



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1667 OF 2015

DAVID OKINYI OWUOR.....CLAIMANT

VERSUS

SUPER SECURITY LIMITED.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa 27th February, 2020)

JUDGEMENT

1. The Claimant filed a Memorandum of Claim on 21st September, 2015. He avers that he was employed by the Respondent as a night security guard on 1st March, 2015.

2. He avers that he was constructively dismissed from work due to poor working and environment conditions as a result of underpayment, being overworked, denial of rest and annual leave and the Respondent's refusal to pay house allowance and deduct and remit NSSF and NHIF deductions.

3. He seeks the following reliefs:

1. Notice pay, Kshs. 12,548.50/-

2. Damages for unfair termination, Kshs.150,581.50

3. Annual leave, Kshs. 25,097/-

4. Rest days, Kshs. 9,446.40/-

5. Overtime, Kshs. 220,809.60/-

6. Underpayment, Kshs. 157,164/-

7. Interest on (i) to (vi) above

8. Order to the effect that NSSF and NHIF deducted and not remitted, be and is hereby ordered that the same be remitted within 30 days

9. Certificate of Service

10. Costs of the cause

11. Any other relief this Honourable Court may deem fit to award under the circumstances

4. The Respondent filed a Statement of Response on 14th October, 2015. It avers that it engaged the Claimant as a guard on 30th January, 2014 and was paid all his wages until he deserted duty on 12th March, 2018 without any reasonable cause. It avers that it never received any letter including the resignation letter dated 5th March, 2015.

5. It contends that the Claimant's claim is misleading since he worked only on normal workdays and utilised all his off-days and annual

leave. Further, no overtime service was rendered by the Claimant. It avers that the claim is baseless, misleading and should be dismissed with costs.

Claimant's case

6. The Claimant, CW1, testified that he was employed by the Respondent as a security guard at a salary of Kshs. 6,000/-. He testified that he was not issued with a payslip. It was his case that he worked from 6pm to 6 am and had no rest day or off-duty.

7. He contended that he resigned on 5th March, 2015 and his resignation letter was stamped and signed by the Operations Manager. It was his testimony that he resigned on his own volition as he was being underpaid and he worked under difficult circumstances. He testified that he did not abscond duty.

8. In cross-examination, he testified that he was employed on 1st March, 2013 and that he applied for the job and was successful. He denied filing cause 1905 of 2015 against Base Security Service.

9. He testified that he worked for the Respondent for 1 year and was paid. He testified that his name did not appear in the muster roll in 2013 and did not know the reason for that. He testified that he was paid Kshs. 6,000 through his bank account but he did not have his bank statement.

10. In re-examination, he testified that the muster roll was shown to him for the first time in Court. He testified that the letter produced by the Respondent was not an application for a job.

Respondent's case

11. Fredrick Nyongesa Juma, RW1, testified that he is in charge of the Respondent's general operations and has been at the Respondent for 6 years.

12. He testified that the Claimant worked for the Respondent as a guard from 31st January, 2014. He stated that the Claimant was not employed in 2013. He averred that the Claimant reported to work at 6pm until 6am.

13. It was his testimony that the Claimant was paid during the time he worked. He stated that the Claimant resigned from work on 12th March, 2015 and that he had called the Operations Officer and informed him that he was not on duty. He testified that the Claimant never complained of underpayment and was not unfairly terminated.

14. Upon cross-examination, he testified that the Claimant was issued with an appointment letter, which was not produced in Court. He testified that the Operations Manager received a letter on 31st January, 2014. He stated that the Claimant did not resign.

15. He testified that the resignation letter was a forgery as the March 2015 the muster roll indicated that the Claimant deserted duty. It was his testimony that the Claimant deserted work. He stated that the Respondent did not issue the Claimant with a show cause letter and he never went on leave.

Claimant's submissions

16. The Claimant submits while the Respondent denies that it employed him on 1st March, 2013 and avers that his date of employment was 30th January, 2014. He submits that Section 74 of the Employment Act mandates the employer to keep records of employment. He relies on Section 10 (2) (d) of the Employment Act and further submits that an employment contract must contain a commencement date but the contract was not produced by the Respondent.

17. He submits that the job application letter dated 31st January, 2014, produced by the Respondent bears his employment date as 1st January, 2014, however this is a falsehood. He relies on the case of **Cyrus Muinde Maundu v Albert Marangu t/a Glorious Preparatory School [2018] eKLR.**

18. He submits that the Respondent created a hostile working environment for him by failing to demonstrate that it observed statutory obligations including complying with the Regulation of Wages (General) (Amendment) Order 2013, failing to keep leave records, payslips and attendance register.

19. He submits that the Respondent's actions precipitated his resignation hence constructive dismissal. He relies on the case of **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR** and submits that this case meets all the requirements set out therein.

