



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.166 OF 2018

MARK NGAIRA IBOCHIO.....CLAIMANT

VERSUS

WORLD CLASS CITIES MINISTRIES.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent, a religious society on 31st August, 2012 as a Night Guard and paid a wage of Ksh.5,000.00 per month and which he continued earning until his employment was terminated on 14th May, 2017.

The work hours were 6pm to 7am all being 13 hours a day. The respondent as running a school within its premises and the claimant would hand over in the morning to the school management.

On 14th May, 2017 the claimant requested the respondent for medical leave and a wage advance of Ksh.3,000.00 to enable him attend hospital for treatment as he was ailing with severe ulcers. The respondent through Pastor Gilbert Adagala gave him Ksh.5,000.00 and advised him he would be replaced for the time he was absent.

On 12th June, 2017 the claimant reported back to work but the respondent advised him to report back on 19th June, 2017 instead. This was then changed to 27th June, 2017 when he was informed that the respondent had hired a new night guard and his services were no longer required.

Termination of employment was without notice, hearing or any lawful reason given to the claimant. Such resulted in unfair termination of employment.

During the period of employment there was underpayment contrary to the Wage Orders, the claimant worked overtime without compensation, no housing or an allowance was paid, and there was no rest day, leave days taken or payment in lieu thereof.

The claims are for;

- a) Underpayments Ksh.393,555.52;
- b) Off days/rest days Ksh.359,229.00;
- c) Notice pay ksh.15,374.00;
- d) Public holidays ksh.83,230.00;
- e) Annual leave ksh.55,881.53;
- f) Severance pay Ksh.39,915.67;
- g) Overtime pay ksh.621,743.56;
- h) Certificate of service;
- i) Compensation; and costs.

The claimant testified in support of his claims.

The respondent is a religious organisation and also runs a nursery school in its premises. In the year 2012 the claimant was called by Bishop Adagala to a the night guard but was not issued with any written contract. The Bishop would pay the wages in cash midmonth and month end. Work hours were from 6pm to 7am as there was no reliever and had to wait until morning when the nursery school would start. The claimant rented a room in Ronda as there was no housing or an allowance pay by the respondent. he remained at work for 7 days a week without leave, rest of compensation.

The claimant also testified that he had chronic ulcers and on 14th May, 2017 he asked the Bishop for time and money to attend a private hospital as doctors in public hospitals were on strike. the bishop gave him Ksh.5,000.00 and when he reported back he found he had been replaced with a new guard.

Defence

The defence is that the claimant willingly volunteered to offer a security service which was not an official contract. Such service was not on a day to day basis but only once in a while since other worshippers offered their services freely as the respondent church belongs to them and were all volunteers. The respondent did not at any time give the claimant ksh.5,000.00 to attend hospital on a medical issue or terminated employment as alleged. The claims made are without basis and should be dismissed.

Gilbert Adagala testified that the claimant was not an employee of the respondent church but gave free services like other worshippers who own the church. The daily expenses for the church are made through offerings and tithes given by church members. This is a community church and all members take care of it as volunteers. All those willing to help are welcome and the claimant was not a watchman as claimed but occasionally offered his voluntary service.

Mr Adagala also testified that the claimant had family problems and approached him for food, clothes and cash. The claimant is aged at 76 years and the families had been friends for long starting with his father and the respondent offered to meet some of the claimant's needs.

The respondent as a charitable organisation does not owe the claimant any dues. every member of the church understands that the respondent is run by virtues of faith.

The claimant was given a room within the respondent premises where he was accommodated with his family. One classroom was offered to the claimant to sleep with his grandchildren as a benefit.

Benson Sigei testified that he is a pastor with the respondent and runs his own business. The claimant was a member of the respondent church. The claimant had family problems and the respondent gave him accommodation after he left his regular job. He was allocated a room in one classroom. All those offering services at the respondent have no salary as they are volunteers.

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

The keeping of work records is a matter important in all relations.

In employment and labour relations, every employer is required to keep work records. Such is mandatory under the provisions of section 10(1) and (3) of the Employment Act, 2007 read together with section 73 of the Act. section 10(6) and (7) of the Act requires an employee to keep such records for a period of not less than 5 years and where a suit such as herein is filed to submit the same with the court. such is a duty required of an employer.

In this case the claimant asserts that he was employed as a night watchman by the respondent. the respondent has denied such allegation and asserted that the claimant volunteered to be a night watchman as he had no place to go and was offered accommodation, food, clothes and a classroom was given to him and his grandchildren as he had nowhere else to sleep. That there was no employment relationship as all members of the respondent church offer their services as volunteers.

No records of the volunteers have been submitted. Where the claimant offered to be a night watchman volunteer, there is nothing in writing. No record of the night volunteers for such service is submitted with the court.

The payment of ksh.5,000.00 per month to the claimant is not challenged. Where the claimant was a volunteer for the respondent as asserted in defence, where he received a payment of ksh.5,000.00 per month for such service, the respondent as a registered society should have kept the payment records.

