



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 291 OF 2016**

**IN THE MATTER OF COMPLAINTS AND JURISDICTION ON CASES OF DISPUTE BETWEEN EMPLOYERS**

**AND IN THE MATTER OF UNFAIR TERMINATION SECTIONS 47 AND 87 OF**

**THE EMPLOYMENT ACT NO 11 OF 2007 LAWS OF KENYA.**

**BETWEEN**

**LUCAS ONYANGO SAOKE.....CLAIMANT**

**VERSUS**

**ROBINSON SECURITY GROUP T/A**

**ROBINSON INVESTMENT LIMITED .....RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent for unlawful termination that allegedly came about after an indefinite suspension.
2. It is stated that the claimant was employed by the Respondent on or about the 9<sup>th</sup> July, 2014 as an operations manager earning a salary of Kshs. 53,000/- which was not inclusive of house allowance.
3. The claimant stated that throughout his employment with the Respondent, he never enjoyed his full annual leave nor off duties and was not compensated for the same.
4. He contends that he worked for longer hours reporting at 6.00am and leaving at 8.00 pm for 7 days a week, however he was never compensated for the said overtime worked.
5. That sometime on the 5<sup>th</sup> January, 2016 he was put in police custody for allegedly assaulting one of the Respondents staff and Kshs. 10,000/- was deducted from his salary without any consultation.
6. The claimant states that he complained to the Respondent on the refusal for leave and in response the Respondent paid him Kshs 11,097 for part payment for leave not taken in the year 2014. Subsequently he was granted off days commencing on 19<sup>th</sup> May, 2016 to 24<sup>th</sup> May, 2016.
7. He stated that on reporting to work on the 24<sup>th</sup> May, 2016 he was taken to police station for allegedly losing one uniform however no charges were preferred and the matter was dropped. The Respondent then suspended him from work for a week and upon returning to work after the one-week suspension, he reported back to work but was not allocated any duties.
8. He stated that he was paid half salary for the entire month of May of Kshs. 29,200/- and on inquiring on the issue he was informed that he was on suspension and that the Respondent had instructed he be paid half salary.
9. The claimant avers that he was constructively dismissed from employment when the Respondent failed to pay him for the month of June therefore forcing him to stay away from work as he was no longer able to afford basic needs for his family.
10. He therefore prayed for judgment against the Respondent;-

- i) That the Court do find the actions taken against the claimant is unlawful hence unfair termination.**
- ii) That the claimant be paid one month salary in lieu of Notice.**
- iii) The Respondent pay the Claimant the balance of May 2016 salary.**
- iv) That the Respondent refund to the claimant Kshs. 10,000/- which was deducted in January, 2016 and Kshs 10,000/- which was deducted in February, 2016 without any reasonable cause nor consultations.**
- v) That the Respondent further refund to the Claimant Kshs. 10,000/- deducted from the claimant's salary in the month of December, 2015. Allegedly for cash bail when the claimant appeared in Court for a case which the claimant was appearing in Court as the employers' representative in his capacity as the operations manager.**
- vi) That the Respondent pay the claimant 15% house allowance derived from the claimant's basic salary of Kshs 53,000/- for a period of 1 year 11 months.**
- vii) That the Respondent to pay the claimant overtime and for off duties worked for but was not paid.**
- viii) That the Respondent pay the claimant for public holidays worked for but was not paid.**
- ix) That the Respondent to pay the claimant 13% salary increment given to the respondent employees but the claimant was denied this benefit for unexplained reasons.**
- x) That the Respondents to pay the claimant compensation based on section 49 (1)(c) of the Employment Act, 12 months' gross salary.**
- xi) That the Respondent pay the costs of this suit.**
- xii) That the Respondent to issue the claimant with a certificate of service in the meaning of section 51 of the Employment Act.**
- xiii) That the claimant be paid annual leave for 1 year 10 months.**

11. The Respondent entered Appearance on the 7<sup>th</sup> November 2016 and filed its response to the claim herein on the 7<sup>th</sup> February, 2017 admitting that it employed the Claimant in July 2014 as its' operations manager earning a salary of Kshs. 43,000/- all-inclusive and denying all the other allegations on the claim thereof.

12. He stated that the Claimant reported to work at 8am and left at 6pm and never worked for any overtime as alleged. Further that he never worked during any holidays as alleged.

