



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 364 OF 2018

JOSEPH CHIGODI MWAROCHA.....1ST CLAIMANT

JULIUS MURIITHI NKOU.....2ND CLAIMANT

VERSUS

WINSTAR SECURITY GUARDS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought jointly by Joseph Chigodi Mwarocha and Julius Muriithi Nkou against Winstar Security Guards Limited. The claim is by way of a Memorandum of Claim dated 30th May 2018 and filed in court on 4th June 2018. The Respondent filed a Response on 2nd July 2018.

2. The matter proceeded to full trial with the 1st Claimant, Joseph Chigodi Mwarocha testifying on his own behalf and on behalf of his co-claimant, Julius Muriithi Nkou. The Respondent called its Business Strategy Director, Charles Ndegwa.

The Claimants' Case

3. The 1st and 2nd Claimants state that they were employed by the Respondent on diverse dates as security guards. At the time of leaving employment, they each earned a monthly salary of Kshs. 8,000.

4. The Claimants aver that the Respondent failed to pay them their salaries for the months of March and April and when they enquired about this, the Respondent told them to write resignation letters.

5. The Claimants claim that the Respondent's failure to pay them their salaries and forcing them to write resignation letters constitute unfair constructive termination of their employment by:

- a) Failing, refusing and/or neglecting to pay the Claimants their monthly salaries for the months of March and April thus frustrating the Claimants and ultimately forcing them out of employment;
- b) Threatening to evict the Claimants from the house they were residing in;
- c) Forcing the Claimants to write resignation letters.

6. The Claimants aver that they were not paid any contractual or terminal dues. They lay a claim for unjustifiable and unfair termination of employment as follows:

1st Claimant: Joseph Chigodi Mwarocha

- a) One month's salary in lieu of notice.....Kshs. 14,420.00
- b) March and April salaries.....28,840.00

- c) Underpayment.....262,763.00
- d) Leave pay for 5 years.....58,170.00
- e) Gratuity for 5 years.....49,860.00
- f) Unremitted NSSF dues for 53 months.....10,600.00
- g) Unremitted NHIF dues for 53 months.....26,500.00
- h) 12 months' salary in compensation.....173,050.80

2nd Claimant: Julius Muriithi Nkou

- a) One month's salary in lieu of notice.....Kshs. 14,420.00
- b) March and April salaries.....28,840.00
- c) Underpayment.....106,587.00
- d) Prorata leave for May 2017 – April 2018.....11,080.00
- e) Unremitted NSSF dues for 19 months.....3,800.00
- f) Unremitted NHIF dues for 19 months.....9,500.00
- g) 12 months' salary in compensation.....173,050.80

7. The Claimants also ask for costs and interest.

The Respondent's Case

8. In its Response dated 27th June 2018 and filed in court on 2nd July 2018, the Respondent admits that the Claimants were employed as security guards at a beach house in Diani.

9. The Respondent further states that the Claimants were employed on one year contracts, running from 2nd June 2017 to 2nd June 2018. They each earned a monthly salary of Kshs. 8,600.

10. The Respondent avers that between 8th March 2018 and 11th March 2018, in the course of routine patrols, it was discovered that the Claimants were not on duty as required. Upon further investigations, it emerged that the Claimants were taking up other assignments in the neighbourhood and neglecting their assignment altogether.

11. The Respondent states that it was forced to deploy other guards at the Claimants' assignment.

12. The Respondent denies asking the Claimants to write resignation letters and states that the Claimants voluntarily returned their uniforms on 3rd March 2018, a day after the Respondent had informed the Labour Office of the Claimants' dereliction of duty and desertion.

13. The Respondent's case is that it did not in any way terminate the Claimants' employment. Rather, the Claimants by their own actions, terminated their contracts of employment.

14. By way of counterclaim, the Respondent asks for one month's salary in lieu of notice from the Claimants.

Findings and Determination

15. There are three (3) issues for determination in this case:

- a) Whether the Claimants have proved a case of unlawful termination of employment;
- b) Whether the Claimants are entitled to the remedies sought;
- c) Whether the Respondent has established a proper counterclaim against the Claimants.

Unlawful Termination?

16. In their Memorandum of Claim, the Claimants accuse the Respondent of constructively terminating their employment, by failing to pay their salaries and forcing them to write resignation letters.

17. Constructive termination of employment occurs when an employer makes the work environment so intolerable that the employee has no choice but to leave.

18. In his testimony before the Court, the 1st Claimant, testifying on his own behalf and on behalf of his co-claimant, Joseph Chigodi Mwarocha did not lead any evidence to support the assertion of constructive termination. Instead, he complained that the Respondent did not reach out to them to go back to work and they were not subjected to any disciplinary hearing.

19. It is a basic principle of law that parties are bound by their pleadings and that evidence that is at variance with what is pleaded does not resolve the issues before the Court (see *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR*).

20. Under Section 47(5) of the Employment Act, an employee alleging unfair termination or wrongful dismissal bears the burden of proving the allegations. To my mind, an employee who pleads one set of facts and goes ahead to testify on a different set of facts cannot be said to have discharged this evidential burden.

21. I therefore find and hold that the Claimants have failed to establish a case of unlawful termination of employment. The claims for compensation and notice pay must therefore fail.

Other Claims

22. Regarding the claims for salary arrears for March and April I have this to say; the Claimants failed to dislodge the Respondent's averments that they deserted their place of assignment in March 2018. They therefore failed to prove that they were at work during the said months and the claims for the respective salaries fail.

23. Regarding the claims for leave pay, the Court was unable to ascertain the effective dates of the Claimants' employment. The Memorandum of Claim gives the effective date of the 1st Claimant's employment as January 2013, a date which the 1st Claimant reiterates in his witness statement.

24. Oddly, the Memorandum of Claim does not mention the effective date of the 2nd Claimant's employment; instead it mentions Patrick Kitsao Charo who is not a party to these proceedings.

25. In his testimony before the Court, the 1st Claimant gave 20th December 2013 as the effective date of his employment. He was also equivocal on the 2nd Claimant's employment date.

26. Because the Claimants were unclear as to the effective dates of their employment with the Respondent, they could not prove their claims for accumulated leave pay. These claims consequently fail and are disallowed.

27. The claims for underpayment were not proved and no basis was established for the claim for gratuity.

28. Regarding the claims for unremitted NSSF and NHIF dues, the only thing to say is that any such dues would be payable to the statutory bodies and not to the Claimants.

29. Overall, the Claimants entire claim fails and is dismissed.

30. Each party will bear their own costs.

31. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mbithe for the Claimant

No appearance for the Respondent