



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 973 OF 2016

GEOFREY WANDERA MURUKA.....CLAIMANT

- VERSUS -

A.A. BAYUSUF & SONS LIMITED.....1ST RESPONDENT

ZEDEKIACH AGIRA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 22.12.2016 through Mune Katu & Associates Company Advocates. The claimant has pleaded that the 1st respondent was his employer and the 2nd respondent was employed by the 1st respondent as foreman at the 1st respondent's construction sites. He further pleads as follows. He was verbally employed as a security guard on 02.06.2015 at Kshs. 10, 500.00 per month. Initially he was deployed to the Likoni site and later to the Kilifi site. He worked 6.00am to 6.00pm and was not paid the overtime. He was not given weekly off duty and he worked on Sundays and public holidays without due compensation. His employment was terminated verbally on 07.11.2016 without notice and without reason. He prays for judgment against the respondents for:

- a) One month salary in lieu of notice (B.S +H.A) Kshs. 11, 623.20.
- b) Unpaid leave for 17 months $12597.90 \times 17\text{months} \times 1.75/26$ Kshs.13, 299.00.
- c) Overtime worked and not paid per Security Protective Order $11623.20 \times 1.5 \times 2\text{hours} \times 30\text{days} \times 17\text{months}/26$ Kshs.683, 910.00.
- d) Days worked but not paid $Kshs.11, 623.20 \times 7\text{ days} / 26$ Kshs.3, 129.30.
- e) Off days worked but not paid for 17 months $11623.20 \times 2\text{hours} \times 4\text{weeks} \times 17\text{months}/26$ Kshs.9, 835.00.
- f) Working on public holidays 11 days $11623.20 \times 11 \times 2/26$ Kshs.9, 835.00.
- g) Underpayment on the gross salary (B.S +H. A) $(11, 623.20 - 10, 500) \times 17\text{months}$ Kshs. 139, 478.40.
- h) Total Kshs.941, 168.20
- i) Certificate of service.
- j) Costs and interest.

The respondents filed the defence on 29.07.2017 through M/S Kadima & Company Advocates. The respondent pleaded that the claimant was employed by letter of appointment and commenced work on 20.07.2015. Further the claimant was hired by letter of posting and reported on duty on 20.07.2015 and paid for days worked an amount of Kshs. 6, 000.00. Further the working shift commenced 8.00am to 5.00pm and any overtime was recorded and paid but payment sheet showed that the claimant did not work overtime as he was not listed and paid as such. The respondents' case is that the claimant utilised his leave days when he took leave in October as the same was approved and thereafter he deserted duty and his salary was paid by M-pesa No. KK686GXUQC of Kshs.10, 500. The 1st respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified to support his case. The respondents' witness (RW) was the Human Resource Manager one Antony Marani Situma.

Final submissions were filed for the parties. The Court has considered all material on record and finds as follows.

To answer the **1st issue** for determination the Court finds that there is no dispute that the claimant was employed by the 1st respondent as a day security guard. The dispute exists on whether employment was verbal per the claimant or in writing per the 1st respondent. RW confirmed that the claimant never signed the letter of offer in as referred to in RW's witness statement. The Court returns that the claimant's evidence that he was verbally employed will prevail as is consistent with RW's evidence that no offer letter was signed by the claimant. Per RW's and claimant's evidence, the claimant's monthly net payment after NHIF and NSSF deductions was Kshs.10, 500.00. The claimant worked effective 02.06. 2015 per claimant's evidence.

The **2nd issue** for determination is whether the claimant was terminated from employment verbally on 07.11.2016 per his pleading and testimony or he deserted duty effective 01.11.2016. The claimant testified that he applied for leave per leave form exhibited and from 01.10.2016 to 30.10.2016 which he signed on 21.09.2016 but was not approved. So he continued to work until 07.11.2016 when the 2nd respondent dismissed him verbally. RW admitted that the leave form showed the leave was not approved but nevertheless the claimant took leave to his rural home in western Kenya and when failed to resume duty. RW testified thus, **"He signed leave forms requesting leave. He worked July to September 2015 on probation. He was confirmed and worked and took leave 2016 September. The leave form is not filed. Is filed by claimant. Is for October 2016. Claimant deserted employment. He was paid salary for October 2016 Kshs. 10, 500.00. That was his last monthly payment. The pay was 06.10.2016. It was by M-pesa. He deserted on 01.11.2016. I called him. He picked my office call. He said he had no fare to travel back from Western Kenya. I send him his salary to travel back – the last salary. I have no evidence of telephone conversation."**

