



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1268 OF 2013

MWENDO KATIKU.....CLAIMANT

VERSUS

DAVID KOINE

T/A CITY WATCH GUARDS SERVICE.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 24th February, 2010 as a night security guard at a monthly wage of Ksh.4, 000 without house allowance against Ksh.6, 340 as required in Legal Notice No.70 of 1st May, 2009 and Ksh.1, 000 house allowance contained in the Amendment of Protective Security Order, 2003 to make a total of Ksh.7, 340 and hence there was an underpayment of Ksh.3, 340 per month until 40th April, 2010 being total due Ksh.6, 680.

From 1st May, 2010 the wage increased to Ksh.6, 974 and house allowance Ksh.1, 046 totals due at ksh.8, 020.10 per month while the actual pay was Ksh4, 000 and for 12 months there was underpayment of ksh.48, 241.20.

From 1st May, 2011 basic pay was ksh.7,845 per month and house allowance Ksh.1,176.90 total being Ksh.9,022.90 per month while the actual pay was ksh.4,000 per month and for 12 months the underpayment of Ksh.60,274.80.

From 1st May, 2012 to 30th October, 2012 the due wage was ksh.8,873.80 per month plus house allowance of Ksh.1,331.70 total being Ksh.10,204.87 but the actual pay was ksh.4,000 and total underpayment for 6 months was Ksh.37,229.22.

The claim is that the work hours were 6PM to 6AM from Monday to Saturday which is 6 days for 12 hours which is 72 hours in a week contrary to 52 hours per

Regulation of Wages Protective Security Services Order, 1998. The 20 hours overtime were not paid for per week total overtime hours is 80 hours and for 32 months overtime is 2560 hours at 1.5 rate total pay is Ksh.151,446.18.

The claimant was only allocated annual leave for one year only and for the untaken leave total pay is Ksh.12,286.80.

Notice pay was not paid and claim for 10,204.87 and compensation at 12 months all at ksh.122,458.64.

The claimant is seeking the following dues;

- a. Notice pay ksh.10,204.87;
- b. 50 days annual leave Ksh.19,624.75;
- c. Underpayments of wages Ksh.152,425.22;
- d. 3840 overtime hours ksh.151,446.18;
- e. Severance pay for 2 years Ksh.12,286.80;
- f. Compensation Ksh.122,458.64; and

g. Costs of the suit.

The claimant filed his witness statement and written submissions.

The claimant's case is that upon employment by the respondent he was assigned duties at the defunct County Council of Kiambu at a monthly wage of Ksh.4,000 and he worked diligently until 1st November, 2012 when his employment was terminated without notice of payment of terminal dues. He reported on duty and found a new security guard and the respondent told him to go home and would be recalled back which was not done and which he claims through these proceedings.

Defence

The defence comprise of mere denials save that the claimant was not employed by the respondent but only helped him secure a job with Kiambu County Council while he as a counsellor.

Determination

On the pleading and by consent of the parties to rely on the same.

Section 47(5) of the Employment Act, 2007 (the Act) places the burden of proving unfair termination of employment on the employee, and the burden of justifying the grounds of termination on the employer.

The employer is required to justify the grounds of termination pursuant to section 43 of the Act where the employer has to prove the reasons for termination and under Section 45(2)(a) and (b) of the Act requires an employer to prove that the reasons for termination were valid and fair reasons, and section 41 of the Act that obligates the employer to hear and consider any representations an employee may wish to make where summary dismissal is envisaged for fundamental breach of contractual obligation or gross misconduct.

The claim that the claimant reported on duty on 1st November, 2012 and found that he had been replaced is not challenged in any material way. The respondent's case is that he helped the claimant secure employment with Kiambu County Council. There is no material evidence in this regard.

The court finds the respondent has failed to discharge its obligations under the law. There was unfair termination of employment contrary to section 45 of the Act and the remedies under section 49 of the Act are and shall be assessed accordingly.

On the claim for underpayment, such wages are regulated under the Wage Orders and the tabulation done by the claimant is in tandem with the set Wage Orders in the Protective Security Orders cited and attached to the Memorandum of claim. The claimant is awarded ksh.152,425.22 in underpayments.

The claim for overtime is also tabulated in compliance with the Wage Orders and the same is awarded at ksh.151,446.18.

On the claim for annual leave pay, the claimant is claiming pay for 30 days each year save section 28 of the Employment Act, 2007 provides for 21 days of annual leave where there is no written contract of collective agreement. For the period of 24th February, 2010 to 1st November, 2012 the claimant had a period of 32 months the claimant is entitled to 52 days of annual leave of which he already enjoyed 30 days of annual leave leaving a balance of 22 days. Based on the last basic wage of ksh.8, 873 per month, annual leave pay due is ksh.6, 507.

Notice pay is due pursuant to section 35 of the Act where notice to terminate employment is not given. The claimant is awarded one months' notice pay at ksh.10, 204.87.

The claim for compensation is due on the finding there was unfair termination of employment and one month's pay is found appropriate all at ksh.10, 204.87.

On the claim for severance pay, such is not due as this is not a case of a redundancy. The unfair termination of employment is addressed and redressed above.

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

a. A declaration there as unfair termination of employment;

b. Compensation awarded at ksh.10,204.87;

c. Notice pay Ksh.10,204.87;

d. Underpayments ksh.152,425.22;

e. Leave pay ksh.6,507;

f. Overtime awarded at ksh.151,446.18; and

g. Each party shall bear own costs.

DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2020.

M. MBARU

JUDGE