



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.348 OF 2014

JOHN MAINA KARIUKI1ST CLAIMANT

PETER KIPROP KEMOI2ND CLAIMANT

VERSUS

BABS SECURITY SERVIC LTDRESPONDENT

JUDGEMENT

On 10th January, 2014 the 1st claimant was employed by the respondent as a night watchman and assigned duties at G.D.C. site in the Menengai Hill forest at a monthly wage of Ksh.9,000.00 per month. The 2nd claimant was employed on 4th March, 2014 as a night watchman and assigned duties with the 1st claimant and paid a similar wage.

Work hours were 5pm to 9am each day. This amounted to 15 hours work and for the overtime hours there was no compensation. Work days were seven (7) days each week without an off day.

Despite the claimants being promised a wage of ksh.9,000.00 per month, they were paid randomly through the bank where there were deposits of Ksh.5,250.00 on 6th March, 2014; Ksh.7,700.00 salary for February, 2014 and on 16th May, 2014 he was paid ksh.8,000.00. there was no indication as to whether NSSF and NHIF was paid for as no payment statement was issued.

On 10th June, 2014 about 100 employees of the respondent stopped work demanding wage arrears, they assembled at the barrier gate at Menengai Hill forest and met with management at 10am. The claimants also went to where the other employees had gathered to demand the payment of his wage arrears and the manager Mr Mbugua abused him and dismissed him. the claimant reported his matter to the DGC management but the respondent refused to pay the due wages.

The 2nd claimant's case is that he was rained on for a whole night and caught anaemia but the respondent refused to pay for his treatment.

The claimants were underpaid contrary to the wage orders, termination of employment for demanding the wage arrears was unfair and without justifiable cause. The owing terminal dues have not been paid.

The 1st claimant are seeking the following dues;

- a) Notice pay ksh.10,116.15;
- b) April and May, 2014 wage ksh.23,267.10;
- c) Underpayments Ksh.13,950.65;
- d) Overtime pay Ksh.59,q40.60;
- e) Off days ksh.31,126.60;
- f) Compensation; and
- g) Costs.

The 2nd claimant is seeking the following;

- a) Notice pay ksh.10,116.15;
- b) April and May, 2014 wage ksh.23,267.10;
- c) Underpayments Ksh.13,950.65;
- d) Overtime pay Ksh.21,010.50;
- e) Off days ksh.14,007.60;
- f) Leave Ksh.2,042.80;
- g) Compensation; and
- h) Costs.

The 1st claimant testified in support of his claims. upon employment there were two shifts and he was in the night shift for 7 days a week. He wage due was not paid in time or not paid at all. The arrears accumulated and his affected other employees who went on strike. the claimant decided to use the chance to demand for his wage arrears and he left his colleague standing in for him but the manager saw him and dismissed him without paying him or giving him a chance for a hearing.

The defence is that the claimants were employed as casual employees and not entitled to claims wages as employment was for less than 6 months. There was no work for over 15 hours as alleged as there were shifts where the claimant would be made to work for 8 hours per day only without need for overtime work.

The claimant was paid final dues and nothing is due as claimed.

The respondent filed the witness statement of Samuel Mureithi Ngari the director and who states that the claimant were employed for a period of less than 6 months as casuals and were placed in shifts for 8 hours per day and paid in accordance with the law. that the 1st claimant was employed in January, 2014 and then deserted duty in June, 2014 while the 2nd claimant was employed as a day guard on 2nd April, 2014 and left in June, 2014. Both were paid owing terminal dues.

There was no witness called by the respondent save for the statement filed.

Determination Counsel for the claimant submitted that the 2nd claimant is not keen on his case. There was no prosecution of such case. The claimant was not in court. the 1st claimant only gave evidence on his claims and not in a representative capacity. Such case for the 2nd claimant is therefore removed.

The defence did not file any work records. The responses given in challenge of the claims is devoid of any evidence as required under section 10(6) and (7) of the Employment Act, 2007 where the employer is the party to file work records with the court once a claim has been lodged with the court. see **Jane Njeri Wanyoike & 23 others versus Pan Africa Insurance Company Limited & 2 others [2017] eKLR.**

Without the required work records to confirm employment, hours of work, days of work, payment statements and reasons leading to termination of employment, the court must believe the employee as the respondent has filed in its legal duty to file the required work records as the custodian of the same. This omission is serious and a violation which should receive a sanction as failure to file work records has the import of the respondent not filing the statutory returns for the employees has serious implications and a matter the Labour Officer should address and prosecute.

