



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**CAUSE NO.61 OF 2016**

**JOSEPH OGEMBO MOSE.....CLAIMANT**

**VERSUS**

**LOCHAB BROS COMPANY LTD.....RESPONDENT**

**JUDGEMENT**

The claim is that the claimant was employed by the respondent as a night security guard in Narok town. His work hours were 6pm to 6am daily from Monday to Sunday. Such work included on public holidays and without a day of rest and there was no compensation.

In August, 2014 the respondent made a deduction from the claimant's salary amounting to ksh.1, 000.00 which was then Ksh.7, 600.00 per month. He protested against this deduction and demanded for an explanation but was ignored.

On 25<sup>th</sup> September, 2014 the manager, Jasbir Gingh told the claimant that his employment had been terminated and was paid Ksh.6, 350.00 for the 25 days worked. There was no notice pay or the dues owing for untaken annual leave, overtime, rest days and work on public holidays.

The claimant is therefore seeking the following the unfair termination of his employment by the respondent;

- a. Notice pay Ksh.7,600.00,
- b. Overtime pay Ksh.164,824.65;
- c. Public holidays Ksh.33,280.00;
- d. Off duties pay Ksh.146,510.80;
- e. Leave for two years Ksh.10,132.00;
- f. Compensation Ksh.91,200.00; and
- g. Costs of the suit.

The claimant testified that he was employed by the respondent as a guard at Narok from January, 2012 until 25<sup>th</sup> September, 2014. His monthly wage was Ksh.7,600 paid in cash. Work days were 7 from 6pm to 6am each day without a day off, public holiday or taking annual leave.

The claimant also testified that in August, 2014 he was paid his wages less ksh.1,000 and when he asked the manager he was informed to wait for feedback. On 25<sup>th</sup> September, 2014 he asked again about the wage deduction and there was no response. He was instead called to the office and the accountant directed to pay his wages and after which employment was terminated. No reasons were given for such action and he was paid ksh.6,350 plus a certificate of service.

The claimant reported the matter to the labour officer but the respondent declined to attend.

The claimant also testified that upon employment on 18<sup>th</sup> January, 2012 his manager was Jasbir Singh based at Narok but the head office is

in Eldoret. The respondent had tractors at Narok which he was guarding with other employees but he was not issued with any written contract save for a recommendation letter by the respondent. he was paid terminal dues of ksh.7,600 in cash.

#### Defence

In defence the respondent has denied all the claims made by the claimant and on without prejudice given the defence that even where there was employment the claimant repeatedly breached the terms and conditions of the employment by absconding duty, reporting to work while drunk, theft of the respondent's property, being violent and engaging in gross misconduct. that the claims made are not justified and should be dismissed.

There were no work records attached to the defence.

In the witness statement of Maranga Otiso he avers that he is the administrator and the respondent did not employ the claimant. The employment letter submitted by the claimant does not originate from the respondent and the claims made are without justification.

As the respondent were absent at the hearing, no witness was called.

The claimant filed his written submissions.

#### Determination

Section 10 of the Employment Act, 2007 requires ever employer who is notified of a suit filed with the court to file the work records with regard to the employee or evidence that is necessary to disapprove the allegations made and or to confirm the terms and conditions of employment. This amounted gross misconduct subject to summary dismissal.

There was no work record submitted.

The respondent called Maraga Otiso Okari the personnel manager of the respondent since August, 1993 and who testified that the respondent offices are based in Eldoret and the claimant has never been an employee of the respondent. the respondent has no other office save for the one in Eldoret and all employees are paid through the bank at Eco Bank into each staff account and not in cash as alleged by the claimant. Each employee is issued with an employment contract after a successful interview.

Mr Okari also testified that the documents submitted by the claimant to assert that he was an employee of the respondent are not issued by the respondent. the director Ranjit Lochab Jasbir is a person unknown to the respondent. the letter dated 26<sup>th</sup> September, 2014 a recommendation to the claimant is not issued by the respondent as alleged. It does not bear the letterhead or details emanating from the respondent. the language of the letter is done by a layperson who has done spelling errors and the signatures therein are strange to the respondent.

Mr Okari also testified that there is no connection between the claimant and the respondent to justify the claims made which should be dismissed.

At the close of the hearing both parties filed written submissions.

Employment between the parties is challenged. The claimant on the one hand asserts that he was employed by the respondent from January, 2012 to 26<sup>th</sup> September, 2014 when he was dismissed after he questioned a wage deduction of ksh.1,000. That upon termination of employment the claimant was paid his terminal dues and issued with letter of recommendation.

The respondent on the hand has denied employing the claimant on the grounds that they do not have an office in Narok and that the letters submitted by the claimant to confirm employment as not from their office. Several elements in the letter of recommendations were noted by Mr Okari as having errors which cannot have been from the respondent's office and the fundamentally the signatures therefrom are not from the respondent officers.

On this basis, the court questioned the claimant with regard to his employment and the following issues emerged;

The claimant testified that he was working with 75 other employees at Narok but could only recall John Bett and Mwamba and that his supervisor was James Kiilu while his wages would be paid by the manager Jasbir;

That John Bett is still working for the respondent at Narok;

That his wages were all paid in cash;

The general area of work was Narok Ngoringori;

Upon termination of employment the accountant paid him ksh.6,350 in terminal dues; and

That the respondent has since sold the firm/business to a white man.

On this evidence it emerges to the court that there are several lapses in the evidence submitted by the claimant. Where he worked with 75 other employees he can only remember 3 colleagues which is unlike a *normal work environment* of a security guard to be aware and keen on details and particularly persons closely working with him. also where John Bett is alleged to be working for the respondent this would have been the best witness to attend or be summoned to support his case. The claimant was at a great distress to describe to the court the general area he used to work at with the respondent. as noted above, a person employed as a security guard is keen to detail and to fail to appreciate the general area of work is strange.

These details lacking on the part of the claimant, he does not stand well on his case particularly with his employment with the respondent challenged.

Section 47(5) of the Employment Act, 2007 places the burden of proving unfair termination on the employee, and the burden of justifying the grounds of termination on the employer. See **Muthaiga Country Club versus Kudheiha Workers [2017] eKLR**.

The claimant has not discharged the burden of proof of unlawful termination as required of section 47 (5) of the employment act as follows;

...For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer...

The handwritten note attached as annexure 3 to the Memorandum of Claim, the alleged letter of recommendation is not proof of employment. This is not the letter envisaged under the provisions of section 51 of the Employment Act, 2007 or a letter similar to a contract of service as under section 10 thereof.

Without proof of employment, to assess the claims made will be to go contrary to the court jurisdiction addressed under section 12 of the Employment and Labour Relations Court Act, 2011.

**Accordingly, the claims made are hereby dismissed. Each party shall bear own costs.**

**Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....