13. It is stated that the respondent received several complaints regarding the claimant at his work place; that the claimant would ask for bribes from other staff members in the pretext that he would assign them duties to lucrative clients and another complaint was forwarded to them by the Kenya national private security workers union by its letter of 4<sup>th</sup> November, 2015.

14. It was stated that the claimant was reported to Nakuru central Police station for assaulting his colleague at work and the Respondent bailed him out for Kshs. 10,000/- which was deducted in his salary of January, 2016. The Respondent then carried out its investigations and issued the Claimant a warning letter of 6<sup>th</sup> January, 2016.

15. Later on that the Claimant was implicated with tampering with evidence of investigation of the theft of the Respondent' client's lorry which the Respondent issued the claimant with show cause letter dated 30<sup>th</sup> March, 2016 why his services should not be terminated for gross misconduct.

16. The Respondent stated that upon issuance of the show cause letter the Claimant absconded duty and failed to report to work even after being serve with another warning letter of 25<sup>th</sup> June, 2016.

17. The claimant filed a response to the memorandum of response on the 27<sup>th</sup> February, 2017 denying the Respondents response and affirming his claim, he further stated that he was never issued with a letter of Appointment and the letter attached is a fabrication by the Respondent. He affirmed that his salary was Kshs. 53,000/- exclusive of house allowance.

18. He stated that he was never involved with the lost lorry and that the matter was reported to the police and was under investigations by a private investigator. He denies ever being served with any show cause letter.

19. He stated that he never deserted work as alleged and the address of the warning letter of 25<sup>th</sup> June, 2016 is unknown to him. He maintains that he was suspended by the Respondent for a week which was extended indefinitely and was to be called back to work but was never called.

20. This claim proceeded for hearing on the 13<sup>th</sup> February, 2019 when the Claimant, **Lucas Onyango Saoko(CW-1)** testified that he was verbally employed by the Respondent on 9<sup>th</sup> July, 2014 as operations manager whose duties were to assign guard duties, discipline and relay clients issues to the Respondent. That he was earning a net salary of Kshs. 43,000/-. He testified that he worked from 6am to 8pm throughout the week with no rest day. that prior to his dismissal he was not issued with any Notice to Show cause letter as alleged rather that he was suspended from employment and was never recalled. He contends that he never deserted work .on the complaints raised by the union he testified that the complaints were never raised to him and only learnt of the same after filling this suit in the Respondents response.

21. On cross examination, he testified that he was partly paid Kshs. 11,000/- for leave for the year 2014/2015. That he was suspended by the Respondent's Human Resource manager verbally. He maintains that he was not issued with any employment letter and the signature of the employment letter is not his. He testified that he was not in control of the muster's roll and that he did not take any off days. he testified that he applied for leave and off days severally but the Respondent did not approve. he stated that the cash bail in the criminal assault matter was paid to him by the Respondent in his official capacity as the operations manager. He testified that the union letter of complaint did not reach him and on the tampering of evidence in the theft of lorry incident, he testified that it was a police case matter and was never implicated in any way.

22. The Respondent called one witness **Agnes Mukami (RW-1)** the Respondent's director who testified that the claimant was employed by the Respondent in July, 2014 and left in May, 2016. She maintained that the claimant was issued with an employment letter which indicates his salary as Kshs. 43,000/- all inclusive. She contended that the Claimant claim is marred with falsehood and should be dismissed together with the reliefs sought therein.

23. On cross examination, she testified that the claimant tampered with evidence in the theft of lorry incident, also that she was issued with a show cause letter dated 30<sup>th</sup> April, 2016. Further that after the Claimant deserted duty they tried calling him but all their calls went unanswered.

#### **Claimant's submissions.**

24. The claimant submitted that he never took his annual leave or off days neither was it paid. He argued that he applied severally for leave but the Respondent declined to allow him take his leave as evidenced by exhibit LOS-3 rather that he was paid Kshs. 11,097 as part leave payment for the year 2014 only.

25. He submitted that the Respondent on several occasions deducted his salary without consultation an issue that he followed up with the Respondent in vain.

26. The Claimant argued that he was not issued with an appointment letter and the letter appointment produced in evidence by the Respondent was prepared as an afterthought. Further that the letter of appointment was not signed by him and that he saw the letter at his advocates office after this suit was filed.

27. He submitted that the agreed gross pay was Kshs 53,000/- where Kshs.8000 is deducted as PAYE and Kshs 2,000/- is deducted for payment of NSSF and NHIF. Additional he contends that the Respondent was responsible for giving evidence to the contrary since he is the employer and the custodian of the claimants documents including pay slips.