In the case of **Jason Mogaka Otiso versus Shadrack Obuga Mukanda [2016] eKLR** the court held as follows;

It is the duty of an employer to keep all work records of each individual employee. Such is a legal requirement pursuant to section 73 and 74 of the Employment Act. Such a record does not only help an employee, it works to the advantage of the employer as with such a record, once a suit such as this one if filed, the employer is able to submit these records in support of their defence to show that the Claimant was their employee or not. ... such is a bad practice as upon proof by the employee that indeed they offered their labour to an employer, and the employer failed to issue any letter of employment, such can only work to the disadvantage of the employer as the employer is not the custodian of work records.

Without filing the work records and not calling any witness too be examined, the defence is left empty and with mere denials. The claims are not challenged in any material way.

The 1st claimant worked for the respondent as a night watchman/guard from January to June, 2014. There was no stoppage of employment and without any work records, the evidence that work was for 15 hours per day and for 7 days in a week without any rest days stands unchallenged. The defence that the claimant was working in a shift and would be relieved in his duty is devoid of any material record(s). the claimant however testified that he was in a shift and on his last day he left his work colleague to go and address the management with regard to his unpaid wages.

Where the respondent was running two shifts and the claimant worked in a shift, reasonably this should be for 12 hours each. The overtime hours are therefore 3 hours per day and not as stated.

The defence that the claimant deserted work on 10th June, 2014 is without any evidence. Work desertion is a ground for summary dismissal and the employer must demonstrate that there was effort to call and hear the employee but the employee failed to take heed or offer any defence. In this case the allegation that the claimant deserted duty is without any evidence of how the respondent as the employer addressed such gross misconduct, is not sufficient defence.

In any event the claim that the claimant was not paid his wage in time and in full and there were several months he went without pay is not challenged. Failure to pay an employee the due wages in time and in full is an unfair labour practice. Such is subjecting the employee to servitude where the employee has offered his labours and there is no payment in return. Such is a practice prohibited under section 5 of the Employment Act, 2007 and read together with Article 30 of the Constitution, 2010.

In this case, where the claimant was dismissed from his employment by the respondent for demanding to be paid his wage arrears, such is unfair termination of employment contrary to section 45 of the Employment Act, 2007.

Compensation is due and is hereby assessed at three (3) months gross wage based on the Wage orders for the year 2014 all at ksh.10,116.15 .

The claim that the claimant was a casual employee as employment was for under 6 months is contrary to the legal definition of a casual employee as under section 2 of the Employment Act, 2007 read together with section 10 and 37 of the Act. The wage due was not paid daily but monthly and the claimant continued in his duties without stoppage for over a month and the nature of work done was not envisaged to end on a daily basis. Such employment therefore converted by operation of the law to employment with full benefits under the Act.

The Court of Appeal in the case of **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR** held as follows;

*Our reading of Section 37 of the Employment Act reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR**.*

The claimant remained in the employment of the respondent for a period of 6 months undertaking the same duties without stoppage.

Notice pay is due and this is assessed at one month's gross wage due under the Wage orders all at ksh.10,116.15.

Without evidence of the full wages due for 2 months being paid in cash or through the bank, such owes and awarded at ksh.23,267.10.

Underpayment is a serious omission. The daily wage and or the monthly wage is stipulated in law and the employer cannot lawfully negotiate to pay below such wage. For the underpayments the claimant is hereby awarded Ksh.13,950.00.

The overtime claimed is based on work for 15 hours but this is reasonably found not feasible in light of the claimant's evidence that there were two shifts. There was 12 hours' work being 3 hours over and above the legal minimum assessed at ksh.11, 205.60.

Off duties are due where not taken or paid in compensation and the claim for ksh.31,126.60 is hereby confirmed.

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

(a) A declaration that employment was terminated unfairly;

(b) Compensation awarded at kshs.30,348.45;

(c) Notice pay Ksh.10,116.15;

(d) Unpaid wages for April and May, 2014 ksh.23,267.10;

(e) Underpayments Ksh.13,950.65;

(f) Overtime pay ksh.11,205.60;

(g) Pay for untaken rest/off days Ksh.31,126.60;

(h) The claimant shall be issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007; and

(i) Costs of the suit.

Delivered at Nakuru this 14th day of March, 2019

M. MBARU JUDGE

In the presence of: