



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 305 OF 2018

KENYA NATIONAL PRIVATE SECURITYITY

WORKERS UNION.....CLAIMANT

VERSUS

GUARD FORCE SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed by the Claimant on 11/10/2018 praying for the following reliefs in favour of the grievant:-

(a) Reinstatement to the job and in the alternative maximum compensation for unlawful dismissal.

(b) Terminal benefits including

(i) Salary for September, 2017 – 12,221.

(ii) Unpaid leave days for two years – Kshs.24,442.

(iii) Unpaid overtime – Kshs.84,960.

(iv) Underpayment for 57 months – Kshs.297,597.

2. The grievant testified as C.W.1, and told Court that he was employed by the Respondent as a Security guard on 1/1/2015 vide an oral contract. That he was stationed at Miwani, KPLC office. That he was paid Kshs.6,000 per month which was later increased to Kshs.7,000.

3. That the Assignment Contract for the Respondent ended and were replaced by another company. The employees, including the grievants were not notified. The grievant called the respondent and he was asked to return his uniform.

4. The grievant and his colleagues were not paid September, 2017 salary. The grievant and colleagues stopped working on 30/9/2017. The grievant and colleagues did not go on leave at all and were not paid in lieu of leave days not taken. That they worked 12 hours a day and were not paid overtime. The grievant stated he was therefore underpaid. That he should have been paid Kshs. 12,000 and house allowance which he never got. The claimant prays to be awarded as prayed.

4. The respondent did not enter appearance nor file a Memorandum of defence despite service of summons and statement of claim on 11/10/2018. The claimant filed an affidavit of service sworn to on 19/12/2018 by Patrick Sakwa, Kadukha, the Branch Secretary General of the Claimant union who effected service.

5. The evidence adduced by C.W.1 is uncontroverted and the claimant has proved on a balance of probability that he was on 30/9/2017 retrenched by the respondent without following the substantive and procedural requirements under Section 40 of the Employment Act.

6. C.W.1 was simply asked to return his uniform without notice, without consultation, without payment of terminal benefits, due and owing to him including salary for September, 2017, payment in lieu of two years untaken leave; payment of overtime worked daily for 4 hours and underpayment in that he was paid salary that was less than the statutory minimum wage in the Security Industry. The respondent did not notify the Labour office also.

7. The Court finds that the respondent violated Sections 36, 40, 41 and 45 of the Employment Act, 2007 by failing to follow the lawful procedure in effecting retrenchment of C.W.1 and his colleagues.

8. C.W.1 is entitled to compensation in terms of Section 49(1) and (4) for the unlawful and unfair termination of employment. In this respect, the claimant had served for two years; he did not contribute to the termination; he was not paid terminal benefits upon termination including underpayments; leave pay and salary earned. The claimant suffered loss and damage and was not compensated for the loss.

9. The respondent did not adhere to the minimum legal provisions regarding workers in the security industry. The respondent was therefore unlawfully exploiting workers. The Court has considered similar case of **Joshua Mwaniki –vs- andela Kenya Limited ELRC Cause No. 452 of 2019**, in which Onesmus Makau awarded the claimant who had served for 2 years six (6) months compensation.

10. The Court considers this an appropriate case to award C.W.1 who had served for two years, considering all the aggravating factors above, equivalent of five (5) months' salary as compensation for the unlawful and unfair termination in the sum of Kshs. 12,221 x 5) 61,105.

11. In addition the claimant has proved on a balance of probabilities that C.W.1 was owed and not paid the terminal benefits set out in the Statement of Claim and the Court awards C.W.1 accordingly as follows: -

(a) September salary – Kshs.12,22

(b) Unpaid two years leave – Kshs.24,442.

(c) Unpaid overtime for 12 months – Kshs.84,960

(d) Underpayments for 57 months – kshs.297,597.

Total award – Kshs.480,325.

(e) The award is payable with interest at Court rates from date of judgment till payment in full.

(f) Costs to follow the event.

Dated and delivered at Nairobi this 11th day of March, 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 ruling 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:

Mr. Bagade for Claimant

Chrispo – Court clerk.