



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1928 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ALBANO KATHENYA KITHURE.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent as a Security Guard (Dog Handling Section) in January 2007. Due to medical conditions, he resigned from employment on January 2015.

On 29th October 2015, he filed a Memorandum of Claim seeking the following reliefs:

- a. Underpayment Kshs.280,784.20
- b. Overtime Kshs.1,025,308.00
- c. Leave pay for 2014 Kshs.10,911.70
- d. Refund for uniform Kshs.2,400.00
- e. Costs of the suit
- f. Interest on the above till payment in full
- g. Certificate of service
- h. Any other relief this Court may deem fit to award under the circumstances.

The Respondent filed a Response to the Memorandum of Claim which was amended by its Amended Reply to Memorandum of Claim and Counterclaim dated 5th April 2018. It admitted that the Claimant resigned. He never went back to clear so that his final dues could be calculated and paid. It avers that the Claimant would also have been issued with a Certificate of Service.

In its counterclaim, the Respondent avers that though the resignation was accepted the Claimant was informed that payment in lieu of notice would be deducted from his dues. It therefore claims Kshs.10,500 as payment in lieu of notice.

Claimant's Case

At the hearing, the Claimant relied on his Witness Statement dated 21st August 2015 as his evidence-in-chief. He testified that the uniform refund was Kshs.2,400 which was deducted from his salary for 3 months at Kshs.1,100 per month. He testified that he did not issue a notice because he resigned due to sickness and that prior to this he had a discussion with the Respondent.

On cross-examination, he testified that he was employed in 2007 and maintained that the refund was deducted at the rate of Kshs.1,100 per month. He testified that upon surrendering the uniform, he was issued with an acknowledgment. He testified that the amount was deducted in

2007 but could not recall the months.

He contended that he did not give notice because he resigned after discussions and he submitted a medical report. He admitted that he did not respond to the counterclaim.

He testified that he was not issued with a contract, that his initial salary was Kshs.8,500 which was subsequently increased to Kshs.10,500. He testified that every year, the workers demanded underpayment but there was no response to their letters. He further testified that he complained about unpaid overtime but he did not have a copy of the complaint letters.

He testified that he took 2 days off per month thus he did not claim for off days. He confirmed that the muster roll indicates that he did not work for 4 days in March 2012. According to him, he got someone to work in his place and that this applied to all guards who took 4 days off per month.

He testified that he was entitled to 25 days leave and that he had taken leave for the year 2013. It was his testimony that he had no balance of leave which was to be carried over to 2013. He denied receiving the response to his resignation letter dated 21st January 2015. He testified that he returned company property and was cleared.

Upon re-examination, he testified that the muster roll has records until 20th February 2014 yet February has 28 days. He stated that the leave form produced by the Respondent was for July 2013 which indicated that he had no pending leave. He however testified that he had earned leave through the year 2014 and this is the leave he claims.

Respondent's Case

Raymond Nzioka the Respondent's Human Resource Manager testified as RW1. He denied that the Claimant is entitled to underpayment. He testified that the pay roll for the period between 1st May 2011 and 30th April 2014 reflects that in 2011 the Respondent paid the Claimant Kshs.5,800, in the succeeding 5 months the salary was Kshs.7,200 per month and thereafter Kshs.9,500 per month.

He testified that the Claimant used a salary of Kshs.8,463 per month which does not tally with the payroll and based on the calculations, the Claimant does not qualify for underpayment.

He testified that the Claimant went on leave and had off-duty days. He testified that the Claimant was absent on 1st and 2nd March 2012 and was on off duty on 26th, 27th, 28th and 29th March 2012 and on 5th, 6th, 7th and 8th April 2013.

He testified that the Claimant is not entitled to overtime because the claim includes days he was absent or on off duty. He admitted that the Claimant is entitled to leave for 2014. He testified that the correct amount in respect of leave pay is Kshs.10,500 and not Kshs.10,911 as claimed. That this amount is based on the January 2015 salary.

He testified that the Claimant is not entitled to uniform refund because he did not clear or return the company uniform. He testified that the Claimant resigned without notice thus the Respondent is entitled to Kshs.10,500 as notice pay and costs of both the claim and the counterclaim.

On cross-examination, he testified that the Claimant worked from 6 am to 6 pm. He testified that the Respondent did not produce pay slips but a summary of pay slips. He testified that the Claimant resigned on 19th January 2015 but was present until 31st January 2015.

He conceded that house allowance was not reflected in the pay slips and testified that the Respondent paid a gross pay. He testified that the Respondent did not produce the Claimant's contract of employment. He further testified that the Claimant's resignation was accepted and a letter was prepared.

On re-examination, he stated that the Claimant was paid for the 19 days worked in January 2013.

Claimant's Submissions

The Claimant submitted that the pay slips prove that there was no provision of house allowance. He further submitted that the Respondent cannot claim that the pay was consolidated since the express provision was not provided for in the employment contract or pay slip. He relied on **Martin Ileri Ndwiga v Olerai Management Company [2017] eKLR** where the Court held that where a written contract is not issued immediately Section 10(1) of the Employment Act makes it mandatory that such document should issue not later than 2 months.