20. He submits that having established that he was constructively dismissed he ought to have been subjected to termination procedure before separation. He therefore states that the termination procedure was not followed and that the Respondent failed to discharge the evidentiary burden of proving the fairness of the termination process under Section 47 (5) of the Employment Act. In support of this, he relies on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR.**

21. He avers that the Respondent did not produce an employment contract or payslips to prove that it paid him Kshs. 7,000. He avers that in accordance with Legal Notice 197 of 2013 he is entitled to the difference of Kshs. 6,548 per month.

22. He contends that the parties were in agreement that he worked 12 hours which amounts to 72 hours per week. He avers that Regulation 6 of the Regulation of Wages (Protective Security) Order of 1998 caps the working hours for day and night guards at 52 hours. He therefore submits that he is entitled to overtime amounting to Kshs. 283,392.

23. He submits that he never went on leave and relies on the case of **Grace Kaverenge Kendeli v Laborex Kenya Limited [2013] eKLR** where the Court allowed the claim for leave for reason that the Respondent did not produce any leave records.

24. He submits that he had no rest days and the Respondent did not challenge this by any evidence. He urges the Court to award the prayer of Kshs. 100,531.20/-

25. He submits that having proved this unfair termination he is entitled to compensation for unfair termination as prayed. He further submits that having been terminated without notice or payment, he is entitled to salary in lieu of notice under Section 35 of the Employment Act.

26. He further submits that the Respondent necessitated the filing of the suit thus, he is entitled to costs and interest of the suit.

Respondent's submissions

27. The Respondent submits that by the Claimant in his cross-examination, the Claimant admitted that he joined the Respondent on January 2014 after his application for employment on 31st January, 2014.

28. It submits that in its muster roll, produced in Court, for the period March 2013 to March 2015 the Claimant's name appeared in February, 2014 to March 2015. It is its submission that there is no other evidence that the claimant was employed in January 2014 as opposed to 1st March, 2015.

29. The Respondent submits that the Claimant deserted duty on 5th March, 2015 and in order to sanitise his action, he wrote the letter of resignation which he dated even date.

30. It submits that having voluntarily quit employment, the Claimant cannot claim unlawful termination. It contends that there is no proof of the allegations of unlawful termination.

31. It submits that it paid overtime. It avers that its muster roll captures all days the Claimant was on duty and that the salary ranged Kshs. 7,000/- up to Kshs. 9,000/-. It further submits that the Claimant's days off were captured in the muster roll and there was no evidence that he worked overtime.

32. It submits that the Claimant having abruptly quit his employment, he cannot seek to benefit from his conduct.

33. I have examined all the evidence and submissions of both Parties. The Claimant exhibited Appendix 1 – a letter he wrote dated 5/3/2015 indicating that he considered himself terminated because he was being paid below the minimum wage; not being paid overtime and house allowance nor off duty.

34. He sought to be paid his wages. The Claimant admitted he wrote this letter, which the Respondent considered a resignation. There is no other letter addressed by the Respondents terminating the Claimant's services.

35. The issue for determination then is whether the Respondent constructively dismissed the Claimant.

36. The Claimant contends that the Respondents treated him in such an unfair manner that he had to quit his work. The Claimant has not however proved that he raised any complaints with the Respondent about the way he alleges he was treated. He contends that he was paid 6,000/= per month through his bank. He did not produce his bank statement to prove the same.

37. He also indicated that he worked from 6 pm to 6 am which the Respondent admits thus earning him an overtime of 4 hours daily.

38. Is the fact of underpayment in itself then a reason to say that the Claimant was constructively dismissed?. I do not think so. For constructive dismissal to occur, the Claimant must demonstrate that the Respondent was no longer interested in honouring terms of the contract of employment. So he had no option but to resign.

39. There is no indication that the Claimant sought any explanation from Respondent as to why they were underpaying him. He did not ask for his overtime pay. He just rose up one morning and left in a huff because he was dissatisfied with the salary he was earning and which he had earned since he was employed and he had accepted all along as per his contract with the Respondent.

40. In this Court's view, there was no alteration of the initial contract and the Respondent did not do anything or omit to act in any way as to render the Respondent's action as a constructive dismissal.

41. My finding is that the Claimant resigned on his own motion and all he is entitled to is underpayment of salary if any and overtime pay.

42. The Claimant told Court that he was employed on 1/3/2013 and left on 21/3/2015. That makes it a total of 2 years employment.

43. The Respondent on the other hand indicated that the Claimant was employed on 31/1/2014. He admitted in cross-examination that he

worked for Respondent for 1 year. I will therefore take that as the period he worked for Respondent and in calculating underpayment, I will put it at 12 months:-

= 12,548.50 less 6,000/= paid

= 6,548.50 x 12 = 78,582/=

44. I also award Claimant overtime pay of 4 hours per day for 1 year = 52.25 per hour per day = 418.24 per day x 365 days = 148,893.4

Total = 227,475.44 - Less statutory deductions

45. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 27th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Onbwoga holding brief Kiarie for Claimant – Present

Respondents – Absent