28. The Claimant submitted that from the documents produced in evidence by the Respondent it showed that the Claimant was paid his salary on 23<sup>rd</sup> June, 2016 and shortly after on 25<sup>th</sup> June, 2016 allegedly a warning letter was written on alleged desertion demonstrating that their argument of desertion is not plausible. He therefore argued that the reason for his termination was due to his persistency on requesting to go for his leave.

29. He thus submitted that he has made out a case on a balance of probability and urged the court to allow his claim as prayed,

#### **Respondent's Submissions.**

30. The Respondent on the other hand submitted that the Claimant deserted employment after being issued with a show cause letter why disciplinary action should not be taken against him for gross misconduct of tampering with evidence in the investigations of the Respondents lost Lorry. Further that prior to this incident the Claimant had been accused of soliciting bribes from his colleagues and one time assaulting his colleague which issues the Respondent had issued him with several warning letter before the Notice to show cause.

31. It is submitted that the Claimant took all his off days and never worked on any public holidays as evidence by the Master Roll produces and the claimants off days requisition forms

32. On the leave days not taken, the Respondent submitted that the claimant became entitled to leave after one year of working that is June, 2015 which he took half of the days and paid for the balance of days not worked therefore the claimant utilized his annual leave and the balance were duly compensated for.

33. It is submitted that the Claimant did not tender any evidence to affirm that he worked any overtime rather that the Respondent's witness confirmed in court that the Claimant worked from 8am to 6pm therefore the claim for overtime is unfounded.

34. The Respondent submitted that the deduction of Kshs. 10,000/- in January, 2016 was for monies deducted by the Respondent after paying cash bail for the Claimant in the assault case in December, 2015.

35. On the salary increment, the Respondent submitted that there was no salary increase given to any of its employees, nevertheless that even if there was increase of salary the same was dependent on the discretion of the Respondent. The Respondent submitted that the Claimant was paid Net salary of Kshs 41,900/- or thereabout after the statutory deduction till his desertion.

36. He submitted that the Claimant failed to serve it with a demand letter therefore is not entitled to any costs as was held in the case of **stanley Kauga Nkaricha –v- Meru Teachers College and another [2016] eklr** which quoted the case of Super **marine handling Service Ltd-v- KRA CA No. 85 of 2006**.

37. The Respondent therefore prayed for the claim to be dismissed with costs.

38. I have examined the evidence and submissions of the parties herein. From the claimant's evidence he avers that he was orally employed by the respondent earning a salary of 53,000/= per month without House Allowance.

39. The respondents on their part aver that the claimant was employed vide a letter of appointment dated 9/7/2014 (Exh.1) at a salary of 43,000/= all inclusive.

40. The claimant denied ever being issued with the said letter and denied signing the said letter. The claimant having denied the letter of appointment the onus of proving that he signed it rests with the respondent which onus the respondent failed to discharge.

41. I therefore presume that the claimant was employed as he stated on 9/7/2014 verbally and his salary was 53,000/=.

42. On issue of termination, the claimant avers that he was constructively terminated from work in June 2016 when the respondent declined to pay his salary and so couldn't work.

43. On this, the respondent averred that the claimant absconded duty in June 2016. They deny sending the claimant on suspension in May 2016. The allegation by the claimant that he was not paid his June 2016 salary has been admitted by the respondent who aver he never worked in June 2016.

44. The respondents did not however issue him with any show cause letter or subject him to any disciplinary process for absconding duty. The letter apparently sent to the claimant on desertion of duty was also sent to an address in Kisumu which the claimant denies is his.

45. It is also not clear why the respondent chose this particular address as there is no evidence that that was the claimant's address.

46. In essence, there is no reason as to why the claimant's salary was not paid in June 2016 and in my view this amounts to a constructive dismissal.

47. Having found as above, I find the claimant's dismissal was unfair and unjustified.

48. In terms of remedies, I award the claimant as follows;

**1. 1 month salary in lieu of notice = 53,000/=**

**2. Balance of June 2016 pay = 23,694/=**

**3. 1 year leave pay not taken 53,000/=**

**4. Unpaid house allowance = 174,900 as claimed**

**5. Compensation equivalent to 6 months salary for unfair termination**

**= 6 x 53,000/=**

**= 318,000/=**

**TOTAL = 598,900/=**

**Less statutory deductions**

**6. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Awuor for claimant – present

Githiru for respondent – present

Court

Assistant

-

Fred