



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.45 of 2019

COLLINS WANJALA LUKORITO.....CLAIMANT

VERSUS

MIDAL GROUP (K) LIMITED.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent in Nakuru as a night security guard on 29th January, 2018 at a wage of Ksh.7,000 per month until 13th May, 2019 when his employment was terminated unfairly by being declared redundant on account of hospitalisation and injuries sustained while on duty.

The claim is that the claimant work hours were 6pm to 6am on night duty and vice versa while on day shift.

While the claimant was on night shift on 13th May, 2019 at Riva petrol Station in London Estate within Nakuru he was attacked by a group of robbers and injured and hospitalised for a period of one month up to June, 2019.

Upon discharge from hospital the claimant made contact with the respondent with a view of resuming duty but was shocked to learn that his employment had been terminated due to hospitalisation. His dues were not paid. There was no notice or a hearing under the provisions of section 41 of the Employment Act.

The claim is also that there was breach of the claimant's constitutional rights to equality and non-discrimination and right to fair labour practices as envisioned under article 27 and 41 of the constitution. the particulars of such breaches are that employment was terminated on the grounds of health status and on account of disability. The right to fair labour practices was violation on the grounds that there was no fair procedures in termination of employment, failure to pay house allowance, annual leave, notice pay and statutory dues to NSSF and NHIF.

The termination on account of redundancy was unlawful as there was no notice on account of such matter, failure to pay for leave days, notice pay and severance pay and violation of section 40 of the Employment Act.

The respondent has also failed to issue the claimant with a certificate of service.

The claim is for the payment of the following dues;

- a) General damages, exemplary and aggravated damages under article 23(3) of the constitution for violation of constitutional rights;
- b) Compensation under section 49 of the Employment Act for unfair termination of employment Ksh.193,724.30;
- c) Underpayments Ksh.104,356,00;
- d) House allowance Ksh.31,403.52;
- e) Notice pay Ksh.16,143.70;
- f) Unpaid wage for 13 days in May, 2019 Ksh.8,802.30;

- g) Off days/rest days Ksh.118,528.16;
- h) Overtime ksh.177,792.24;
- i) Public holidays ksh.25,715.45;
- j) Annual leave ksh.16,298.14;
- k) Severance pay Ksh.11,642.08;
- l) Service pay ksh.11,642.08;
- m) Certificate of service;
- n) Costs.

The claimant testified in support of his claims that upon employment by the respondent in on 29th January, 2018 he was not issued with letter of employment. He was placed at different work sites at section 58 within Nakuru town and then Riva Petro station in Langa supervised by Mr Okwemba. His wage was paid at ksh.7,000 per month without provisions of housing or a house allowance in lieu thereof.

The claimant also testified that he worked for 7 days a week for 12 hours without overtime pay, rest day or annual leave or taking public holidays. He was not registered with the NSSF or NHIF and the respondent did not pay.

The claimant also testified that on 10th May, 2019 he was dismissed from his employment. He has pleaded that termination of employment occurred on 13th May, 2019 but this was in error because he was on duty on the night of 10th May when he was attacked by robbers and injured. He was rescued by KK guards who responded to the alarm and took him to hospital where he was admitted until 18th May, 2019 for which the respondent paid and was issued with discharge summary. The respondent knew he had been injured and in hospital. He was not able to return to work. The respondent sent him home to recover from his injuries since he had a plaster on his leg and walking with the assistance of a stick.

The claimant went for his May, 2019 salary and was informed that he had not been at work. On 7th June, 2019 he was paid Ksh.1,000 and informed his employment had been terminated. No reasons were given. This was in violation of his human rights. It was discrimination against him for being unwell. His rights in employment were violated and thus claims as pleaded.

Upon cross-examination the claimant testified that upon injury while at work he was admitted in hospital for two weeks and the respondent paid for his hospital bill but when he reported on duty for the May, 2019 wage he was informed his employment had been terminated. The alleged payment of Ksh.5,500 was not done. The respondent said his wages was used to pay for the hospital bills. Upon being discharged from hospital he could not work due to the nature of injuries.

The claimant also testified that he was paid ksh.1,000 by the respondent and since such payment he never returned to work. He left his issued uniforms at the place of work.

Defence

The defence is that the claimant was employed on 30th January, 2018 as a day security guard and was attacked and injured by a group of robbers while on duty on 10th May, 2019 and was hospitalised. There was no termination of employment as alleged.

The claimant was expected to return to work in August, 2019.

The claimant was employed under terms agreed upon between the parties on 30th January, 2018 and being employed as a security guard he was required to work on public holidays and this was communicated and agreed upon.

The defence is also that the claimant did not work for the statutory period of 12 months to make the claims outlined. There was no breach or violation of constitutional rights and the law as alleged. Upon failing to return to work, the claimant cannot claim unfair termination of employment. The claims made should be dismissed with costs.

The respondent filed work records.

Lucas Owiti the operations manager testified that he employed the claimant with effect from 30th January, 2018 and there was agreement to pay a wage of ksh.7,000 per month. He was placed at section 58 and then moved to Riva bay petrol station until 10th May, 2019 when he was attacked by robbers and injured and was hospitalised. The respondent paid the hospital bills of Ksh.34,350 and obtained the discharge summary.

The claimant's wage changed to ksh.7,500 per month from 8th October, 2018.

In May, 2019 the claimant was paid Ksh.5,500 for days worked.

Mr Owiti also testified that when the claimant got injured, upon discharge he went to the office and upon assessment of his condition he was advised to go home. He returned after some time but his condition had not improved, he was unkempt and not taking proper care of himself, he had not taken a shower and was directed to go home to be assisted, he was given ksh.1,000 bus fare and to return in August, 2019 but the next day the claimant issued the respondent with a demand notice from his advocate. The claimant had been given time off and would be paid but upon the demand he never returned back to work.

There was no termination of employment and he never returned to work in August, 2019 as directed and he opted to file suit.

There was no underpayment as the claimant agreed to paid ksh.7,000 and which was increased to ksh.7,500.

In a week the claimant took a day off and the muster roll was kept in this regard. Duty was organised to cater for a day off. When he had his off day he remained at work. The claimant never got registered with NSSF and NHIF and thus the respondent could not make payments thereof.

The claimant did not take annual leave. He left employment on his own accord.

At the close of the hearing both parties filed written submissions. The court has taken these into account and the issues which emerge for determination can be summarised as follows;

Whether there was discrimination against the claimant, unfair labour practices and breach of the constitutional rights;

Whether there was unfair termination of employment;

Whether the remedies sought are due;

Whether costs should be paid.

Employment of the claimant by the respondent is admitted.

It is common cause that the claimant was injured while at work on 10th May, 2019 while on duty. The pleading that he was injured on 13th May, 2019 was corrected in evidence. the respondent as the employer admitted the date of injury was 10th May, 2019.

It is also common cause that the claimant was admitted in hospital and upon discharge the respondent paid the charges all at Ksh.34,350.

From the evidence of Mr Owiti for the respondent it came out that the hospital bill paid was sourced from the due wages of the claimant. This is because upon discharge from hospital and upon return to the office he was not paid his dues wages for May, 2019. That the claimant looked unkempt, his condition was not good and thus was advised to travel home to be taken care of by his family. He was paid ksh.1,000 as bus fare.

The evidence of Mr Owiti corroborates that of the claimant who testified that upon discharge from hospital he returned to work but was sent home, his wage for May, 2019 was not paid and he could not pay his house rent and which was locked. He pleaded with the respondent who paid him ksh.1,000 and nothing more.

In employment and labour relations the staple food is written communication. The employer has the duty to issue the employee with written contract of employment with terms and conditions of employment. Such duty is taken so seriously that section 10 of the Employment Act, 2007 (the Act) requires the employer to produce such records with the court once suit is filed. Where the record is not filed, the word of the employee is to be taken as the truth.

Where the respondent paid for the hospital bill following the work injury from the wages due, this ought to have been communicated in writing. The work relations taken into account, to make payments to a third party from the wages of an employee without the consent and or approval and knowledge of the employee is contrary to the provisions of section 17 read together with section 19 of the Act.

Where the payment of the hospital bill was taken as an advance payment, the claimant ought to have been issued with a payment statement taking this into account.

Section 17(1) of the Act provides;

(1) Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya— and section 19(1)(g) that;

(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

...

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages

upon Mr Owiti assessed the claimant's condition upon return to work and allowed him to go home and resume duty in August, 2019. There was no written communication in this regard.

What then was the rationale of Mr owiti and in this case the respondent paying the claimant ksh.1,000 for bus fare home? This cannot be explained in any other manner save to confirm the claimant remained the employee of the respondent. his wage for May, 2019 was not paid in full. his employment was left at large.

The claimant is also not without blame. Upon injury and admission in hospital, he returned to demand for his wages for May, 2019. Even where the claimant was away from work for a reasonable cause and for being injured while at work and for being admitted in hospital, the law demanded that he regularise such absence from work under the provisions of section 30 read together with section 34 of the Act. see **Anne Wairimu Kimani versus Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR** the court held that;

*Further to the above, section 34 of the Employment Act, 2007 requires that where an employee is unable to attend work due to illness, sickness or any medical condition, such should be brought to the attention of the employer within a reasonable time. The law gives the condition that the employee should also submit a medical certificate from a medical practitioner. See **Dorothy Ndungu versus Machakos University & others [2016] eKLR.***

Whatever matter caused the claimant to be absent from work, the due process of the law, the lapses in the respondent failing to issue communication to the claimant cannot justify his alleged failures.

To claim for unfair termination of employment in the circumstances set out above would be to avoid taking the required legal responsibility on the part of the claimant. The respondent too as the employer, should pay for work done and time served. The claimant has capped his employment up and until the 13th May, 2019 which he clarified to be 10th May, 2019.

Wages due to the claimant from the respondent as due up and until the 10th May, 2019.

The court finds no case of unfair termination of employment.

With regard to the alleged case of discrimination against the claimant, his case is that his employment terminated on account of his ill-health and disability following work injury he was sent home and since he had a leg in plaster this was used against him.

Whereas it is true the claimant got injured while at work and was hospitalised, upon return to work he testified as follows;

... the respondent knew I had been injured and taken to hospital.

I was not able to return to work due to my injury. The respondent sent me hoe to return until I got well. I had a plaster to my leg and walking with the aid of a stick. ... my leg injury made me not to work properly. ...

The claimant was thus aware due to his injury he could not discharge his duties and was allowed time off to recuperate.

To infer that there was discrimination against him in these circumstances is without proper cause. The respondent admitted there was injury to the claimant, he was admitted in hospital and paid his bills. Mr Owiti testified that;

... when the claimant got injured, upon discharge he came to the office alone and we assessed his condition and then sent him home. After some time he came back but his condition was bad. We sought to know who was taking care of him and it was apparent that he had not taken a shower for some time and his condition was of concern to us and we requested him to go home for assistance and we gave him ksh.1,000 for him to travel home and come back in August, 2019 to help assess if he could resume duty. ... the following day we received a demand notice from the claimant's advocates. ...

On this basis, save for the failure to pay the claimant his owing wages for work done, the court finds no matter for the breach of constitutional rights to equality and non-discrimination and unfair labour practice. where the respondent failed to pay for work done, that is addressed as set out above under the provisions of the Act.

On the claims for payment of damages, without a finding of violations of the constitution or the law such is not due. equally, there was no unfair termination of employment to justify compensation as claimed. Notice pay is equally not due in this instance.

With regard to underpayments, an employer and employee cannot enter into an agreement for underpayment. Such is unlawful and cannot receive the sanction of the court as the purpose of the Wage Orders published every year by the government is to give employers guidelines not to pay below the minimum wage.

Under paragraph (h) the claimant has set out his basis for the claim of underpayment on the basis that he was employed as a *Machine Attendant* whereas his pleadings and evidence was that he was a security guard.

Under the wage orders, a security guard employed from 30th January, 2018 was entitled to a wage of ksh.13,369.50 under the Regulation of

Wages (General) (Amendment) Order, 2017 in force in the period of 1st May, 2017 to April, 2018.

The wage due was to be paid together with a house allowance of 15% of the basic wage at ksh.2,005 and total due per month was ksh.15,374.

For the period of February to April, 2018 the claimant was paid Ksh.7,000 per month which was an underpayment of ksh.8,374 per month and total due is Ksh.25,123.05. For the period of May, 2018 to April, 2019 the minimum wage due was Ksh.14,038 and house allowance Ksh.2,105.70 total wage being Ksh.16,143.70 per month.

For the period of May, 2018 to January, 2019 the claimant was paid a wage of ksh.7,000 being an underpayment of ksh.9,143.70 and for the 9 months the total underpayment is Ksh.82,293.