It was his submission that in the absence of the employment contract the court can only agree that house allowance was never paid and that the Respondent being the custodian of employment records under Section 74 of the Employment Act failed to discharge its evidentiary burden of proof.

He submitted that RW1 confirmed that he worked from 6 am to 6 pm. In respect of this, he relied on Regulation 6 of the Regulation of Wages [Protective Security] Services Order 1998 and submitted that the order caps the working hours at 52 hours over six days a week. He submitted that the muster roll had no probative value and ought to be given no evidentiary weight because it had inconsistencies. He further submitted that the claim for overtime has not been challenged. He relied on **Meshack Kiiio Ikuluma v Prime Fuels Kenya Limited [2013] eKLR** where the Court held that it is the duty of the employer to keep employment records.

He submitted that the Respondent did not provide pay slips to show that the Claimant was paid at the recommended wage rate under the Regulation of Wages (General) (Amendment) Order 2013.

With respect to the counterclaim, he submitted that there was no requirement for the notice of resignation because it was unconditionally accepted by the Respondent. He submitted that the Respondent had a duty to engage him on any form of discussion if they were not willing to accept the termination.

On refund for uniform, he submitted that his resignation was unconditionally accepted and there was no mention of clearance or uniform. He urged the Court to grant his reliefs and award costs.

Respondent's submissions

The Respondent submitted that the claim for house allowance is a continuing injury thus its validity was for 12 months. Therefore, the only valid claim for house allowance was for November 2014 and December 2014 seeing that the claim was filed on 29th October, 2015. It argued that if the Claim for this relief was valid for other reason, then it has to fail because of being time barred under section 90 of the Employment Act.

It submitted that there are no specific days pleaded for overtime thus it is just a blanket prayer covering every single day of the Claimant's working life. It submitted that it cannot be true that the Claimant worked continuously for 8 years without rest on his off days or annual leave or just being away from duty and that the Claimant admitted that he took off-duty days of 4 days every month together with his leave days.

It argued that both overtime and underpayment special damage where particulars have to be pleaded and proved. It was its submission that the Claimant cannot be awarded these claims without giving proper, specific and accurate particulars. It relied on the case of **Fred Makori Ondari v The Management Committee of the Ministry of Works Sports Club [2013] eKLR** where the Court declined the prayer for overtime as it was not backed by evidence and the amount claimed was not explained.

He further relied on the cases of **Charles Nguma Maina v Riley Services Limited [2018] eKLR** and **Samuel Omutoko Mabinda v Riley Services Limited [2019] eKLR** where the courts rejected the claims for overtime and underpayment on the basis that there was no tangible evidence and the claims have were exaggerated.

It maintained that uniform refund is refundable only upon full clearance with the Company and the Claimant is not entitled to a refund before clearing with the Respondent. It submitted that it had proved its claim on the required notice thus it is entitled to Kshs.10,500 as sought in the counterclaim.

With regard to costs, it submitted that each party should bear its own costs as it would be great injustice to require the Respondent to meet costs of the claim while the counterclaim is not challenged and is likely to succeed.

It concluded that the Claimant has failed to establish and prove his case against it thus the claim ought to be dismissed with costs and the counterclaim upheld with costs.

Analysis and Determination

The main issues for determination are:

- a. Whether the Claimant is entitled to the reliefs sought.
- b. Whether the Respondent is entitled to the counterclaim.

Whether the Claimant is entitled to the reliefs sought

(i) Underpayment

The Claimant testified that he was employed in 2007 and was earning Kshs.8,500 per month. He further testified that this amount was later increased to Kshs.10,500. RW1 denied that the Claimant is entitled to underpayment. He stated that the amount stated by the Claimant does not tally with the payroll because he earned Kshs.5,800 in 2011 which was increased after 5 months to Kshs.7,200 and thereafter Kshs.9,500.

There was a discrepancy in the amount pleaded by the Claimant, the amount stated during the hearing and that indicated in the payroll. The incomplete payroll and the pay slips produced by the Claimant indicate that from October 2009 to May 2011 the Claimant earned Kshs.5,800; from June 2011 to October 2011 he earned Kshs.7,200; from November 2011 to April 2013 he earned Kshs.9,500; and from May 2011 to January 2015 he earned Kshs.10,500.

