action that is unprotected cannot form basis of a claim for unfair termination of employment. subsequent summary dismissal is lawful and justified.

Compensation and notice pay are remedies not available in a case of justified termination of employment.

On the claim for underpayments, the employer is the custodian of work records. The payments with regard to the claimant’s wages is not submitted. The defence that the wages paid were consolidated is not sufficient. The claimant as a guard had his wages protected in law and the Wage Orders serve as a basic minimum.

The respondent should have filed the payment statements of the claimant to confirm the nature of wages paid for the period of 2012 to 6th September, 2016.

From the Memorandum of Claim, in the year 2012 the claimant asserted that he was earning Ksh.4,200 wage instead of the minimum wage for a guard at Ksh.7,586 an underpayment of ksh.3,386 and for that year has claimed an underpayment of Ksh.39,876.

But alas!

The claimant attached several payment statements to the Memorandum of Claim;

January, 2012 he was earning a gross wage of ksh.8,380 per month;

June, 2013 he was earning Ksh.9,800;

August, 2013 he was earning Ksh.9,600;

June, 2016 he was earning Ksh.10,500 per month.

These payment statements are endorsed by the respondent and are evidence that these payment are over and above the minimum wage payable for each year.

Upon further analysis of these payment statements are indicative that the claimant was adequately compensated for his labours and to claim for a house allowance over and above what was paid would be an unjust enrichment.

Overtime claim is not particularised. The security sector is regulated under the Wage Orders. Without the claimant being specific as to the nature of hours worked each day, to claim that every week he had 87 hours multiplied by 12 months is failure to take account of his employment and applicable regulations.

The claim for holidays is general. Public holidays are gazetted and do not apply generally.

Rest days are regulated under section 27 of the Employment Act, 2007. Upon the claimant filing his claim seeking for a rest day each week and for the duration of employment, the respondent ought to have submitted evidence as to how such right was secured or a payment made in lieu of taking a rest day. This claim is not challenged in any material way.

For rest days due, in the year 2012 the minimum wage was Ksh.7,586 and for the 48 days due total pay is Ksh.18,206.

For the period of 2013 and 2014 the minimum wage was Ksh.8,579 and for the 48 days claimed, total dues is ksh.20,589.

The claimant is entitled to Ksh.38,795.60.

On the claim for service pay, on the payment statements, the claimant was registered with NSSF and NHIF. Service pay is not due.

Refund of uniforms, the claimant shall attend at the shop floor, undertake clearance and such deductions shall be addressed.

Accordingly, the claims made are found without merit save the claimant shall be paid for rest days not taken at ksh.38,795.60 only. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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