



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 207 OF 2016

EVANS NYAMBOSO NYAGAKA.....CLAIMANT

VERSUS

J.R.S GROUP SECURITY LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed suit on 20/7/2016 seeking the following reliefs:-

- (i) One month salary in lieu of notice in the sum of Kshs.15,000
- (ii) Underpayments in the sum of Kshs.107,530.
- (iii) Unpaid leave days for 12 years in the sum of Kshs.135,960.
- (iv) Unpaid overtime for 12 years Kshs.942,656.
- (v) Unpaid Public holidays worked for 12years Kshs.90,640.
- (vi) Unpaid Rest days worked and not paid Kshs.1,885,312.
- (vii) Compensation for unlawful dismissal.

2. The Respondent responded to the Memorandum of Claim on 7/6/2017 in which the claim is denied and the claimant is put to strict proof.

3. The Claimant testified as C.W.1 and adopted a witness statement dated 20/6/2016 as his evidence in chief. C.W.1 produced list of documents dated 20/7/2019 marked exhibits, '1' to '6'.

4. The Claimant testified that he was employed by the respondent on 2/2/2004 as a Security Guard. That he worked continuously until 30/3/2016 when his employment was unlawfully terminated by the respondent.

5. That he initially earned 3,800 per month. The salary was later adjusted to Kshs.6000 per month and later it was adjusted to Kshs.9,000.

6. That he had served in various assignments without any problem doing night shift duties.

7. That on 27/2/2016, whilst in night duty, he became ill and was experiencing chest problems. That he sought permission to go and see a doctor.

8. That on 30/3/2016 when he reported back on duty he was informed that he had been replaced and should hand over company property.

9. That for the 12 years he served the company he had no written –warning. That he was never given leave for 12 years and used to work even during public holidays. That he worked overtime of 4 hours daily without pay. That the termination was unlawful and unfair. That he be paid the terminal benefits and compensation as set out in the claim.

10. Under cross-examination by Mr. Maua for the respondent the claimant denied that he was found asleep at work. The claimant stated that

on 27/2/2016, he was sick. The claimant denied that he had signed a discharge voucher upon termination. The claimant said he had asked for 3 days off on 27/2/2016 when he fell sick but was replaced when he came back. The claimant denied that he had been disciplined at work. The claimant prayed to be awarded as prayed.

11. R.W.1 Kiptoo Patrick Maru testified for the respondent that he was a supervisor of the respondent. R.W.1 adopted a witness statement dated 24/8/2017 as his evidence in Chief. R.W.1 produced exhibits (1) to (9) filed on 23/8/2017.

12. R.W.1 testified that on 21/2/2016 he was at work and visited one client's residence by the name Sandeep Shah at 2200hours. On arrival he hooted at the gate but there was no response. That he banged the gate and there was no response. That he called the Control Room to establish if there was a guard at the site. The Caretaker at the place went round the compound and found the claimant asleep in the compound of the client. The claimant was summoned to the office the following morning. Under cross-examination R.W.1 stated that the caretaker was an employee of their client Sandeep Shah. That he had worked for the respondent since 2014. R.W.1 stated he did not know if the claimant was paid terminal benefits.

13. R.W.2 Yassir Khan adopted a witness statement dated 24/8/2017 as his evidence in Chief. He testified that he was a general manager of the respondent. That on 21/2/2016, the Claimant was accosted by the night supervisor while sleeping at work and was summoned to office the next morning. The claimant was removed from night shift to day shift because he was an habitual sleeper on 22/6/2016. That the claimant sought 3 days off to prepare for day shift which he was granted. The claimant did not return to work after 3 days and did not notify the respondent of his absence. That he was advanced Kshs.10,000 when he took off. That the claimant did not return for a long time and according to the company policy an employee was regarded a deserter after a period of 7 days absence.

14. That the claimant had taken all his off days regularly and it is not true that he never went for off days for 12 years. That the Claimant was paid salary regularly and was treated lawfully and fairly all the time.

15. Under cross-examination by M/s Odinga for the claimant R.W.2 stated that a hearing was conducted by the Human Resource Manager and Operations Manager and R.W.2 before the employment of the claimant was terminated. R.W.2 however did not have minutes of the said hearing. R.W.2 stated that the claimant was a night guard and worked from 6am to 6pm. R.W.2 said he was not aware of the sickness of the claimant. R.W.2 stated that he did not know if the claimant went on leave or if he was paid in lieu of leave.

