



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

COURT NAME: ELDORET LAW COURT

CAUSE NUMBER: ELRC.C/76/2017

CITATION: STEPHEN OOKO ONDIEK VS SAMWEL KURIA KAMAU

JUDGMENT

1. The claimant averred that he was on 6th June, 2006 employed by the respondent as a day guard. His salary was kshs. 3,000/= per month. This was later after five years increased to kshs. 6,000/= per month.
2. According to the Claimant he served the respondent until January, 2017 when the respondent wrongfully and unprocedurally terminated his service and refused to pay his terminal dues.
3. According to the Claimant he was terminated because he was accused of being rude when he refused to take half of his salary for December, when he persisted to be paid his full salary, he was on 5th January, 2017 dismissed. The matter was reported to the area Chief and Labour Office where the respondent availed himself and agreed to pay him the balance of his underpaid salary.
4. The respondent offered instead the underpaid salary which the Claimant refused to take. The respondent on his part pleaded that there was no employer-employee relationship between him and the Claimant.
5. According to the respondent, the Claimant was merely an agent of the landlord tasked to collect rental income and maintain premises. The primary responsibility to hire and fire guards remained that of the Landlord who are not the respondent.
6. At the hearing the Claimant stated that he was employed on 6th June, 2006 at a salary of Kshs. 3,000/= per month. He was initially appointed as a day guard and later as day and night guard. His salary was then increased to kshs. 6,000/= per month. They were initially two guards but one left at some point leaving him alone. This is when he started guarding at night.
7. According to the Claimant he was terminated on 5th January, 2017. He was not given any reason for termination. He refused to take his salary because of deductions. Someone else was brought to take over night duties. That is when he was told his salary would be reduced.
8. The Claimant further stated that during the period he worked for the respondent he never went on leave. He denied receiving the letter dated 30th June, 2016 complaining he absconded duties.
9. The cross-examination, he stated that the respondent called him to assist and that he never applied for the job. He denied he was a caretaker and that he stayed at the premises. It was his evidence that he knew the respondent was an agent and that he never knew the landlord.
10. The respondent witness Mr. Kamau stated that he was a rent-agent and that one of the properties he was managing was Pioneer estate. He adopted his witness statement filed on 2nd November, 2017 as his evidence in chief. He also relied on the documents filed with the claim. He denied ever employing the Claimant, he only used to ensure he got paid. The Claimant had no contract or letter of appointment from him. The respondent further denied terminating the Claimant service.
11. According to the respondent, there were complaints by tenants that the Claimant used to absent himself a lot from work. The respondent called him and cautioned him but he never changed. The tenants therefore replaced him. It was Mr. Kamau 's evidence that he was unable to process the Claimant's leave because he was not his employee. His work was to collect rent. He was not responsible for Claimant's salary. He never knew how much he was paid.
12. In cross-examination he stated that the Claimant was guarding at Eldoret Court and that the premises were owned by a Mr. Tanui . It was his evidence that Mr. Tanui never talked to the watchman and that the Claimant was a caretaker. He stated that he did not know from who the Claimant got the job.

13. He further stated that he was the one who used to give the Claimant his money collected from tenants. The tenants used to call him whenever the Claimant was not at work.

14. According to him, the tenants were the ones who employed the Claimant. His role was to collect the money and pay the Claimant.

15. One of the issues to be decided in this matter is whether there was employee-employer relationship between the Claimant and the respondent. The respondent has averred that the Claimant was a caretaker and that he was employed by the tenants. His role was merely to collect rent and pay the Claimant his salary. The respondent however denied in his evidence that he knew how much the Claimant earned. If that were so, how did he know how much money to pay the Claimant? The respondent further stated that he was once called by the tenants who complained that the Claimant was absent from work most of the time and he called him and warned him about.

16. If the tenants were the ones who employed the Claimant, why would they call the respondent to complain to him about Claimant's absence from work? Would it not have been easier for the tenants to deal with the Claimant as their employee?

17. From the foregoing, the respondent is not being truthful in denying that the Claimant was his employee. The Court thus finds and holds that there existed employer-employee relationship between the respondent and the Claimant.

18. That having been said the respondent did not tender any evidence on how the service of the Claimant was terminated. This may have been perhaps because of the mistaken or intention to conceal the relationship and portray to court that the Claimant was not his employee.

19. Under Section 43 of the Act, no employer is permitted to unfairly terminate the service of an employee. The termination will be considered unfair if the employer fails to prove that the reason for the termination is valid or fair reason and that the termination was carried out through a fair procedure.

20. Regarding heads of claim, the Claimant pleaded that he was underpaid but never produced any evidence to show how much he was paid and also did not attach any gazetted wage order relied on to show by how much he was underpaid. To this extent this claim will be disallowed. The claim for overtime also although pleaded, no evidence was led during the trial to support the same. The same will also be disallowed.

21. In conclusion the Court will award the Claimant as follows: -

- a. One month salary in lieu of notice 6,000
- b. Leave dues 62,865
- c. Six months compensation for unfair Termination 36,000

104,865

- d. Costs of the suit items (a) (b) (c) are subject to taxes and statutory deductions where applicable.

22. It is so ordered.

DATED AT ELDORET THIS 22ND DAY OF MARCH, 2021

DELIVERED AT ELDORET THI 22ND DAY MARCH, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA