



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.102 OF 2016

JOSEPH CHODO.....CLAIMANT

VERSUS

LAKE NAKURU LODGE.....RESPONDENT

JUDGEMENT

The claimant's case is that on 28th March, 2013 he was employed by the respondent as a day/night guard working for 12 hours per day and without pay for overtime hours and earning Ksh.4, 500 per month until February, 2012 when he was issued with a letter of appointment and wages increased to Ksh.6, 221 per month which was an underpayment. He was not allowed annual leave or the payment of statutory dues.

The claim is that the claimant was dismissed from his employment without notice, reasons or a hearing. The respondent claimed that there was a robbery on 7th September, 2012 at the work place there were CCTV cameras but these were not manned for the claimant to be alerted of the robbery. It was alleged that the thief stole ksh.3, 000 from a guest at the hotel. The claimant and his colleagues were booked at Bondeni Police station where they recoded statements and released and resumed duty where he worked until 16th January, 2013 when he was sent home.

The claimant was home for two months when he decided to visit the respondent but was told that he had been found guilty over the theft which occurred on 7th September, 2012.

The claimant reported the matter too his trade union. Nothing was done.

The claimant is seeking the following dues;

- a) Notice pay Ksh.9,103.30;
- b) Underpayments from April, 2010 to 31st December, 2012 Ksh.97,883.50;
- c) Overtime pay sh.30,451.80;
- d) Public holidays ksh.26,109.70;
- e) Leave for 2.9 years Ksh.17,431.30;
- f) Gratuity for 2 years ksh.9,103;
- g) Compensation ksh.109,239.60

The claimant testified he was employed from 28th March, 2010 by the respondent and was issued with letter of appointment from February, 2012 and paid ksh.6, 221 together with NSSF contributions. His work hours were 7pm to 6am without overtime pay.

There was theft in one of the guest rooms during his night shift and which led to his dismissal from employment but there was no warning, hearing or notice given.

The claimant also testified that he reported the matter to his trade union and wrote to the respondent and informed him later that the matter had been settled and he should collect his cheque but he could not do so.

The claimant was informed that The cheque was left with the county labour officer. The hearing between the respondent, union and the labour officer was without his participation. He opted to file suit.

Upon cross-examination, the claimant testified that while on night shift, he would leave the workplace in the morning and be picked by the employer's bus and be picked back to work in the evening. Night duty would end at 7am from 6pm and there was a schedule to be followed since he respondent is located within the park. Every week he had a break and when he needed time off he had to make an application.

- In August, 2011 he took two days off;
- 21st July, 2011 took 2 days off;
- 5th may, 2012 took 3 days off;
- 6th June, 2012 took 3 day of;
- 3rd October, 2011 took 2 days off;
- 19th April, 2012 took 3 days off; and
- 7th April, 2012 took 3 days off.

These off days were allowed.

The defence is that the claimant was not employed as a guard as defined under Legal Notice No.98 of 1st May, 2010 and such wage Orders do not apply to him as he was a *night watchman* and without any quantisation's and paced at 'other areas' outside of Nakuru municipality and he was thus paid in accordance with the applicable wage regulations of Ksh.4, 291 per month.

Overtime worked was compensated with an award of two days off before change of shift from night to day.

The claimant was paid whenever he worked during public holidays. Annual leave was allowed and taken.

The claimant is not entitled to payment of gratuity. The respondent paid statutory dues for the claimant.

The claimant was paid in lieu of notice vide cheque No.007928 dated 14th February, 2014 through the Labour Office through letter to the office dated 7th February, 2014.

The defence is also that there was a robbery within the premises the claimant was guarding and he was negligent in his duties by complicity. There were criminal charges levelled against the claimant but these were withdrawn on humanitarian grounds and the respondent had to compensate the guest who suffered financial loss following theft in the guest room.

The defence is also that the claimant reported the matter to Kenya National Private Security Workers Union a stranger to the respondent instead of his trade union KUDHEIHA Workers which covers the respondent employees in the hospitality industry and the Minister appointed a conciliator and an amicable solution was reached, it was held that the respondent had followed the due process in the dismissal of the claimant; the claimant be paid underpayments of salary of 6 months and one month's notice. such dues have since been paid and deposited with the labour office for collection by the claimant.

The claims made should be dismissed.

Francis Karangi the human resource manager testified in support of the defence that the claimant was initially employed by the respondent's director and placed at his private residence and was later issued with letter of appointment and placed with the respondent from 28th February, 2012 and put on the pay roll and statutory dues paid.

Mr Karangi also testified that all guards work from 7am to 6pm to allow for an hour of handover with a total of 9 hours each day. Within each week the claimant had 4 days out of work to compensate for his overtime hours worked. These would be 4 days off taken consecutively to cover rest days and for the off days the claimant would be required to apply and the respondent kept the schedule.

The respondent is based at the National Park, 30 kilometres from the central business district and outside the Municipality and the wage orders are for outside areas. The claimant would be picked and taken back in the bus with other employees.

There was theft within the premises when the claimant was on duty and a guest lost cash. The matter was reported to the police but the respondent later withdrew it on humanitarian grounds but terminate his employment. The claimant reported the matter to a third party but his union addressed it and the matter was resolved before the labour officer and his dues paid through the same office with approval from the union all at Ksh, 22,862. The respondent accepted the recommendations by the Labour Officer and paid as required.

Mr Karangi also testified that the claims made are without merit and should be dismissed with costs to the respondent.

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

Determination.