The Court has carefully considered RW's evidence and finds it was inconsistent and incoherent. First RW is not clear whether the claimant went on leave in September or in October 2016. Second, while disputing the unapproved leave forms exhibited for the claimant he fails to exhibit his alleged leave forms that may have been completed and approved the leave. Third, while stating that the claimant took leave and travelled to Western Kenya but never resumed thereafter, he contradicts himself when he says that the claimant deserted duty on 01.11.2016 –suggesting the claimant reported at work and deserted that date. Forth, in re-examination he stated that it was not his duty to call the claimant to resume duty when he overstayed after sending him salary for October on 06.11.2016 by M-pesa and which the Court finds inconsistent that after the payment, RW thereafter made no telephone call when the claimant failed to report as agreed and per RW's account. The Court therefore cannot trust the evidence by RW on the circumstances of the termination of the contract of employment. The Court further finds no ground to discount the claimant's pleading that he was verbally dismissed on 07.11.2016 (after payment of October 2016 salary on 06.11.2016). The Court finds that the claimant's account is upheld per his testimony thus, **"I applied for annual leave – my page 39. Leave was not approved. I was not paid in lieu of leave. I did not desert. I worked up to 07.11.2016. I found another guard, Hussein working in my position. He asked me to see boss, one Latif. Latif told me there was no more work for me. I was told to leave. I instructed my Advocate to do a demand letter. Respondent did not reply."**

To answer the **3rd issue** for determination the Court returns that the termination was unfair for want of a valid or genuine reason per section 43 and 45 (2) of the Employment Act, 2007 and as submitted for the claimant. The Court further finds that the termination was unfair in substance and procedure in view of section 45 of the Act as no reason was given and the in the circumstances, the claimant was given no notice and chance to know the circumstances – and the Court finds that the abrupt termination was contrary to due process of fairness envisaged in section 45 of the Act. Indeed, in the respondents' own submissions, the termination would be unfair if no notice was given per section 35(1) of the Act and which the Court has found to have been unfair.

The **4th issue** for determination is whether the claimant is entitled to the prayers made.

First, the Court has to determine the monthly base for any monetary award. The respondent has submitted that the claimant's gross monthly pay was Kshs. 11, 000.00 and after statutory deduction of NSSF and NHIF it came to Kshs. 10,500.00 and which the claimant does not dispute to have been paid. Per the wage order the minimum monthly wage as submitted for the claimant was Kshs. 10, 107 plus house allowance 10% making Kshs.1, 516.00, a monthly sum of Kshs.11, 623.20. The evidence and submission by the respondent, and which is not disputed, was that the claimant was housed. The Court has no reason to doubt that evidence. In the circumstances, the Court finds that the claimant's gross monthly wage was Kshs. 11, 000.00 and a net pay of Kshs. 10, 500.00. By that finding the Court further finds that the under payment on basic pay and house allowance as alleged and prayed for will collapse.

Second in justifying the maximum compensation under section 49 (1) (c) of the Act it is submitted for the claimant that the termination was procedurally unfair because there was no notice; he was not given a notice to show-cause; no hearing was given prior to termination; no valid reason for the termination was given; and the termination was unfair in terms of sections 41(1), 43 and 45 of the Act. For the respondent it was simply submitted that the claimant was not entitled as prayed. The Court has considered the undisputed submissions for the claimant. The Court has considered the aggravating factor that while the claimant was told there was no work, another guard had replaced him at his work station. The claimant's record of service was not questionable and he desired to continue in employment. He appears to have had a genuine grievance that he had been denied annual leave, off days and holiday offs which the Court finds to be an aggravating factor against the respondent. However, the Court has considered the mitigating factor that the respondent paid slightly above the minimum basic monthly statutory wage. The Court awards him 10 months' gross wages at Kshs. 11, 000.00 per month making **Kshs.110, 000.00**. He is awarded one-month salary in lieu of notice **Kshs. 11, 000.00** per section 35(1) of the Act. He is also awarded 7 days' pay for work in November 2016 Kshs. 11,000 x7/26days in a month making **Kshs.2, 961.50**. The Court has already found that the claimant applied but was not granted annual leave and is awarded **Kshs.13, 299.60** as prayed for and per section 28 of the Act.

Third, on overtime, off days and public holidays worked but not paid the claimant exhibited the record he signed showing the check in and checkout time and dates. The claimant served a notice to produce as envisaged in section 74 of the Employment Act. The respondent failed to produce evidence to rebut the claimant's evidence. The Court therefore finds that the claimant has established, on a balance of probability, that he worked extra hours as claimed and on the off days and public holidays. He is awarded as computed except on basis of Kshs. 11, 000.00 per months as follows:

a) Off days **Kshs.57, 538.50**.

b) Overtime **Kshs.647, 307.70.**

c) Work on public holidays **Kshs.9, 307.70.**

Fourth, the Court has already found that the claimant has failed to establish underpayment of basic pay and house allowance because the minimum basic pay was accorded and the claimant had been housed by the respondent.

The claimant has succeeded in his claims and prayers and is awarded costs. He is also entitled to a certificate of service per section 51 of the Employment Act, 2007.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) Payment of the sum of **Kshs.851, 415.00** by 01.08.2021 failing interest at Court rates to be payable thereon from the date of this judgment until the date of full payment.
- 2) The respondent to deliver the claimant's certificate of service within 30 days from the date of this judgment.
- 3) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4TH JUNE, 2021.

BYRAM ONGAYA

JUDGE