



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.595 OF 2014

JAMES MCHOVOTI NALISI.....CLAIMANT

VERSUS

ECLIPSE INTERNATIONAL LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 16th June, 2014 as a night guard with a wage of ksh.5, 000.00 per month and which was increased to Ksh.7, 000.00 per month at the time employment was terminated on 24th January, 2014.

The claim is that during the duration of employment the claimant was underpaid contrary to wage orders. Work hours were 6pm to 6am all being 12 hours at work without compensation for overtime. The claimant was at work during public holidays, no annual leave was allowed and such work was not compensated as required under section 27 and 28 of the Employment Act.

The claim is also that on 24th January, 2014 the claimant was barred from accessing his work place and directed to go home. The next day the claimant reported back as he had not been given reasons for not attending work and when he was accused of theft without any material particulars and this was not true. The respondent alleged that there was a customer who was lodged at the premises and lost this phone but such allegations were not true as the respondent [...] had a girlfriend he wanted to hide in the lodging and the claimant secretly allowed her into the lodging where the respondent [...] joined her later. The claimant learnt later that the lady had stolen Ksh.5, 000.00.

The claimant was dismissed due to this incident which was unfair and not justified. The claimant had not been alerted to stop the lady from leaving the premises for the alleged theft to be addressed.

The claimant is seeking the following;

- a) Notice pay Ksh.10,116.15;
- b) Underpayments ksh.76,011.45;
- c) Overtime Ksh.43,454.80;
- d) Public holidays ksh.27,209.50;
- e) Annual Leave for 2 years Ksh.19,269.80;
- f) Salary for 24 days for January, 2014 ksh.11,709.60; and
- g) Compensation ksh.139, 602.60.

The claimant testified that he was employed by the respondent in January, 2011 as a security guard with duties to ensure that there was order in the club as a bouncer. He was not paid as a security guard and claims the underpayments, 24 days worked in January, 2014, overtime and annual leave. The claimant is also seeking compensation as the reasons leading to termination of employment were not valid.

The claimant also testified that the respondent had contracted Simba, a security company which provided guards but he wore a t-shirt written security while the security guard wore a uniform. The respondent had a business running 24 hours and he was the night security guard and worked over weekends and all public holidays as the business was more during such days. There was no pay for working overtime and during public holidays. On 21st October, 2011 there was an altercation, the claimant apologised and was returned to work.

The claimant also testified that he was not paid his terminal dues. he had taken a loan of Ksh.8, 000.00 and at the time his employment was terminated he had repaid part of it.

The defence is that the claimant was not employed as a bouncer and not a security guard as alleged. There was a verbal contract from 15th June, 2011 and was paid ksh.5, 000.00 per month. The respondent had a security company offering security services within its business. There was no underpayment. There is no minimum wage for the position of bouncer.

The defence is also that the claimant had various work benefits and got a loan facility and salary advances.

The claimant was in the evening shift from 7pm to 3am when the club closed pursuant to the applicable regulations and work was for 8 hours. The claim that the claimant worked during public holidays and was not allowed annual leave is denied.

In December, 2013 the claimant had taken a loan of ksh.8, 000.00 with a deduction of Ksh.880.00 per month and had only repaid one instalment with a balance of ksh.7, 120.00 and upon dismissal from employment such was deducted from the owing terminal dues. the claimant had a salary advance of ksh.920.00 which was not repaid.

The claimant was on 24th January, 2014 dismissed from his employment as he was not of good conduct and on several occasions was in violation of the his employment rules and regulations and was issued with warnings on 7th June, 2012, 21st July, 2011 and 22nd May, 2013 from being found drunk while on duty, drinking within the work premises and beating up a customer. Following complaints by customers the respondent conducted investigations and found the claimant to have grossly misconducted himself and summary dismissal was justified.

On 23rd January, 2014 the claimant in collusion with one woman transferred a customer's mpesa money to another phone and the claimant was found withdrawing the money from an mpesa agent. The customer complained to the management that he had lost ksh.10, 000.00 and made statement on the transactions. The claimant was called for a hearing by the accountant Robert Limo but there was denial despite the investigations. This put the reputation of the respondent at stake and noting the gross misconduct, the claimant was dismissed.

Robert Limo the accountant testified that the claimant was paid ksh.7, 000.00 at the time of his summary dismissal. He had been paid Ksh.5, 000.00 for on year after employment and while on probation and then ksh.6, 000.00 and the last wage was ksh.7, 000.00.

The claimant was not a night guard as alleged as such service had been outsourced to a security company. The claimant remained a bouncer.

The claimant had disciplinary issues all through his employment and had been issued with warnings. On the night of 23rd January, 2014 the claimant was found to have colluded with a customer to steal from another customer. This was investigated and the claimant was found culpable.

The claimant did not apply for annual leave as required. The claimant worked during public holidays and was paid double the daily wage.

The claimant had a loan of ksh.8, 000.00 and this was deducted from his terminal dues.

The pleadings filed by the claimant must have an error where he states that he was employed from 16th January, 2014 and dismissed from such employment on 24th January, 2014. This is clarified in evidence and in the defence where the respondent confirmed that employment commenced verbally on 15th June, 2011 until 24th January, 2014.