Both parties agree that the claimant was engaged on casual terms and on 28th February, 2012 the claimant was issued with letter of appointment for the position of *Watchman* effective 1st March, 2012 and employment was regulated *on terms and conditions of service as contained in the current agreement between the Kenya Association of Hotel Keepers and Caterers (KAHKC) and the Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA workers)*. Pursuant to section 8, 10 read together with 37 of the Employment Act, 2007 an employer is allowed to convert oral and casual employment to written term contract. Such conversion and issuance of a letter of appointment commences formal employment and in this case this was addressed by letter dated 28th February, 2012.

Whatever claims the claimant may have had in the period prior to 1st March, 2012 such ought to have been addressed under the provisions of section 90 of the Employment act, 2007. Where his employment with the respondent ended on 16th January, 2013 as pleaded at paragraph 19 of the Memorandum of Claim, such ought to have been addressed on or before 28th February, 2015.

The suit was filed on 9th March, 2016. Claims made and relating to the period before the letter of appointment taking effect on 1st March, 2012 are time barred.

The only valid claims the claimant can urge are those relating to his employment with the respondent from the letter of appointment from 1st March, 2012 to 16th January, 2013 and even so employment lapsing as of 16th January, 2013 when the claimant avers he last attended work, to file the Memorandum of Claim on 9th March, 2016 was out of time.

In the case **Attorney General & another versus Andrew Maina Githinji and another [2016] eKLR** where Court of Appeal in upholding a Preliminary Objection based on Section 90 of the Employment Act, 2007 held that;

...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013 ...

With the claimant's employment ending on 16th January, 2016 when he was directed to go home, such effectively being his last day at work; he ought to have filed his claim within 3 years stipulated under section 90 of the Employment Act, 2007.

Where the claimant were to contend that his employment terminated following his visit to the respondent's director's house in Mwariki sometime in April, 2013 as pleaded under paragraph 20 of the Memorandum of Claim, under the letter of appointment he became subject to existing protocols between the respondent and KUDHEIHA Workers. Under the Labour Relations Act, 2007 the trade union enjoys representation of its members where there is a dispute such as this and in addressing terms and conditions of employment.

In this regard, the claimant reported a dispute with the Kenya National Private Security Workers Union and which union, though not recognised by the respondent under the provisions of the Labour Relations Act, 2007 copied the demand letter to the labour officer and the respondent. the matter was then taken up by the recognised union, KUDHEIHA workers and which union followed and a conciliator was appointed and a resolution achieved with settlement of the matter and payment to the claimant through the Labour Office.

Where the claimant had any claims with regard to his employment with the respondent, his legal representative, the trade union at the shop floor settled the matter. Such is allowed under the provisions of section 62 and 68 of the Labour Relations Act, 2007;

62. (1) *A trade dispute may be reported to the Minister in the prescribed form and manner—*

(a) by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and

(b) ...

(2) ...

(3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within—

(a) ninety days of the dismissal; or

(b) any longer period that the Minister, on good cause, permits. ...

Under section 68 of the Labour Relations Act, 2007 once a dispute has been resolved by the parties it must be done in writing and signed in agreement. Such dispute is marked as resolved and upon the confirmation by the Labour Officer; there is no mandate to move the court.

Where an employee and member of a trade union is aggrieved by the settlement undertaken on his behalf by the legal representative and trade union, recourse is not against the employer but against such trade union. in **Seth Panyako versus Kenya**

Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers [2013] eKLR;

... The Respondent assumed the duty of fair representation of its Members at the workplace, in Court and at the Collective Bargaining Platforms. It owed the Claimant a duty of care, and is shown in very clear terms to have breached that duty by failing to fairly represent the Claimant on interdiction despite the promises made by Chairperson Jared Conan. There was no engagement with the employer even after the Claimant's dismissal. The failure by the

Respondent to skilfully represent the Claimant ended in a very unfair outcome. The Respondent's Constitution mandated the Respondent to offer the Claimant legal and financial support.... The Respondent's Constitution allowed the Respondent to offer the Claimant both legal and financial support.

The rationale is that a trade union is liable for damages if it fails to perform the mandate which it accepted to represent its members. See **Food and Allied Workers' Union versus Ngcobo [353/ 12] 2013 [ZASCA] 45.**

The claimant was represented by KUDHEIHA during the conciliation process. A settlement was achieved and the matter resolved and the respondent as the employer has since paid the agreed upon terminal dues. to file suit as herein, the claimant has acted contra to the agreement arrived at under the hand of his trade union.

The payments made to the claimant in settlement included a one month's notice pay and underpayments for 6 months. I take it in tabulation of such dues, the parties took into account the fact that the claimant's employment was from 1st March, 2012 to 16th January, 2013 and within such time the claimant enjoyed off days and applied since his employment ended before a total 12 months, his rights under section 28 of the Employment Act, were secured. The respondent being outside the business district of Nakuru Municipality, the applicable Wage Orders are those for other areas and the wages paid to the claimant are commensurate with such regulations and to claim there were underpayments from April, 2010 to 31st December, 2012 is without justification. The claimant as a guard was required to work for a total of 60 hours each week speared accordingly. Where claimant enjoyed an off/rest day each week and then worked for 9 hours each day and total being 49 hours per week, such fell short of the 60 hours regulations. To claim overtime pay is to seek unjust enrichment.

The analysis above taken into account; the claims time barred and or lacking merit; the claims made after an agreement between the trade union and the employer before the Conciliator settling the matter is without foundation. The suit is hereby dismissed. Costs to the respondent.

Dated and delivered electronically this 12th June, 2020.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15th March, 2020 the Judgement herein shall be delivered to the parties via e-mails. this 12th June, 2020.

M. MBARU

JUDGE