16. R.W.2 stated that the claimant had a good relationship with R.W.2. R.W.2 said the claimant had warning letters. R.W.2 said he was not sure if the claimant was served with a notice to show cause. R.W.2 stated that the claimant was paid Kshs.11,530 per month and it was deposited in his account.

17. R.W.2 said he did not know if the claimant was underpaid. R.W.2 said he did not know if the claimant was paid terminal benefits.

Determination

18. The issues for determination are:-

- (a) Whether the employment of the claimant was terminated for a valid reason following a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought in the Statement of Claim.

19. The Claimant testified that he was victimized and replaced when he had taken a sick off. The respondent on the other hand states that the claimant was an habitual sleeper at work during night shifts and had written warning letters to that effect. That the claimant was transferred to day duties upon being caught red-handed asleep on 27/2/201. That the claimant then asked for 3 days off to go and prepare a house to do day duties. That he was given an advance of 10,000 for that purpose and 3 days off. That the claimant did not return to work for more than 7 days and was declared a deserter and summarily dismissed from employment.

20. R.W.1 and R.W.2 did not produce any of the alleged warning letters. The respondents did not produce minutes of alleged disciplinary hearing before the summary dismissal. The unsupported evidence by RW1 and RW2 lacked credibility.

21. Under Section 43(1) and (2) the Employer bears the onus of proving that it had a valid reason to terminate the employment of the claimant. The testimony by R.W.1 and R.W.2 fall short of discharging this onus. To the contrary the claimant established that he was replaced without notice, notice to show cause or disciplinary hearing whilst he was on a sick off. The claimant demonstrated that he had worked for the respondent for over 12 years without any written warning or record of misconduct.

22. The claimant also demonstrated that he was paid salary less than the Statutory minimum wage during the 12 years of service. That he was not given annual leave except occasional off-days. That he worked 4 hours over-time daily and was not paid overtime. That he was not given one paid rest day every week as per the law in the industry.

23. The claims by the claimant in this regard are time barred except for the last three years from the date of filing suit. Accordingly, the terminal dues set out in the claim are granted for the last three years.

24. The Court finds that the claimant has proved that his employment was wrongly terminated in terms of section 47(5) of the Employment Act, 2007.

25. Accordingly, the respondent violated sections 36, 41, 43, and 45 of the Employment Act and the claimant is entitled to compensation in terms of Section 49(1) (c) and 4 of the Act.

26. In this respect the Claimant had worked faithfully for 12 years. The claimant worked overtime without pay, was underpaid and was not granted annual leave. The claimant was not paid terminal benefits upon termination. The claimant did not contribute to the termination. The claimant wished to continue working and lost prospects of future employment. The claimant suffered loss and damage.

27. The Court has considered the Court of Appeal decision in **Ken freight East Africa Ltd. –vs- Benson K. Nguli, Civil Appeal No. 31 of 2015**, and upon considering the factors above, including that the claimant had served 12 years as compared to 14 years in the case above, the Court awards the claimant ten (10) months' salary in compensation for the unlawful and unfair termination of employment.

28. In the final analysis, Judgment is entered in favour of the claimant against the respondents as follows: -

- (a) 10 months' salary in compensation (11,530x10) Kshs.115,300.
- (b) One month salary in lieu of notice – Kshs.11,530.
- (c) Underpayments as set out in prayer 2(a) and (b) is awarded, limited to three years only to be calculated.
- (d) Accrued leave for 3 years in the sum of Kshs.(11,530x3) Kshs.34,590.
- (e) Unpaid overtime as per prayer (4) for 3 years Kshs.235,664.
- (f) Public holidays worked for 3 years as per prayer 5 Kshs.22,660
- (g) Rest days worked for 3 years as per prayer 6 Kshs.471,328.
- (h) Interest at Court rates from date of judgment till payment in full.
- (i) Costs of the suit.

Dated and delivered at Nairobi this 18th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Odinga for Claimant

Mr. Mauwa for Respondent

Chrispo: Court clerk.