



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1142 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

DANIEL LUGHASHI AGENA.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

The claimant herein was engaged by the respondent, a private security company, as a security guard in April 2006. He worked for the respondent until 21st October 2011 when he was summarily dismissed for absconding duty by letter of the same date.

The claimant had taken leave following the death of his spouse and did not report back to work on the date he was supposed to hence the dismissal.

According to the claimant he reported back on duty on 29th October 2011 and was assigned duty. That a disagreement arose when he applied for his 2010/2011 annual leave which he had not taken. It is then that he was directed to return his uniforms to the office and go away.

The claimant prays for the following remedies in his memorandum of claim dated and filed on 4th July 2012 –

1. A declaration that the termination of the claimant was unlawful, wrongful and malicious.

2. The respondent be compelled to pay the claimant the following–

- (i) Notice.....Kshs.8,463
- (ii) Severance pay 15 x 326 x 6.....Kshs.29,340
- (iii) Leave allowance for 42 days equivalent to 8,463 x 2.....Kshs.16,926
- (iv) Underpayment 2006 – 2011.....Kshs.94,888
- (v) Overtime 4 hours per day equivalent to 3,888 hours.....Kshs.131,086
- (vi) Refund uniform deduction 2,400 per annum x 6 Kshs.14,400
- (vii) Unpaid house allowance for 6 years 15% of 8,463 x 12 x 6..... Kshs.91,400
- (viii) Full compensation for wrongful loss of Employment.....Kshs.101,556

Total **Kshs.502,459.**

3. Respondent to issue certificate of service to the claimant.

4. The respondent to pay costs to the claimant.

The respondent filed a response to the memorandum of claim on 24th August 2012. It denies that the claimant was dismissed upon seeking annual leave. It further denies that the claimant had a clean record.

RW1 RAYMOND NZIOKA testified that he joined the respondent's employment as Human Resource Officer in August 2015 after the claimant left employment. That according to the respondent's records the claimant was employed by the respondent as a security guard on 15th December 2005 and worked until 9th September 2011 when he proceeded on leave following the death of his spouse. He was to report back on 6th October 2011 but did not resume duty until 21st October 2011 when he was summarily dismissed.

According to the testimony of RW1 the claimant took all his annual leave and had no leave balance at the time of dismissal.

RW1 admitted that the claimant had not been paid uniform refund of Kshs.2,400 which was payable upon clearance. That the claimant had not cleared.

He testified that the claimant was paid a gross salary of Kshs.8,463 which was inclusive of house allowance and overtime. He testified that the claimant was not entitled to notice as he had been dismissed. That having absconded duty, it is the claimant who owed the respondent pay in lieu of notice.

RW1 further testified that the claimant does not qualify for compensation.

Under cross examination RW1 stated that the claimant worked from 6 to 6, that uniform deduction is made for only one year and that the claimant was not issued with a certificate of service because he did not avail himself. He stated the claimant was dismissed after failing to report back for three weeks and that he was not given a hearing because he was not available. He denied that the claimant's leave was extended by the then Human Resource Manager on telephone as the same was not documented.

Determination.

I have considered the evidence on record and submissions by the parties. The issues for determination are whether the claimant's termination was fair and if he is entitled to remedies sought.

Whether the termination was unfair

The respondent's case is that the claimant took leave from 10th September 2011 and was expected back on 6th October 2011 but did not report back until 21st October 2011 when he was dismissed. According to the claimant he reported back on 9th October and wrote the letter dated 9th October 2011 at page 13 of his bundle of documents. The claimant also states he was assigned duties at Trans World Radio as is evident from the Gard Dispatch at page 7 of his bundle of documents. That he was dismissed on 21st October 2011 because he asked for the balance of his leave.

For dismissal to be valid and fair, the respondent must comply with both Section 41 of the Employment Act which provides for the procedure for termination, and Section 43 of the Act which provides for proof of valid reason. Section 47(5) provides that the burden of the employee is to prove unfair termination while the burden of the respondent is to justify the grounds for termination.

In the instant case, the respondent's witness stated that the claimant did not resume duty after taking leave and could not be taken through a disciplinary hearing because he was not available. The claimant on the other hand produced a letter he wrote on 9th October 2011 and the guard dispatch signed by Mr. Gichobi, the Operations Manager, on the same date. The respondent did not deny the authenticity of both documents. RW1 only stated that the letter written by the claimant on 9th October 2011 was not in its records.

From the foregoing, I find that the claimant has proved that he actually reported to work on 9th October 2011 and was assigned duties at Trans World Radio as night guard on the same date. The averments by the respondent that the claimant did not report back after leave is thus not correct from the evidence on record. This therefore means that there was no valid reason for summary dismissal of the claimant on grounds of desertion of duty.

Besides the forging, the claimant was never taken through any disciplinary process. He was not asked to show cause why his services should not be terminated for whatever grounds the respondent had. He was never subjected to a disciplinary hearing as envisaged under Section 41 of the Act. For these reasons the summary dismissal was also procedurally unfair.

On the remedies the respondent admitted owing the claimant Kshs.2,400 being uniform refund.

The claimant is not entitled to severance pay as he was not declared redundant. He would however have been entitled to service gratuity which is provided for in the Regulation of Wages (Private Protective Security) Order at the rate of 18 days per year worked. Since he did not pray for it, I cannot grant him the same.

The claimant prayed for leave of 42 days. According to the leave application forms, the last leave taken by the claimant was for the period up to December 2010. He is thus entitled to leave for 2011. The leave form shows he was entitled to 25 days per year. Having worked up to 21st October 2011 when he was dismissed, he is entitled to 20.1 days leave for 2011.

On underpayments, overtime and house allowance claims, the respondent stated that the claimant's salary was consolidated and he is not entitled to the same.

Section 3(6) of the Employment Act provides that t-

(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

Further Section 26 of the Act provides that –

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

The Labour Institutions Act further provides at Section 48(1), (2) and (3) as follows –

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law?

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to?

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order, commits an offence.

(3) If an employer, is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.

From the legal provisions aforesaid, the assertion of the respondent that overtime and house allowance were consolidated with the claimant's basic wage is inconsistent with the law. As provided in Section 48(1)(b) of the Labour Institutions Act, the court must read into the contract the provision of the law being the statutory minimum terms of employment applicable at the time relevant to the suit.

RW1 having admitted that the claimant worked from 6 pm to 6 am and was not paid overtime or house allowance the claimant is entitled to both.

For overtime, the court can only go back 12 months, this being a continuing injury. I thus award the claimant overtime for 12 months at 4 hours per day for 24 days a month (the claimant testified that they worked for 24 days and then took 4 days off every month). This would be 1,152 hours. At the rate of Kshs.406.10 per day, this works out to Kshs.131,846.40 which I award the claimant. Normal overtime is paid at 1.5 times the hourly rate which I have applied in the tabulation.

I have further applied the statutory minimum rate of Kshs.9,732.50 as per statutory minimum rate of pay for night watchman consolidated with house allowance as in the respondent's own admission it paid consolidated wage.

The claimant is entitled to underpayments as follows –

2006 to 2009:

Kshs.6,665.40 – 5,300 = 1,365.40 x 36 months.... Kshs.49,154.40

2009: Kshs.7,864.85 – 6,800 = 1,084 x 12..... Kshs.12,778.20

2010: Kshs.8,651.45 – 6,800 = 1,851.45 x 12..... Kshs.22,217.40

2011: Kshs.9,732.50 – 6,800 = 2,932.5 x 6..... Kshs.17,595.00

