



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.61 OF 2016**

**JOSEPH OGEMBO MOSE.....CLAIMANT**

**VERSUS**

**LOCHAB BROS COMPANY LTD..... RESPONDENT**

**JUDGEMENT**

The Memorandum of Claim herein was filed on 25<sup>th</sup> February, 2015. The respondent answered with Response file don 31<sup>st</sup> August, 2015. The respondent also filed a witness statement on 3<sup>rd</sup> June, 2016.

The respondent was notified of court mentions for taking hearing directions on several occasions. There was no attendance. There are returns on file to confirm notification.

A hearing date was allocated for 28<sup>th</sup> February, 2019, the respondent was served on 14<sup>th</sup> February, 2019 but there was no attendance. The claimant was heard on his case.

The claim is that the claimant was employed by the respondent as a night security guard in Narok town. His work hours were 6pm to 6am daily from Monday to Sunday. Such work included on public holidays and without a day of rest and there was no compensation.

In August, 2014 the respondent made a deduction from the claimant's salary amounting to ksh.1, 000.00 which was then Ksh.7, 600.00 per month. He protested against this deduction and demanded for an explanation but was ignored.

On 25<sup>th</sup> September, 2014 the manager, Jasbir Gingh told the claimant that his employment had been terminated and was paid Ksh.6, 350.00 for the 25 days worked. There was no notice pay or the dues owing for untaken annual leave, overtime, rest days and work on public holidays.

The claimant is therefore seeking the following the unfair termination of his employment by the respondent;

- a) Notice pay Ksh.7,600.00,
- b) Overtime pay Ksh.164,824.65;
- c) Public holidays Ksh.33,280.00;
- d) Off duties pay Ksh.146,510.80;
- e) Leave for two years Ksh.10,132.00;
- f) Compensation Ksh.91,200.00; and
- g) Costs of the suit.

The claimant testified that he was dismissed by the respondent from his employment for unknown reasons. He was only paid for days worked at ksh.7, 600.00. other dues for overtime, untaken rest days and annual leave and the due pay for work during public holidays was not paid.

Defence

The defence is that during the employment of the claimant with the respondents, he repeatedly breached the terms and conditions of the employment by absconding duty, reporting to work while drunk, theft of the respondent's property, being violent and engaging in gross misconduct. that the claims made are not justified and should be dismissed.

There were no work records attached to the defence.

In the witness statement of Maranga Otiso he avers that he is the administrator and the respondent did not employ the claimant. The employment letter submitted by the claimant does not originate from the respondent and the claims made are without justification.

As the respondent were absent at the hearing, no witness was called.

The claimant filed his written submissions.

Determination

Section 10 of the Employment Act, 2007 requires every employer who is notified of a suit filed with the court to file the work records with regard to the employee or evidence that is necessary to disapprove the allegations made and or to confirm the terms and conditions of employment.

The respondent field defence and denied the claims and on without prejudice stated that the claimant was an employee but engaged in gross misconduct. However, there was no work record submitted.

The respondent failed to attend court despite being notified and being served with the mention and hearing notices. The absence thus noted the court was left with the claimant's evidence only.

Termination of employment even where the employer has valid reasons must be procedural and in accordance with section 35 and 41 of the Employment Act, 2007. The employer must issue notice to the employee and invite the employee to a hearing where the matters leading to termination of employment should be addressed so as to give the employee a chance to give his defence. In the absence of such a procedure, the resulting termination of employment is not procedural and is unfair pursuant to section 45 of the Act. see the cases of **Francis Kimani Kinuthis versus Flamingo Hill Camp Limited Cause No.379 of 2017** and **Iyego Farmers' Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR.**

Notice pay is due under the provisions of section 35 read together with section 41 and 45 where there is procedural unfairness in the termination of employment. The claimant is awarded ksh.7, 600.00 as claimed for notice pay.

Overtime worked in not challenged in any material way and noting the hours tabulated the claimant is awarded ksh.164, 824.65.

Rests days worked is addressed under the provisions of section 27 of the Employment Act, 2007 and where not taken, compensation is due. the claimant is awarded isKsh.146, 510.80 as claimed.

Despite therein being no defence, the claim with regard to work during public holidays is not contradistinguished with the claims for overtime, rests days and the claim for annual leave pay. To award in the set out parameters would be double pay which would result in unjust enrichment. This prayer is declined.

Leave days earned are due under the provisions of section 28 of the Act. where not taken, payment in lieu thereof is awarded at Ksh.10, 132.00.

With the awards above, this is found to be adequate compensation tot eh claimant.

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

**(a) Notice pay ksh.7,600.00;**

**(b) Overtime pay Ksh.164,824.65;**

**(c) Pay for rest days ksh.146,510.80; and**

**(d) Annual leave pay ksh.10,132.00.**

**(e) No orders on costs.**

**Delivered at Nakuru this 28<sup>th</sup> day of March, 2019**

**M. MBARU**

**JUDGE**

In the presence of: .....