



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1440 OF 2016

KIZITO OPIYO OBURA.....CLAIMANT

VERSUS

RELIANCE PROTECTION SERVICE LIMITED.....RESPONDENT

JUDGMENT

1. The suit was undefended and proceeded for formal proof by way of Affidavit Evidence, Pleadings and written submissions.

2. The claimant, in the statement of claim filed on 22/7/2016 prays for payment of terminal benefits including:-

(i) One-month salary in lieu of notice Kshs. 6,000.

(ii) Underpayments for the period 1st May, 2013 to 30th April, 2015 in
the sum of Kshs. 108,057.40.

(iii) Service charge in the sum of Kshs. 12,117.80.

(iv) Payment for public holidays worked and not paid for 3 years in the sum of Kshs. 13,848.

(v) House allowance for 41 months in the sum of Kshs. 36,900.

(vi) Unpaid leave not taken for 3 ½ years in the sum of Kshs. 16,963.80.

(vii) Unpaid overtime in the sum of Kshs. 580,953.60.

(ix) Provision of Certificate of Service.

and

(x) Compensation for unfair termination.

3. The claimant testified that he was employed as a night watchman by the respondent in July, 2011 earning Kshs. 6,000 per month. That he worked continuously until the employment was terminated on or about the 9th February, 2015 by Mr. Robert.

4. That on 4th February, 2019, the claimant had gotten permission to take a sick off to go to hospital for treatment. That he came back after five (5) days with medical record which Mr. Robert disputed and sent the claimant home without payment of terminal benefits. Mwaure and Mwaure Wahiga & Co. Advocates wrote a demand letter to the respondent demanding payment of the terminal benefits set out in the Statement of Claim. The letter is dated 15/4/2015 and is before Court. The claimant also produced copies of the medical documents he received while on sick-off. Same are dated 28/1/2015.

5. The sick sheet dated 4/3/2015 states that Mr. Kizito (the claimant) was diagnosed of Extra Pulmonary Tuberculosis (TB) and has been

adhering well to medication since 28/1/2015 and was now fit and could work. The report shows also various dates when the Claimant attended Mbagathi District Hospital, Diabetic Clinic up to 15/1/2015.

6. The testimony by the Claimant was not rebutted by the respondent who despite service of summons and Statement of Claim failed to file a statement of reply to the suit.

7. The Court finds that the claimant has proved that he was owed and not paid the terminal benefits set out in the statement of claim including notice pay, underpayments, unpaid public holidays, unpaid house allowance, unpaid leave pay, and unpaid overtime constituting 4 extra hours daily for 41 months worked. The Court awards the liquidated amounts set out herein before in the judgment.

Compensation

8. The Claimant has proved on a balance of probabilities that his employment was unlawfully and unfairly terminated for no valid reason whilst he was on a medical – off. That the respondent disregarded the medical evidence presented by the claimant to justify a 5 days absence whilst he underwent treatment.

9. The Court finds that the respondent had no valid reason to dismiss the claimant from employment and did not follow a fair procedure in dismissing the claimant. The respondent therefore violated sections 36, 41, 43 and 45 of the Employment Act, 2007 and the dismissal was unlawful and unfair.

10. The claimant is entitled to compensation in terms of Section 49(1) (c) and 4 of the Act.

11. The claimant did not contribute to the dismissal. He was dismissed without payment of any terminal benefits and compensation. He was not given certificate of service to help him get alternative employment. The claimant had served the respondent for about 4 years and lost means of livelihood unlawfully and unfairly.

12. the claimant did not enjoy payment of overtime, house allowance nor was he granted leave during his tenure. These are aggravating circumstances.

13. Considering the case of **Kenfright (E.A) Limited –v- Benson K. Nguti [2019] eKIR**, in which the Supreme Court recognized compensation under Section 49 of the Employment Act 2007 as the appropriate remedy for unlawful termination of employment while taking into account the factors above in terms of sub-section 49(4), the Court awards the claimant the equivalent of six (6) months' salary in compensation for the unlawful and unfair dismissal calculated at the salary that ought to have been paid at the time in the sum of 10,911 per month in the sum of Kshs.65,466.

14. In the final analysis judgment is entered in favour of the claimant against the respondent a follows:

- (i) Notice Pay - Kshs. 6,000.00
- (ii) Underpayment - Kshs. 108,057.40
- (iii) Service pay - Kshs. 12,117,00.
- (iv) Unpaid public holidays - Kshs. 13,848.00
- (v) Unpaid house allowance
- 15% of the basic salary - Kshs. 36,900.00**
- (vi) Unpaid leave not taken - Kshs. 16,963,80
- (vii) Unpaid overtime for 41 months
- at 4 hours per day - Kshs. 580,953.60
- `(viii)` Compensation - Kshs. 65,466.00**
- (ix) **Certificate of service within 30 days.**
- Total amount - Kshs. 742,305.80**
- (x) Interest at Court rates from date of judgment till payment in full.
- (xi) Costs of the suit.

Dated and delivered at Nairobi this 8th day of June, 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 Judgment 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

M/s Athena for claimant

Ekale – Court Assistant.