



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 883 OF 2017**

**WILIAM KIKUMU.....CLAIMANT**

**VERSUS**

**AMBASSADOR SECURITY SERVICES.....RESPONDENT**

**JUDGEMENT**

1. This suit was instituted vide a statement of claim dated 10<sup>th</sup> May, 2017 and is based on non-payment of salary and unlawful termination.
2. Through the statement of claim, the claimant averred that he was employed by the respondent with effect from 12<sup>th</sup> March, 2012 and was dismissed sometimes in 2016 when the respondent defaulted on paying his salary.
3. The claimant sought the following orders;

Salary for 4 months

(October, November, December, January) Kshs 53,500/=

Annual leave for 3 years Kshs 23, 156/=

Overtime for 5 years Kshs 113,035/=

Damages for unfair termination Kshs 120,000/=

Total **Kshs 309,690/=**

4. The respondent neither entered appearance nor filed a response in answer to the statement of claim. The claimant through an Affidavit of service sworn by Dorothy Wangari Njuguna on 21<sup>st</sup> September, 2017 proved that he effected service of the statement of claim and summons to enter appearance upon the respondent.
5. The matter was listed for mention before the Deputy Registrar on 14<sup>th</sup> July, 2021 for purposes of taking a hearing date. On the said date, there was no appearance by the respondent. Nonetheless, the matter was set down for hearing on 29<sup>th</sup> July, 2021 and despite being notified of the hearing, there was no appearance on the part of the respondent. The court being satisfied with the return of service, proceeded with the case in absence of the respondent.

**Claimant's case**

6. The claimant testified in support of his case and sought to rely on his statement of claim as part of his evidence in chief. In his oral testimony, the claimant stated that he was employed as a security guard by the respondent with effect from 13<sup>th</sup> March, 2012 with a starting salary of Kshs 9,040/=. He further averred that he was later promoted sometimes in July, 2016 whereafter his salary was reviewed upwards to Kshs 15,000/=.

7. It was his testimony that he stopped working for the Respondent when his salary went unpaid for several months in 2016, namely, October, November, December and for 17 days in the month of January, 2017 hence he had difficulties reporting to work. The claimant further testified that the respondent failed to remit his NHIF and NSSF deductions in respect of 2012, 2013 and the months of January to

May, 2014.

8. He told Court that when he continued pursuing the salary, he was asked to leave employment if he so wished. It was also his testimony that he was not taken through a disciplinary process prior to his termination. The claimant produced a demand letter which his Advocates had sent to the respondent demanding for the unpaid salary. It was his testimony that the respondent snubbed the demand letter.

9. The claimant did not file any submission despite being granted opportunity to do so by Court. Instead, he sought to rely on his statement of claim and testimony before Court.

### **Analysis and Determination**

10. In view of the claim before Court, the evidence and the oral testimony of the claimant, I find that the issues falling for the court's determination are;

- i. Was there an employment relationship between the parties?
- ii. Whether the claimant was unlawfully and unfairly terminated from service?
- iii. What reliefs if any, are available to the claimant?

### **Was there an employment relationship between the parties?**

11. This issue is very significant as it constitutes the basis of the dispute. It will also assist the Court in construing the employment relationship between the parties hence the rights accruing therefrom. Consequently, this will inform the final determination by the court.

12. It is notable that the claimant did not produce any contract or other document for that fact to prove his employment with the respondent. It was his assertion that there was a contractual relationship with the respondent. This assertion was not rebutted by the respondent.

13. Further, the claimant testified in person and was very particular as regards the period he worked for the respondent. He was particular that he worked for the respondent for a certain number of years and months. He was also very specific that his salary was not paid for a specified period that is, 3 months and 17 days.

14. The Employment Act recognizes both oral and written contracts of service. From the claimant's statement of claim and testimony before Court, the employment relationship between the parties was oral and was never reduced into writing.

15. The claimant averred that he had worked for the respondent from 13<sup>th</sup> March 2012 until sometimes in January, 2017. This is a cumulative period of 5 years or thereabout.

16. Section 9(1) (a) of the Employment Act requires that a contract of service for a period of 3 months and beyond, should be in writing. Further, sub section (2) places the burden of drawing such a contract on the employer.

17. In the instant claim, the claimant averred that the contractual relationship lasted for about 5 years or so. It was therefore incumbent upon the respondent to reduce the same in writing. From the evidence on record, it is obvious that this was not done hence the respondent is at fault and the claimant cannot be prejudiced in that regard.

18. Further, no employment records were produced to establish the relationship between the parties. It is the respondent who would have assisted court by availing the employment records. This it failed to do hence must shoulder the consequences arising therefrom.

19. In the case of **Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] eKLR** the Court held as follows;

**“Where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.”**

20. I fully agree with the finding above and will similarly hold that the claimant's testimony and assertion that there existed an employment relationship is true. I will grant the claimant the benefit of doubt in this regard.

21. The claimant is required under law to establish his claim on a balance of probability and I find that he has discharged this burden to the extent that he had an employment relationship with the respondent though unwritten.

### **Whether the claimant was unlawfully and unfairly terminated from service?**

22. On this issue, the claimant averred that he was dismissed from service verbally without any justifiable cause and without being subjected to due process.

23. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is

deemed to be unfair. Further, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove-

**a) that the reason for the termination is valid;**

**b) that the reason for the termination is a fair reason-**

**i. related to the employees conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c) that the employer was terminated in accordance with fair procedure.**

24. Pursuant to the provisions of section 43(1) and 45 (2) of the Employment Act, the respondent had the burden of proving that there was reason for terminating the claimant's services.

25. As the matter was undefended, there was no statement by the respondent nor proof to counter the claimant's assertions. Essentially, there was no proof that the termination of the respondent was justified and that there was a valid and fair reason requiring the termination of the claimant's services. Similarly, there was no proof that the claimant was taken through due process prior to the termination as stipulated under section 41(1) of the Employment Act.

26. In the circumstances, I find in favour of the claimant and hold that his termination was unlawful and unfair.

### **Remedies**

#### **Unpaid Salary**

27. The claimant has prayed for unpaid salary in respect of October-December 2016 and 17 days for the month of January, 2017. It was his testimony that he was earning Kshs 15,000/= at the material time. I will therefore award him unpaid salary for 3 months 17 days at the rate of Kshs 15,000/= per month.

#### **Damages for unfair termination**

28. Having found that the claimant was unlawfully terminated, I will award him compensatory damages equivalent to a gross salary of four (4) months. In making this award, I have taken into account the number of years served by the claimant as well as the nature and circumstances leading up to his termination.

### **Orders**

29. In conclusion, I enter Judgment in favour of the claimant against the respondent as follows;

Compensation equivalent to

4 months' gross salary                      60,000.00

Unpaid salary for 3 months 17 days    53,500.00

Total    **113,500.00**

30. The award shall attract interest at court rates from the date of Judgment until payment in full.

31. The respondent shall also bear the costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of September, 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Mwangi for the Claimant

No appearance for the Respondent

## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

**STELLA RUTTO**

**JUDGE**