At the end of the day, the evidence that the claimant was an employee, he had the single duty of night watchman and was paid a constant monthly wage is not challenged in any material way. Despite his advanced age at 76 years, being illiterate, the respondent exploited his availability and service for the night watchman. Such position is protected in law and there are regulation of wages stipulating the applicable payments.

The failure by any entity, business, enterprise, person of not keeping only serves to that party disadvantage. Records for any engagement whether employment or volunteerism is crucial. Records with regard to payment of monies is even more fundamental and important. Without the respondent keeping any records with regard to its relations with the claimant, the word of the claimant as the employee must be believed as nothing stopped the respondent from entering into a volunteer agreement with the claimant so as to protect itself from the claims herein made.

As cited by the claimant in the case of **Kenya Union of Employees of Voluntary and Charitable Organisations (KUEVACO) versus Redeemed Gospel Church (Incorporated) Cause No.443 of 2015**

... section 8, 9 and 10 of the Employment Act, 2007 where there is allocation of work duties of the nature the grievant was allocated as social worker, he was paid wages at equal intervals and monthly, without any documentation to the contrary, such translates to employment of the grievant by the respondent. Where the respondent enjoyed the labours of the grievant paid him monthly and such labours and or employment was terminated due to exhaustion of funds, such a scenario directly speaks to matters well addressed under section 40 of the Employment Act, 2007.

In this case, where the respondent enjoyed the labours of the claimant on the basis that he suffered family problems and required a place to stay and with such stay and accommodation he offered night watchman duties for the respondent, such was remunerated monthly, the respondent cannot extricate itself from the resulting employment relations with the claimant. Despite not having a written contract of employment, the claimant became protected under the law by operation of section 8,9, 10 and 37 of the Employment Act, 2007.

The defence that the respondent has a consortium of members who offered voluntary services through offerings and tithes is an arrangement separate and different from the employment relationship the claimant had. Upon the claimant undertaking the duty of night watchman, under the law he became entitled to the rights under the Employment Act, 2007.

Termination of employment for whatever reason, for misconduct, gross misconduct or other matter must be within the law under section 41 or 44 of the Employment Act, 2007. In this case employment terminated without due process under the mistaken belief that the claimant was a volunteer. The taking of sick leave is a right under the law. the payment of the due wage so that the claimant could attend to his medical needs is equally a right under the law. such cannot form a valid ground for termination of employment. The court finds the circumstances leading to termination of employment were unfair and contrary to section 45 of the Act.

On the claims made for underpayment, the position held by the claimant that of night watchman is regulated under the Wage Orders with a minimum wage. The assessments done by the claimant are in accordance with the applicable wages due and hereby confirmed at ksh.393,555.52 less 15% included as house allowance as the claimant confirmed he was accommodated and the respondents witnesses testified to this fact. The claimant had a room or classroom allocated for his accommodation. However basic the accommodation offered was, the respondent met the legal threshold. What is due is Ksh.334,522.00.

The claim for overtime due is not challenged in any material way. Under the regulation of wages a night guard is allowed work at 12 hours per day. The claimant has based such tabulation on 5 hours per day which assessed on its merits should be Ksh.124,348.60 for each extra hour at work for 6 days in a week.

Noting the above, the claimant was entitled to a rest day each week and where he remained at work for 7 days, such rest day is tabulated at double the daily due wage all assessed at ksh.359,229.00 less 15% added house allowance and the due pay is Ksh.305,344.65.

The claim for work during public holidays without characterisation and being infused on the claims for daily wage and rest days is not made distinguishable. To make an award in such a maze would result in unjust enrichment. Such is declined.

Annual leave is a right due to every employee pursuant to the provisions of section 28 of the Employment Act, 2007. Where leave is not taken when due, a payment in lieu is the compensation. The claimant is awarded Ksh.55,881.95 for not taking his annual leave.

Severance pay and gratuity is claimed. The matter did not stand out as one due for service pay award as it does not arise out of section 40 of the Employment Act provisions. Gratuity is also only payable where there is a private treaty, agreement or provided for as a workplace practice. such is not an automatic right under the law. the claim is declined.

Compensation and notice pay is due following unfair termination of employment without due process. One month notice pay and one month gross pay in compensation is hereby appropriate. The last wage payable to the claimant under the wage orders shall apply as ksh.15,374.00.

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

- (a) Compensation ksh.15,374.00;**
- (b) Notice pay ksh.15,374.00;**
- (c) Payment in lieu of annual leave ksh.55,881.95;**
- (d) Untaken rest days ksh.30,344.65;**
- (e) Overtime pay Ksh.124,348.60;**
- (f) Underpayments Ksh.334,522.00; and**
- (g) Costs.**

Delivered at Nakuru this 14th day of February, 2019.

M. MBARU JUDGE

In the presence of: