



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 946 OF 2017

JIM OYUGI OTIENO.....CLAIMANT

VERSUS

AMBASSADOR SECURITY SERVICES.....RESPONDENT

JUDGMENT

1. The Claim before me was instituted by the Claimant herein, Jim Oyugi Otieno, vide an unheaded pleading (which I will hereinafter refer to as the Statement of Claim) dated 17/5/2017 and filed herein on 22/5/2017. The Claimant pleaded, *inter alia*:-

a) That he (the Claimant) was employed by the Respondent herein (Ambassador Security Services) on 1st August 2012 as a security guard at a consideration of ksh.9,040.

b) That on or about February 2016, the Respondent started defaulting in paying him (the Claimant), and again defaulted in December before subsequently dismissing the Claimant from employment.

c) That in terminating the Claimant from employment, the Respondent did not adhere to provisions of the Employment Act on termination of an employee; that no hearing took place before the decision to terminate the Claimant’s services and that due process was not followed.

d) That arising from the unlawful/unfair constructive dismissal, he (the Claimant) is entitled to payment of damages and terminal dues as follows:-

i. Salary for 2 months.....ksh,10,000

ii. Annual leave for 3 yearsksh. 29,483

iii. Overtime for 4 yearsksh.68,648

iv. Service payKsh.13,560

v. Damages for unfair termination.....ksh.120,000

TotalKsh.241.691

e) the Claimant prayed that his dismissal be declared unprocedural and improper and that he be paid the aforesaid sum of ksh. 241,691 as terminal dues and compensatory damages. The Claimant also prayed for costs of the suit, interest thereon and any other relief as the court may deem just.

2. Along with the Statement of Claim, the Claimant also filed an undated brief witness statement signed by himself and a list of documents dated 17/5/2017 listing a demand notice dated 14/3/2017.

3. Although the Respondent herein (Ambassador Security Services) is shown to have been served with summons (by registered post on 21/8/2017) and an affidavit of service duly filed in court on 22/9/2017, the Respondent did not file any response to the Claimant’s claim.

4. The matter was subsequently fixed for directions before the court on 9/7/2018 when the following directions were given:-

“The Respondent though served has failed to enter appearance and to file a response to the claim. The same shall therefore proceed as an undefended cause on a date to be taken at the registry”.

5. When the matter came up for virtual hearing/formal proof on 29/7/2021, the Claimant adopted his aforesaid brief recorded statement as his evidence in chief. The said brief recorded statement partly replicates the statement of claim filed herein and reproduced in paragraph 1 of this judgment. The Claimant further testified as follows:-

- a) That he worked for the Respondent from the year 2012 to 2016 and was being paid ksh.9,040 per month.
- b) That the Respondent was not transmitting the Claimant’s NHIF and NSSF contributions.
- c) That he (the Claimant) never took leave during the years that he worked and was not paid anything in lieu of leave.
- d) That his salary was paid in bits and never in full as required and was paid either in cash or by mobile money.
- e) That by the time he left employment in August 2016, some money remained unpaid and was told to go because he was asking for his money. The Claimant prayed that judgment be entered for him as prayed in the statement of claim.

6. In the absence of any defence/response to the Claimant’s statement of claim and evidence by the Respondent rebutting and/or controverting the Claimant’s testimony, the only evidence available for consideration by the court is that of the Claimant.

7. The Claimant did not tell the court whether or not the contract of employment between himself and the Respondent was in writing. None was produced in court by the Claimant. The statement of claim filed in court by the Claimant is also silent on this issue. I must state that the Claimant has all along been represented by counsel.

8. Although the Claimant told the court in his evidence that his salary was being paid either in cash or by mobile money, he did not exhibit either a mobile money statement showing such payments or copies of salary payslips issued by the Respondent, or indeed any other form of documentation issued by the Respondent. This cannot, however, be held against the Claimant, and in particular when the fact of the Claimant having been employed by the Respondent has not been denied.

9. Under the Employment Act 2007, a verbal contract of employment is a valid contract that confers rights and is enforceable in law. This is the creed of Section 8 of the said Act.

10. Section 9(2) of the Employment Act 2007 obligates an employer who is a party to a contract of employment to cause the contract to be drawn up stating particulars of employment and to have the same consented to by the employee. Further, Sections 16(1) and 20 of the Employment Act obligate an employer to issue an itemized pay statement to an employee. Failure by an employer to cause an employment contract to be written down and to issue itemized pay statements (payslips) to employees cannot be held against the employees. It was held in the case of **Robai Musinzi –vs- Safdar Mohammed Khan [2012] eKLR** as follows:

“it is now settled law under the Employment Act that a verbal contract is a contract that can confer rights and can be enforced... many employers fail to issue employees with a contract of service and this acts to their detriment as non issuance of this document leaves the court to interpret the relationship between the parties which could have been well outlined by the mutual agreement of the parties”.

11. Upon closure of the Claimants case on 29/7/2021, the court directed counsel for the Claimant to file written submissions within seven days of the said date, and fixed the matter for mention on 5/8/2021 (to confirm filing of the submissions) and to reserve a date for judgement. Submissions were not filed and on 5/8/2021, I gave counsel upto 11/8/2021 to file the same. Again, submissions were not filed. On 13/8/2021, the Claimant’s counsel, Mr. Mwangi, asked the court to give the matter a date for judgement even without his submissions on record, a request the court acceded to, and ordered that judgment would be delivered on notice.

12. I have carefully looked at the Claimant’s statement of claim and carefully considered his evidence, which is neither rebutted nor controverted. I find that the Claimant was employed by the Respondent, and worked for the Respondent from 1st August 2012 upto August 2016 when he left employment. I further find that termination of the Claimant’s employment was unlawful and unfair as he was just told by the Respondent to go away for persistently asking to be paid his unpaid salary, which was unlawfully being paid in bits. Due process as set out in Section 41 of the Employment Act 2007 was not followed.

13. I find that the Claimant has proved his case on a balance of probability and do proceed to enter Judgement in favour of the Claimant against the Respondent as prayed in the Statement of Claim, save for the claim for damages for unfair termination on which I award three (3) months salary.

14. Accordingly, Judgement is hereby entered for the Claimant against the Respondent in the following terms:-

- a) One month salary in lieu of notice.....ksh.9,040
- b) Payment in lieu of leaveksh.29,483

c) Severance payksh.13,560

d) Three months salary being damages for

unfair terminationKsh.27,120

TOTALKsh.79,203

15. The Claimant is also awarded costs of the suit and interest at court rates from the date of this judgment until payment in full.

16. The Claim for overtime payment during the years worked fails as no evidence was adduced in that regard.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF SEPTEMBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

No Appearance for the Claimant

No Appearance for the Respondent