The minimum wage during the years was Kshs.6,130 in 2009; Kshs.6,743 in 2010; Kshs.7,586 in 2011; Kshs.8,579.80 in 2012 and Kshs.9,780.95 in 2013/2014. For determination of underpayment, the basic pay is loaded with 15% to cater for house allowance. The consolidated pay was therefore as follows –

- (a) Underpayments

1st May 2007 – 30th April 2003, x 5,795 (minimum required wage) house allowance= 869.25/-

$869.25 + 5,795 = 6,664.25/-$

$6,664.25 - 4,500 = 2,164.25/ =$

$2,164.25 \times 12 \text{ months} = \text{Kshs.}25,971/-$

1st May 2008 – 30th April 2009, x 5,795 (minimum required wage) house allowance=869.25/-

$869.25 + 5,795 = 6,664.25/-$

$6,664.25 - 4,500 = 2,164.25/ =$

$2,164.25 \times 12 \text{ months} = \text{Kshs.}25,971/-$

1st May 2009 – 30th April 2010, x 6,839 (minimum required wage) house allowance = 1,025.85/-

$1,025.85 + 6,839 = 7,864.85/-$

$7,864.85 - 4,500 = 3,364.85/-$

$3,364.85 \times 12 \text{ months} = \text{Kshs.}40,378.20/-$

1st May 2010 – 30th April 2011, x 7,523 (minimum required wage) house allowance= 1,128.45/-

$1,128.45 + 7,523 = 8,651.45/-$

$8,651.45 - 5,800 = 2,851.45/-$

$2,851.45 \times 12 \text{ months} = \text{Kshs.}34,217/-$

1st May 2011 – 30th April 2012, x 8,463 (minimum required wage) house allowance= 1,269.45/-

$1,269.45 + 8,463 = 9,732.45/-$

$9,732.45 - 5,800 = 3,932.45/-$

$3,932.45 \times 12 \text{ months} = \text{Kshs.}47,189/-$

1st May 2012 – 30th April 2013, x 9,571.65 (minimum required wage) house allowance= 1,435.75/-

$1,269.45 + 9,571.65 = 11,007.40/-$

$11,007.40 - 6,200 = 4,807.40/-$

$4,807.40 \times 12 \text{ months} = \text{Kshs.}57,688.80/-$

1st May 2013 – 30th April 2014, x 10,911.75 (minimum required wage) house allowance= 1,636.76/-

$1,636.76 + 10,911.70 = 12,548.46/-$

$12,548.46 - 9,800 = 2,748.46.46/-$

$2,748.46.46 \times 12 \text{ months} = \text{Kshs.}32,981.52/-$

1st May 2013 – 30th April 2014, x 10,911.75 (minimum required wage) house allowance=1,636.76/-

$1,636.76 + 10,911.70 = 12,548.46/-$

$12,548.46 - 10,500 = 2,048.46/-$

$2,048.46 \times 8 \text{ months} = \text{Kshs.}16,978.68/-$

TOTAL Kshs.280,784.20/-

Having been underpaid for all the months worked, the Claimant is awarded the same as prayed.

Overtime

The Claimant testified that he worked from 6 am to 6 pm. In cross-examination, RW1 admitted that the Claimant worked from 6 am to 6 pm. The Muster Roll relied upon by RW1 does not indicate the hours worked but the days the Claimant attended work.

The Claimant worked for 12 hours daily. Thus in a week he worked for 84 hours instead of 52 hours. He thus worked 32 hours per week for 52 weeks a year making a total of 1664 hours per year. Having claimed only 96 hours per month, which is less than what he was entitled to even with the exclusion of 4 off days per month and 25 days annual leave days a year, I award the Claimant overtime as prayed.

Leave for 2014

The only dispute with this claim was on the amount payable as leave pay. RW1 testified that though the Claimant is entitled to this claim, the correct amount is Kshs.10,500 and not 10,911.70. The Claimant's last salary was Kshs.10,500, this is the amount payable as his leave pay.

Uniform Refund

The Claimant testified that uniform refund of Kshs.2,400 was deducted Kshs.1,100 for the first 3 months of employment. The Respondent submitted that the amount is refundable upon full clearance with the Respondent. The Claimant testified that he cleared with the Respondent and returned the Company's uniform. The Claimant is therefore entitled to Kshs.2,400 which is accordingly awarded to him.

Certificate of Service

The Claimant is entitled to a Certificate of Service under Section 51 of the Employment Act.

The Claimant is entitled to costs and interest of the suit.

Whether the Respondent is entitled to the counterclaim

The Respondent sought one month's salary in lieu of notice. The Claimant testified that the termination was mutual. The letter dated 19th January, 2015 does not state that the termination was mutual. In accordance with section 36 of the Employment Act, the Claimant was required to give one month's notice prior to his resignation.

Further, the Claimant admitted that he did not respond to the Counterclaim. In the letter accepting the Claimant's resignation, the Respondent informed the Claimant that it would recover the notice period from his terminal dues.

In view of the fact that the Claimant worked for the whole month of January 2021, the Respondent is entitled to recover only 18 days' unserved notice from the Claimant's terminal dues.

Conclusion

Judgment is therefore entered for the Claimant as follows: -

1. Underpayments Kshs.280,784.20
2. Overtime Kshs.1,025,308.00
3. Leave for 2014 Kshs.10,500.00
4. Uniform refund Kshs.2,400.00

Total Kshs.1,318,992.20

5. The Respondent shall recover from the said amount the sum of **Kshs.7,673/=** on account of 19 days' notice not served.
6. The Respondent shall issue a certificate of service to the Claimant.
7. The Respondent shall pay Claimant's costs of the suit.
8. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE