



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

CAUSE NUMBER 2243 OF 2017

BETWEEN

NELSON OMILA SAUNYA.....CLAIMANT

VERSUS

IDEAL SECURITY LTD.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Chwero & Company Advocates for the Claimant

Okongo Omogeni & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 14th November 2017. He avers, he was employed by the Respondent as a Security Guard for 3 years, between 8th February 2013 and 1st October 2016. His salary was Kshs. 7,500 per month.

2. He complains that he did not go on annual leave and worked over weekend and public holidays. He was dismissed on the ground that he absconded. He was sick, and seeking medical attention, at the time he was alleged to have absconded. He was not given the opportunity of a hearing. He was not given notice of termination. The allegations against him were not investigated. His terminal dues were withheld.

3. He prays for Judgment against the Respondent for: -

- a. Declaration that dismissal was wrongful, unlawful and malicious.
- b. Terminal dues amounting to Kshs. 572,000.
- c. Service pay for each completed year of service.
- d. General damages for wrongful termination.
- e. Interest and costs of the suit.
- f. Any other or further relief that the Court may deem fit to grant.

4. The Respondent failed to file its Response within the stipulated time. It moved the Court for leave to file Response out of time. The Court granted extension of 7 days on 16th July 2019. There was no compliance. On 3rd December 2019, the Court ordered that the Claim proceeds to formal proof.

5. The Claimant was heard *ex parte*, on 21st January 2021, when he rested his case. He relied on his Statements of Claim and Witness on record. He adopted his documents as exhibits. He emphasized that he was not paid any benefits. He was unwell. The Respondent told him it would recall him, once he was mended. He was not recalled. He was only paid 7 days' salary on the intervention of the Ministry of Labour.

The Court Finds: -

6. The Claim is undefended, but poorly pleaded. The terminal dues claimed are not broken down in the Statement of Claim. The claimant merely pleads for terminal dues in the amount of Kshs. 572,000.

7. He prays separately for service pay. Is not service pay a component of terminal dues? Had the Respondent participated in the proceedings, there would be questions put to the Claimant, that would have shaken his Claim significantly.

8. Nevertheless, the Respondent kept away. The saving grace is that Claimant adopts as part of his evidence, his letter of demand dated 24th May 2017, in which he demands: one month' salary in lieu of notice, at Kshs. 7,500; accrued annual leave of 3 years at Kshs. 22,500; gratuity for 3 years at Kshs. 4,500; underpayments at Kshs. 260,000; overtime at Kshs. 180,000; and 12 months' salary in compensation for unfair termination at Kshs. 90,000 – total Kshs. 572,000.

9. A letter of demand is not a Statement of Claim. Prayers sought through a Statement of Claim, must be clearly pleaded. In the absence of a Response however, the Court has no reason not to adopt the items contained in the letter of demand, as the details of the prayers by the Claimant. There is no reason, to deny the prayers for notice, leave, gratuity, underpayment and compensation. The prayer for overtime has no support in the evidence and the pleadings of the Claimant. He does not say how many hours he normally worked, and how many hours he worked in excess of his normal schedule. He does not say, when he put in excess hours. There is no formula to his computation of the item at Kshs. 180,000.

10. He exhibits Legal Notice No. 117 of 2015. The minimum monthly wage for a day Security Guard in the Cities, is shown at Kshs. 10,954. He was paid Kshs. 7,500 throughout. The rate did not apply in 2014 and 2013, but was effective 1st May 2015. The Court would allow the prayer for underpayment, pegged on the period 1st May 2015 to 1st October 2016 when he left. This is a period of 17 months. The shortfall was Kshs. 3,454 x 17 = Kshs. 58,718. ***The prayer for underpayment of salary is allowed at Kshs. 58,718.***

11. ***Notice pay is allowed at Kshs. 10,954.***

12. The Respondent has not availed any document to discount Claimant's oral evidence on annual leave. Regulation 10 [1] of The Regulation of Wages [Protective Security Services] Order, 1998, which applies to the industry in which the Claimant worked, grants an Employee, 26 days of annual leave with full pay, after each period of 12 months' consecutive service. ***The Claimant completed 3 years consecutively, and is therefore entitled to equivalent of 78 days' salary of annual leave pay at Kshs. 32,862.***

13. The Order entitles Employees with over 5 years' service, gratuity of 18 days' salary for every completed year of service. The Claimant worked for 3 years. His reward and recognition of years of service would be under Section 35 [5] of the Employment Act. He was not shown to have been subscribed to any other social security regime. ***He is allowed service pay based on the rate provided under the gratuity clause in the Order, of 18 days' salary for 3 complete years, at Kshs. 22,750.***

14. The burden of proof in claims of unfair termination and wrongful dismissal, is prescribed under Section 47[5] of the Employment Act. The Employee must establish that unfair termination or wrongful dismissal has taken place, while the Employer must justify the reasons for termination.

15. The Respondent has not participated in the proceedings, and from the outset, there is no evidence of justification, for the decision to terminate Claimant's employment. The Claimant has shown that at some point, he fell ill. He was absent from work. The Respondent treated him as a deserter and terminated his contract. The Respondent did not bother to issue the Claimant with a letter to show cause, and put him through a disciplinary hearing. There was no attempt to investigate if the Claimant was absent without reason or lawful cause. The Court is persuaded that the Claimant established his contract was unfairly terminated, and the Respondent failed to justify termination.

16. He had worked for 3 years. He did not tell the Court how old he was on termination, and how long he expected to go on working. His record is not shown to have been blemished. He contributed to the decision by the Respondent to terminate his contract, because he does not appear to have formally sought sick leave from the Respondent. ***He is granted 3 months' salary in compensation for unfair termination at Kshs. 32,862.***

17. He does not merit general damages, beyond the statutory compensation.

18. *Costs to the Claimant.*

19. *Interest allowed at the rate of 16% per annum from the date of Judgment, till payment in full.*

IN SUM, IT IS ORDERED:

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: underpayment of salary Kshs. 58,718; notice, Kshs. 10,954; annual leave pay, Kshs. 32,862; service pay Kshs. 22,750; and compensation for unfair termination at Kshs. 32,862 – total Kshs. 158,146.

c. Costs to the Claimant.

d. Interest allowed at the rate of 16% per annum, from the date of Judgment till payment in full.

DATED AND SIGNED AT CHAKA, NYERI COUNTY, UNDER COVID-19 MINISTRY OF HEALTH AND JUDICIARY GUIDELINES, THIS 9TH DAY OF APRIL 2021

James Rika

Judge