



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NUMBER 302 OF 2015

BETWEEN

DEYA SAMSON OWINO.....CLAIMANT

VERSUS

COBRA SECURITY COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Namada & Company Advocates for the Claimant

Mwangi Chege & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 4th March 2015. He avers, he was employed by the Respondent as a Rider/Supervisor, on or around 1st November 2012. His salary was Kshs. 18,000 monthly, as at the time he exited employment.

2. He avers, he was summarily dismissed by the Respondent on 14th July 2014. There was no notice to show cause why he should not be dismissed; he had done nothing to warrant any disciplinary action; no hearing took place; due process was not followed; and the decision was harsh and unwarranted. He asks the Court to find dismissal was unfair, and award him the following remedies:

- a. 1- month salary in lieu of notice at Kshs. 18,000.
- b. Annual leave for the period of service at Kshs. 18,000.
- c. Gratuity at 15 days for 1 complete year of service at Kshs. 9,000.
- d. 12 months' salary in compensation for unfair termination at Kshs. 216,000.
- e. Salary for days worked between 26th June 2014 and 14th July 2014 at Kshs. 11,400.
- f. Overtime at Kshs. 135,000.
- g. Public holidays for the period served at Kshs. 32,000.
- h. Off days for the period worked at Kshs. 57,000.

Total...Kshs. 497,000.

- i. Declaration that dismissal was unfair.
- j. Costs.
- k. Interest.

3. The Respondent filed its Statement of Response on 22nd July 2015. Its position is that the Claimant was employed as a Supervisor/Rider on a contract of 1 year, commencing 29th November 2012 at a gross monthly salary of Kshs. 13,000, which was later reviewed to Kshs. 16,000. The contract was subject to renewal. Either Party could terminate the contract by giving 7 days' notice or paying 7 days' salary in lieu of notice. The Respondent had the right to terminate the contract on lawful cause. The Claimant was assigned a motorcycle. On many occasions he failed to fulfil his supervisory role. He would oversee a few tasks, then go to his home to sleep. He was warned verbally on several occasions. He did not heed the warnings. The Respondent states rather obliquely, at paragraph 6 of the Statement of Response that, "he did not perform and erected [?] to sleep..." The Respondent prays the Court to dismiss the Claim with costs.

4. The Claimant was heard on 18th February 2021. The Respondent did not give evidence. There was however a late appearance in Court, on the hearing date by Counsel Mr. Ndirangu, holding brief for Mr. Chege for the Respondent. The Claimant adopted his Witness Statement on record, which is a replica of the Statement of Claim, summarized above. He confirmed that his first salary was Kshs. 13,000, and the last Kshs. 16,000 monthly.

5. He explained that he requested for off-duty days, to attend burial in his rural home. On return, he was issued a letter of summary dismissal. It was alleged that the Claimant did not discharge his supervisory role satisfactorily. There was no warning or letter to show cause. He was not heard. He worked 12 hours a day. He was not compensated for excess hour worked. He never took annual leave. He was not paid house allowance.

6. The Claimant filed his Closing Submissions on 1st March 2021, while the Respondent did so, on 15th March 2021. The Submission underscore the position of the Parties taken in their Pleadings, and it is not necessary to rehash the same.

The Court Finds: -

7. The Claimant was employed by the Respondent as a Security Supervisor/ Rider, through a written contract, with effect from 29th November 2012. The contract is exhibited by both Parties. The contract was for 1 year, expiring 28th November 2013. It was renewable subject to a favourable performance appraisal of the Claimant. His initial salary was Kshs. 13,000 monthly, later reviewed to Kshs. 16,000, and not Kshs. 18,000 as pleaded by the Claimant.

8. There is no document exhibited by the Parties communicating renewal of the contract after 28th November 2013. Termination however, was on 14th July 2014, which would lead to presumption that the contract was renewed, after 28th November 2013.

9. The reason given by the Respondent in justifying termination decision, is that the Claimant failed in his supervisory role. He would make a few rounds to sites and without exhausting his task for the day, opt to go and sleep at his house.

10. The Respondent states also that the contract had a provision for termination on notice of 7 days. This clause in the view of the Court was in the expired contract, and cannot be relied on by the Respondent. Even if termination was within the contractual period, the law does not allow termination of employment contracts, on notice of less than a month, unless it is a probationary contract under Section 42[4] of the Employment Act, which provides for termination on 7 days' notice or 7 days' salary in lieu thereof. The contract between the Parties was for 1 year, and not a probationary contract. There was no probation period in the contract.

11. It is also clear from the evidence given by the Claimant that he was not heard, and the Respondent did not justify termination. The allegation that the Claimant failed in his supervisory role was not supported by the Respondent through evidence. Termination failed the test of fairness, in substance as well as procedure, under Sections 41, 43 and 45 of the Employment Act. The Claimant merits compensation for unfair termination. He merits notice pay.

12. He had worked for 1 year 8 months. There were no recorded warnings against him, on performance or discipline. His contract was for 1 year which had been renewed. From the record it is not clear for what period renewal was granted. In the absence of evidence from the Respondent, it is fair to presume the period was indefinite. The Claimant is not shown to have played a part in the circumstances leading to termination. He expected to go on working. His period of service however, cannot justify compensation equivalent of 12 months' salary. **He is allowed compensation equivalent of 2 months' salary at Kshs. 32,000.**

13. **He is awarded 1 months' salary in lieu of notice at Kshs. 16,000.**

14. He worked in the Protective Security Services Industry, regulated by The Regulation of Wages [Protective Security Services] Order 1998. He is entitled to 26 days of annual leave under Regulation 10 [1], over a period of 12 months, and 3 days' leave with full pay, for each of the remaining 8 months of service. This works out as follows: Kshs. 16,000 [26 days] + Kshs. 14,769 [24 days] = Kshs 30,769. **He is allowed the prayer for annual leave pay at Kshs. 30,769.**

15. Gratuity under the order is paid to Employees with at least 5 years of service. The rate is 18 days' salary for each complete year of

service. The Claimant did not complete 5 years and would not be eligible for gratuity under this Order. He however merits service pay, under Section 35 of the Employment Act, as there is no evidence that he was subscribed to any Social Security Plan. ***The Court grants him service at 18 days' salary for his 1 complete year of service, at Kshs. 11,076.***

16. He prays for salary for days worked from 26th June 2014 to 14th July 2014 [20 days]. The Respondent offered no evidence that this last salary was paid. ***The Court allows the prayer at Kshs. 12,507.***

17. Regulation 9 of the Wage Order allows Employees who have been required to work on scheduled public holiday, to be paid in respect of any time so worked, at double the normal rate of wages per hour, in addition to the payment the Employee would have received, had he not been required on that particular day.

18. The Claimant prays for 2 months' salary as public holiday pay at Kshs. 32,000. He does not clarify how he reaches at this figure, granted the formula prescribed in Regulation 9 of the Order. He is not clear on which scheduled public holidays he worked. The Court is not able to award this prayer. Similarly, the Court is not persuaded that he worked the overtime hours as pleaded. He claims he worked 4 hours daily, 30 days a month, yet his contract had provision for 1 rest day weekly. There is no adequate proof of overtime. Similarly, there is no proof of off-duty days owed by the Respondent to the Claimant. He pleads off-duty days for the entire period of service, yet discloses for instance, that on the eve of his dismissal, he had taken off-duty days to attend burial.

19. ***He is allowed the prayer for costs, and interest at 16% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent of 2 months' salary at Kshs. 32,000; notice at Kshs. 16,000; annual leave at Kshs. 30,769; service pay at Kshs. 11,076; and unpaid salary at Kshs. 12,507- total Kshs. 102,352.

c. Costs to the Claimant.

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

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT MOMBASA, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 25TH DAY OF JUNE 2021.

JAMES RIKA

JUDGE