For the period of February, to April, 2019 the wage increased to Ksh.7,500 there was an underpayment of Ksh.25,931.

Total underpayment is ksh.133,374.

The total underpayments include the house allowance. The separate claim in this regard is declined.

The wage due for May, 2019 for 10 days is ksh.5,381 gross.

On the claims for overtime work, the wage guidelines for security guards allow for work for 60 hours each week. The responded filed work records and in this regard;

January, 2018 there was work for 2 days only; February, 2018 work for the full month;

This is repeated in March, April, and May, 2018 absent for 2 days, June full month work, July, August, September, October, November, December, 2018, January, 2019 there was work full month; February, 2019 for 5 days absent; March, 2019 full month; April, 2019 full month at work; and May, 2019 10 days worked.

The defence that the claimant was allocated time off but opted to remain at work is in ignorance of the employer's duty under section 27 of the Act where the employee should be allowed time off each week to allow overtime work and where there is such work it should be compensated.

In this regard, for 12 months, the claimant was at work without a break of a single day. Based on the last earned basic wage he is entitled to overtime pay. For work at 12 hours each week for 7 days the claimant had a total of 72 hours which is 12 hours more for a security guard. For each month this amounts to 48 hours all being 576 hours for the duration of employment for the full 12 months worked without rest.

On the basic wage of ksh.14,038 per month, the daily wage due tabulated at the hour is Ksh.38.90 at the rate of 1.5 for the 576 hours all due in overtime is ksh.33,691.20.

The claimant worked for the respondent for a total 14 full months and 10 days all being 53 weeks. Thus entitled to 53 days of rest. Within this time he took a total of 7 days off. Rest days due are 76.

The basic wage for each day, total due for rest days is ksh.21,524.90.

the principles denominator for rest days and annual leave taken being based on the basic wage as he monthly wage was paid and the unpaid house allowance has been factored.

Under section 28 of the Act, the claimant is entitled to 21 days for annual leave which was admitted was not taken. For the duration of employment for 14 full months he is entitled to 23 days of annual leave. Applying the basic wage, total due is ksh.10,762.40.

On the claims for public holidays worked, though tabulated at 11 days for the period of work, there was no outline as to how such days arose and whether they fell within the time taken off as noted above or at work. Without clarity, these claims are declined.

On the claims for severance pay on the grounds that there was a redundancy, this case did not stand out as one for redundancy. From the evidence, the claimant was clear that he got injured while at work and upon return he was sent home to recuperate. He was not paid his wages as due. this is thus not a claim justified under the provisions of section 40 of the Act to warrant a severance pay.

On the claim for service pay, it is the duty of every employer to ensure there is deduction and remittance of statutory dues. this cannot be left at the behest of the employee. To pay wages without the statutory dues is to invite a sanction against the employer. Where the claimant was not registered with NSSF and NHIF, upon conducting his interview for employment on 29th January, 2018 the respondent ought to have directed him to attend in this regard before commencing employment.

Without payment of statutory dues, service pay is due for every full year worked. For the period of February, 2018 to February, 2019 the claimant is entitled to pay for 15 days at the gross wage due all at ksh.16,143.70 by 30 days x 15 all at ksh.8,071.85.

It is conceded that the claimant has since been paid a sum of Ksh.1,000 said to be fare back home, in May, 2019 he received ksh.5,500 and his hospital bill was paid for by the respondent at Ksh.34,350 all being Ksh.40,850 which shall be factored in the owing dues.

A certificate of service is due to every employee upon termination of employment.

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

- a) Underpayment awarded at Kshs. 133,374;**
- b) Wage for 10 days in May, 2019 Ksh.5,381;**
- c) Overtime awarded at ksh.33,691.20.**
- d) Rest days awarded at ksh.21,524.90.**
- e) Annual leave awarded at ksh.10,762.40.**
- f) Service pay ksh.8,071.85.**
- g) A certificate of service shall be issued in accordance with section 51 of the Employment Act, 2007;**
- h) The dues paid above shall be paid in accordance with section 49(2) of the Employment Act;**
- i) The dues payable to the claimant shall be paid less ksh.40,850 already received; and**
- j) Each party shall bear own costs.**

Delivered at Nakuru this 13th day of February, 2020.

M. MBAR?

JUDGE

In the presence of: