



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 488 OF 2017

CHARLES NYEGENYE ARIONG.....CLAIMANT

VS

VICKERS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 21st June 2017 and filed in court on even date is for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Respondent on 24th January 2018.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Branch Manager, Saidi Halfan Bugu. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard from 20th February 2015 until 1st February 2017 when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 11,000.

4. The Claimant pleads that the termination of his employment was unlawful and unfair. He now claims the following:

- a. One month's salary in lieu of notice.....Kshs. 11,000
- b. Half salary for the month of December 2016.....5,500
- c. Half salary for the month of January 2017.....5,500
- d. House allowance @ 15% of basic salary.....39,600
- e. Service pay @ ½ month's salary.....11,000
- f. Underpayment of Kshs. 1,221 for 24 months.....29,204
- g. Compensation for unlawful termination.....183,304
- h. Certificate of service
- i. Costs

The Respondent's Case

5. In its Response filed in court on 24th January 2018, the Respondent admits having employed the Claimant as a security guard but on casual basis. The Respondent states that the Claimant was not entitled to service pay, house allowance or notice pay since he was employed as a

casual employee who reported to work at will.

6. The Respondent further states that the Claimant asked for an opportunity to work for only three months and was therefore not entitled to any terminal dues.

7. The Respondent denies that the Claimant was wrongfully and unfairly terminated and claims that the Claimant himself absconded duty without any justifiable reason.

Findings and Determination

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

- a. The nature and status of the Claimant's employment;
- b. Whether the Claimant has made out a case of unlawful termination;
- c. Whether the Claimant is entitled to the remedies sought.

Nature and Status of Claimant's Employment

9. In its response to the claim, the Respondent states that the Claimant was a casual employee who reported for duty at will. Section 2 of the Employment Act, 2007 defines a casual employee as :

“a person the terms of whose employment provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”

10. The Respondent did not produce any records to prove that the Claimant was a casual employee as defined in law. Indeed, its Branch Manager, Halfan Bugu testified that the Claimant was employed on contractual basis in the year 2015 and assigned light duties due to his poor health.

11. The claim that the Claimant was a casual employee is therefore unsupported and is rejected. Consequently, the Court finds and holds that the Claimant was a regular employee of the Respondent.

A Case of Unlawful Termination?

12. In his witness statement dated 21st June 2017, the Claimant states that he was taken ill on 15th December 2016. He was admitted in hospital until 17th December 2016 when he was discharged on sick off until 6th January 2017. He reported to work on 12th January 2017 and was terminated on 1st February 2017.

13. The Claimant however testified in cross examination that he proceeded on annual leave on 2nd February 2017 and was to resume duty on 3rd March 2017. This was evidenced by a leave application form dated 2nd February 2017. The Claimant further testified that that he did not resume duty because he was advised by the Assistant Manager not to.

14. No explanation was given for the obvious discrepancies in the Claimant's testimony regarding the circumstances surrounding his exit from the Respondent's employment.

15. Section 47(5) of the Employment Act, 2007 states as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

16. In light of the inconsistencies in the Claimant's testimony, the Court finds and holds that he failed to establish a case of unlawful termination of employment. The claims for compensation and notice pay therefore fail and are dismissed.

Other Claims

17. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

18. The Respondent did not provide any evidence to show that the monthly salary paid to the Claimant was inclusive of house allowance. I therefore allow the claim thereon at 15% of the basic salary and adopt the resultant figure of Kshs. 12,650 as the Claimant's monthly salary for purposes of this claim.

19. In the absence of any evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF), the claim for service pay succeeds and is allowed.

20. The claims for half salary for the months of December 2016 and January 2017 as well as underpayment were not proved and are dismissed.

21. In the end, I enter judgment in favour of the Claimant as follows:

a. House allowance for 24 months.....Kshs. 39,600

b. Service pay for 2 years (12,650/30x15x2).....12,650

Total.....52,250

22. This amount will attract interest at court rates from the date of judgment until payment in full.

23. The Claimant is also entitled to a certificate of service plus costs of the case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Nyange for the Claimant

Mr. Chamwada for the Respondent