



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 649 OF 2015

JOEL NDANA MITANGA.....CLAIMANT

VS

TROPIC TRADE MARKET LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Joel Ndana Mitanga against his former employer, Tropic Trade Market Limited. The claim is documented by a Statement of Claim dated 1st September 2015 and filed in court on even date. The Respondent filed a Response on 30th November 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Director, Roberto Miano. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard from December 2009 until 4th November 2014 when he was dismissed. He earned a monthly salary of Kshs. 8,000.

4. The Claimant avers that his dismissal was wrongful and that he was underpaid. He states that he was not given any reason for the dismissal and was not afforded an opportunity to be heard.

5. The Claimant states that he reported a dispute at the Labour Office where it was found that the Respondent was underpaying him by Kshs. 4,548.45

6. The Claimant now claims the following:

- a) Underpayment.....Kshs. 109,163.00
- b) One month's salary in lieu of notice.....12,548.45
- c) Payment for holidays worked.....125,484.50
- d) Unpaid leave.....25,846.15
- e) Overtime.....744,219.61
- f) Sundays worked.....372,114.44
- g) 12 months' salary in compensation
- h) Certificate of service
- i) Costs

The Respondent's Case

7. In its Response dated 26th November 2015 and filed in court on 30th November 2015, the Respondent admits having employed the Claimant but denies the averment of wrongful dismissal. The Respondent states that the Claimant's dismissal was effected in accordance with the law.

8. The Respondent avers that the dispute herein was amicably settled at the County Labour Office in Mombasa, where arrears of underpayment were calculated and approved. Pursuant to the settlement, the Respondent paid the sum of Kshs. 54,581.

9. In response to the claims for public holidays worked and leave pay, the Respondent states that all such claims were paid alongside salary for specific months. The Respondent adds that the Claimant took all his earned leave.

10. The Respondent further avers that prior to the dismissal, the Claimant had been issued with several warning letters.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

12. The Claimant was dismissed by letter dated 4th November 2014 stating as follows:

"RE: DISMISSAL LETTER

You are hereby served with a dismissal letter, this is due to continuous misbehavior and irresponsible attitudes you have been doing (sic) jeopardizing the company premises.

It is your duty as a security guard to ensure that company property is secured at all time while on duty against all cases like theft & opening gates for the residents among other duties. In reference to the letters issued on 2nd Oct & 30th 2014, you have been repeating the same behaviour (changing shifts without management concerns) and covering up other employees when late or absent.

This is not acceptable at all and poses a security threat therefore due to other tenant's demands and complains (sic) on your risky behaviour I have no alternative but to dismiss you.

Yours faithfully,

(Signed)

MANAGEMENT"

13. This letter accuses the Claimant of acts bordering on gross misconduct. However, apart from two warning letters issued to the Claimant on 2nd October 2014 and 30th October 2014, there was no evidence of any formal charges being served on the Claimant for his response.

14. As held in *Anne Atieno Sadiya v Lavage Laundrette & Drycleaners [2011] eKLR* warning letters, even when validly issued do not absolve an employer from the duty to comply with the procedural fairness requirements set out under Section 41 of the Employment Act, 2007.

15. What is more, upon his dismissal, the Claimant was issued with a certificate of service declaring that *"during his employment he was a (sic) honest and hardworking employee."* The Court was unable to reconcile this commendation with the serious allegations of misconduct made against the Claimant in the dismissal letter of even date.

16. What is clear is that the allegations against the Claimant which led to his dismissal were not proved at the shop floor and the dismissal was therefore substantively and procedurally unfair and he is entitled to compensation.

Remedies

17. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service tempered with his negative employment record as evidenced by two warning letters which were live at the time of dismissal. I have further considered that the Respondent settled part of the Claimant's claim at the Labour Office. In addition, I award the Claimant one (1) month's salary in lieu of notice.

18. The claim for underpayment was admitted and partially paid. The balance of Kshs. 12,370.60 is due and payable. In light of the admission under this head, I adopt the figure of Kshs. 10,911.70 as the Claimant's salary for purposes of tabulating his claim.

19. The claims for holidays worked and overtime compensation were not proved and are dismissed. The claims for rest days and leave pay were abandoned in final submissions.

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

a) 3 months' salary in compensation.....	Kshs. 32,735.10
b) 1 month's salary in lieu of notice.....	10,911.70
c) Balance of underpayment.....	<u>12,370.60</u>
Total.....	56,017.40

21. This amount will attract interest at court rates from the date of judgment until payment in full. The Claimant will have the costs of the case.

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF MARCH 2019

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JUDGE

Appearance:

Mr. Mukomba for the Claimant

Ms. Zamza for the Respondent