



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1203 OF 2016

CHRSTOPHER IMBOTI.....CLAIMANT

VERSUS

JOSAN SECURITY SERVICES.....RESPONDENT

**JUDGEMENT**

The claimant filed the Memorandum of Claim on 20<sup>th</sup> June, 2016; served the respondent on 18<sup>th</sup> July, 2016 and there are returns filed to confirm service.

There is no appearance or defence filed.

Satisfied that the respondent is aware of these proceedings and there is no appearance, the claimant was heard on his case.

The claim is that the respondent employed the claimant as a security officer at a wage of Ksh.6, 000 instead of ksh.12, 200 per month which was an underpayment and without housing or an allowance and he worked until 26<sup>th</sup> January, 2015 when his employment as terminated on the grounds that he had permitted a tenant to vacate the premises he was guarding. That such amounted to unfair termination of employment. there was no notice or payment of terminal dues.

The claim is also that the respondent falsely and maliciously filed a complaint with the police alleging that he had stolen a fire extinguisher a fact they knew was not true and which resulted in the claimant suffering injury.

The claimant is seeking for orders as follows;

- a. Payment of full basic salary recommended at Ksh.12,200 plus house allowance, annual leave and overtime for hours worked;*
- b. Compensation for unlawful holding benefits;*
- c. Damages for hardship and exposure to suffering as a result of wrongful termination of employment;*
- d. One months' notice pay.*

The claimant testified in support of his claim.

The claimant also filed written submissions.

**Determination**

Despite the respondent failing to enter appearance or file any defence and work records as required under section 10 of the Employment Act, 2007 the court shall analyse the pleadings, the evidence and written submissions and the applicable law.

The claimant's case is that he was employed as a guard by the respondent and paid Ksh.6, 000 per month instead of the due Ksh.12, 200 per month and which employment was terminated 26<sup>th</sup> January, 2015 when he was alleged to have permitted a tenant to vacate the premises he was guarding. The claim is also that the claimant was accused of stealing a fire extinguisher and a complaint filed with the police and was arrested.

The pleadings are however at great variance with the evidence and the written submissions.

The claimant has claimed for underpayments, house allowance, annual leave and overtime pay and damages for being accused of theft.

However, these pleadings have not set out or given the required particulars. In the written submissions, the claimant has done what ought to have been addressed in the pleadings or made application to amend the pleadings before the matter went on hearing.

The pleadings were filed on 20<sup>th</sup> June, 2016. The applicable Rules of procedure were the Industrial Court (Procedure) Rules, 2014 and under Rule 4, a claim in filing the Memorandum of Claim was required to file all the evidence to be relied upon at the hearing and in the following terms;

4. (1) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out-

(a) ...

(b) ...

(c) ...

(d) the facts and grounds of the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of a labour dispute, the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;

(e) any principle, policy, convention, law, industrial relations issue or management practice to be relied upon;

(f) a schedule listing the documents that are material and relevant to the claim; and

(g) the relief sought.

Without the particulars of claims made, the generality of the averments, the nature of employment date, the court is without sufficient matter to base any assessment for the alleged underpayments, house allowance, annual leave and overtime pay. Such lapse cannot be cured in the written submissions.

In the case of **Boniface Kinyua Kathuri v David Munyoki [2020] eKLR** the court held that;

*.....a plaintiff cannot make a general claims and leave gaps to be filled by assumptions by the defendant or the court. That would be a risky venture and omission. A pleading is everything because a party is bound by his/her pleadings. Where gaps are discovered, the law provides windows/ avenues to seal the loopholes in his/her pleading which is through amendments.*

*This court is not persuaded that because the **Appellants** medical evidence was not challenged or controverted by the **Respondent**, he was at liberty to depart from his pleadings. A party as observed above is always bound by his/her pleadings whether the same is challenged/ controverted/defended or not. The rules of procedure and the law do not change. The onus or proof remains and the trial court must be satisfied that the case has been proved to the required standard in law.*

Even where the claimant was not conversant with the court Rules applicable in his case, Order 2 rule 4 of the **Civil Procedure Rules** which required that;

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality.

In the case of **Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd [2019] eKLR** the court in addressing the failure to file particulars in a claim held that;

*It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings.*

the Court of Appeal in the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR** held that;

*In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.*

At paragraph 3 and 4 of the claimant's Memorandum of Claim he only states that he was employed as a security officer and paid a wage of Ksh.6, 000 per month. The employment date, a crucial and relevant fact in employment and labour relations claims is not stated. Such date is key in tabulation of claims of alleged underpayment, house allowance and any other terminal dues.

Paragraph 13 of the Memorandum of Claim comprises the prayers made. Such include general pleadings for admission of liability, underpayment, house allowance, leave, overtime and compensation for non-payment of terminal dues. the generality of these claims are contrary to the Rule 4 as set out above.

The claim for damages is on the basis that the claimant was accused of theft, he was arrested and no particulars of the loss, damage or injury are pleaded. In evidence the claimant testified that he was arrested and taken to the chief. He was later released and he suffered loss and damage. These are matters not supported by the pleadings.

With advantage of legal representation, the applicable rules, the court finds the claim as filed do not visit any justice to the claimant. The court further finds no matter to require the respondent to attend and address as no specific claims are made with certainty and particulars. To proceed and assess the claimed dues would be without a start date. Such would not aid the course of justice.

**Accordingly, the claim as filed is found without good basis and is hereby dismissed. no orders on costs.**

**DELIVERED IN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....