



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1292 OF 2016

WALTER BARASA OMBIKHWA CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED..... RESPONDENT

JUDGEMENT

In October, 2008 the respondent employed the claimant as a security guard at a wage of Ksh.9, 900 per month and he worked until 5th July, 2015 when the respondent refused to allocate him any work. The supervisor Mr Eseni told him he would be re-deployed and was required to keep on reporting at the head office until 9th July, 2015 when he was told there was no work and was to wait to be called by the deployment officer Joshua. He has since never recalled.

The claim is that there was wrongful termination of employment and the claimant is seeking the following terminal dues;

- a. Notice pay Ksh.9,900;
- b. 6 years of untaken leave days Ksh.29,700;
- c. House allowance for 6 years Ksh.53,460;
- d. 6 years of public holidays Ksh.47,190;
- e. Overtime pay for 4 extra hours each day for 6 years Ksh.579,150;
- f. Untaken public holidays KSH.47,190;
- g. Refund of uniform fees deducted Ksh.6,000;
- h. Unwarranted annual duty deductions at Ksh.980 from 2008-2012 Ksh.3,920;

The claimant is also claiming that there was constructive dismissal and he suffered loss of income and inability to meet his obligations as a result of which he suffered damages at 12 months at Ksh.118, 800 and costs.

The claimant testified in support of the claim that he worked diligently for the respondent until 5th July, 2015 when he was directed to go home and would be recalled which to date has not been done. Work hours were from 6PM to 6AM and no overtime work was paid for. He discovered that he was replaced immediately. He did not abscond duty as alleged and all matters were communicated verbally. The dues claimed are due and should be paid.

The response is that the claimant was employed on 3rd November, 2008. In June, 2015 there was shortage of tenders for guards and the claimant was directed to report to work with a few of his colleagues as usual as the respondent organised placements and the claimant obliged until June, 2015 when he absconded duty.

The response is also that the claimant deserted duty on 30th June, 2015 until 6th January, 2016 when he sent a demand notice claiming for terminal dues.

Notice pay is not due since the claimant deserted duty. The claimant took leave annually and the wage paid was consolidated with the house allowance. The claimant was relieved during the public holidays and he never reported on duty as alleged.

The claimant had a standard 48 hours a week and when he exceeded the management would be notified and would be paid with an extra off day to offset the alleged overtime.

The claimant has not cleared with the respondent so as to be paid his terminal dues due to desertion of duty and the claims made should be dismissed with costs.

The respondent called Fred Esendi a supervisor who worked with the claimant and testified that in June, 2015 he placed the claimant on a site together with another guard who was on annual leave and once back in July, 2015 told him to wait for a reliever but he declined. Later he found him riding on a bicycle and said he had found new employment and never reported back to work. There is no letter dismissing the claimant from work since he absconded duty. He tried to call him on the phone but could not be reached. He was last at work on 4th July, 2015.

The respondent did not file any work records

Determination

Both parties filed written submissions which have been considered and the issues which emerge for determination are whether there is constructive dismissal; whether there is wrongful termination of employment; whether the remedies sought should issue.

The claimant's case is that on 5th July, 2015 he was directed to go home and wait to be recalled which has not happened since. That he was constructively dismissed and is seeking the payment of various dues.

Constructive dismissal occurs where the employee is placed under intolerable working conditions by the employer and forced to resign from his employment due to the conduct of the employer. The employee must hence initiate termination of employment on the grounds that the actions of the employer are so perverse that continued employment is not feasible.

In this case, the claimant was sent away under verbal communication. Such action is by the respondent. There is no resignation. A key element of constructive dismissal is missing.

In response, the respondent's case is that in June, 2015 there was reduced work and the claimant together with other employees were advised that there would be placement but on 5th July, 2015 he did not report to work.

As noted above, the respondent has not filed any work records.

Where there was reduced work and which forced the respondent to issue placement directions, the due notice pursuant to section 40 of the Employment Act, 2007 was not issued and is equally not filed in these proceedings.

Where the claimant absconded duty as alleged, such is a serious matter in employment and labour relations and specifically addressed under section 44(4)(a) of the Employment Act, 2007 (the Act) that failure to report on duty is an act of gross misconduct which justifies summary dismissal. No notice is issued to the claimant by the respondent over alleged absconding duty.

Under Sections 43(1) and 47(5) of the Act, the burden of proving unfair termination of employment rests on the employee while the burden of justifying the grounds of termination of employment rests on the employer. Under section 10(6) and (7) of the

Act, the employer is under a legal duty to submit work records to prove the terms and conditions of employment. See **Muthaiga Country Club v Kudheha Workers [2017] eKLR**.

Without any evidence to challenge the claims made by the claimant, the court finds the respondent wrongfully and unfairly terminated the claimant's employment contrary to section 35, 43 and 45 of the Act. He is entitled to notice pay and compensation pursuant to section 35 and 49 of the Act respectively.

The claimant worked for the respondent from 3rd November, 2008 to July, 2015 all 7 years and compensation of Ksh.6 months is hereby found appropriate. On a wage of Ksh.9, 900 total compensation due is Ksh.59, 400.

Notice pay under section 35 of the Act is for one month all at Ksh.9, 900.

The claimant is seeking leave pay for the entire duration of employment. There is no record of the claimant having taken any leave days pursuant to section 28 of the Act and as required by section 28(2) of the Act what is due is leave days not taken for 18 months only all being Ksh.14,850.

The claim for house allowance is challenged by the respondent on the grounds that the paid wage of Ksh.9900 was consolidated and inclusive of house allowance. No contract, policy or private treaty is attached to confirm such consolidation of wages paid. In any event, the claimant as a security guard is protected and his wage regulated under the Wage Orders.

In July, 2015 a security guard wage was Kshs. 12,221 basic and a 15% of house allowance at Ksh.1, 833.15 the total gross wage payable to the claimant ought to have been 14,054.15. There was an underpayment of Ksh.4, 154.15 each month.

The claimant is seeking a house allowance of Ksh.54, 460 which is found reasonable and allowed.

The claimant is seeking payment of public holidays. These days are set in general terms and not particularised. There are gazetted public holidays each year and cannot be general.

Overtime pay is claimed on the grounds that the claimant worked 4 extra hours each day. The regulation of wages in the private security sector allow for work for 10 hours and not 8 hours. The claimant has grossly exaggerated his claims.

On the claim for uniform refunds and annual duty deduction of Ksh.980 the claimant shall attend at the shop floor and clear with the respondent and upon which the noted deductions shall be processed.

Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

- a. Compensation ksh.59400;**
- b. Notice pay Ksh.9,900;**
- c. Leave pay Ksh.14,850;**
- d. House allowance Ksh.54,460;**
- e. The claimant shall undertake clearance and upon which his deductions shall be processed; and**
- f. The claimant is awarded costs.**

DELIVERED IN COURT AT NAIROBI THIS 9TH DAY OF DECEMBER, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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