By letter dated 24th January, 2014 the claimant was dismissed from his employment with the respondent on the grounds that in most occasions he had been found collaborating with idle ladies and defrauding customers, allowing customers in the room to leave without consent or following the laid down rules, failing to hand over keys, and that he supervised an incident where a customer was robbed of money.

Summary dismissal of an employee is allowed under the provisions of section 44(3) and 94) of the Employment Act, 2007 for a fundamental breach of the employment contract and for gross misconduct. the employee must however be given a hearing in accordance with section 41(2) of the Act. this is to allow the employee to give a defence, if any.

In this case the claimant testified that there was an incident on the night before the 24th January, 2014 when he allowed a customer to a room and was followed by the respondent and thereafter it was reported that some money had been lost.

The claimant testified that in the morning and on his way home he was called by the respondent over the matter. When he reported back to work he was sent away to allow for investigations. When he reported back he was informed that there was theft and was issued with letter of summary dismissal.

The claimant also testified that previously he had been accused of some misconduct, he apologised and was pardoned.

The call to the claimant, being sent home following alleged work misconduct and the apparent investigations that he was made aware of and the resulting summary dismissal for failing to give satisfactory defence is allowed in cases of gross misconduct. where the claimant failed to undertake his duties diligently and was negligent in allowing secret dealings instead of bringing such matters to the attention of the employer, he failed and the resulting summary dismissal was by his own making. Summary dismissal is hereby found justified.

The claimant asserts that he as a security guard and was underpaid. The respondent denies this on the grounds that the claimant was a

bouncer in a job not regulated and there was a security company sourced for security service.

Indeed the claimant testified that there were uniformed guards from Simba while he wore a t-shirt written security.

The practice of employers failing to issue employees with written contract with terms and conditions of employment only results in claims such as this. The failure to issue a written contract to an employee is contrary to the provisions of section 10 of the Employment Act, 2007 and where there is suit filed with the court and the employer fails to submit the necessary work records, the word of the employee must be believed.

In this case the respondent has submitted the contract with Simba security for the provisions of security services. The claimant also set out his duties as those of a bouncer as there were other security guards with him manning outside while he was inside the club to ensure order. By being set out separate from the sourced security guards, the claimant cannot claim to be a security guard. He had defined roles of a bouncer. He was not trained in any stated field.

Though the role of 'bouncer' is not defined under the Wage Orders, such is no excuse to underpay an employee. The Wage Orders has made provision for the minimum wage for all employees including casuals. For the general duties of a 'bouncer' allocated to the claimant he ought to have been paid the minimum wage applicable under the Wage Orders.

In the year 2011 the minimum wage under the Regulation of Wages (General) (Amendment) Order, 2010 and running to 1st May, 2011 was ksh.6, 221.00. where the claimant was paid ksh.5, 000.00 on the basis that he was employed on oral terms, there was an underpayment of Ksh.1, 221.00.00 and for the year the claimant is entitled to Ksh.13, 431.00 for the underpayment.

The evidence that the claimant was paid Ksh.6, 000.00 for the next year and without any work records to support when such pay commenced, the minimum wage covering 2011 under the Regulation of Wages (General) (Amendment) Order, 2011 published 1st May, 2011 the minimum wage was ksh.6, 999.00 and there was an underpayment of ksh.999.00 all being Ksh.11, 988.00 in underpayments.

For the last year of service for 6 full months and payment of ksh.7,000.00 per months the minimum wage applicable was ksh.7,915.90 and the underpayment was by Ksh.915.90 all being Ksh.5,495.40 in underpayments.

All underpayments amount to Ksh.30, 914.40.

On the claim for overtime on the basis that the claimant worked for 12 hours each day, the defence that the respondent business is regulated and operational from 7pm to 3am was not challenged in any material way. Such claim is found without basis.

The defence that the claimant was paid double during public holidays is not supported by any work records. The salary schedule filed and attached to the defence does not tabulate the double pay for any work during public holidays. Such pay is due based on tabulation of the last due wage taking into account the non-payment when due and arising in accordance with section 49(1)(c) of the Employment Act, 2007. For the 8 days due in the year 2011, 11 days due in the year 2012 and 6 days due in the year 2013 all being 24 public holidays, the due daily wage in the year 2013/14 was Ksh.379.30 and for the public holiday a double payment is due at ksh.758.60 all being 18,206.40.

Under section 28 of the Employment Act, 2007 it is the duty of every employer to ensure an employee takes annual leave or is paid in lieu thereof. It should not be left to the employee alone. The law vests the duty upon the employer to ensure compliance.

Where the claimant was not allocated time for annual leave and was not paid, payment in lieu thereof is due for 21 days for each year and prorated for 6 full months all being 52 days. The payment in lieu of not taking leave is Kh.19, 567.60.

The salary due for the 24 days worked in January, 2014 is due based on the last due swage all being ksh.6, 332.00.

As summary dismissal is hereby found justified, notice pay and compensation is not due.

There was no claim for costs.

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

(a) Underpayments ksh.30,914.00;

(b) Public holidays ksh.18,206.40;

(c) Annual leave pay ksh.19,567.60;

(d) 24 days in January, 2014 ksh.6,332.00;

(e) These dues (a) to (d) above shall be subject to the provisions of section 49(2) of the Employment Act, 2007;

(f) The total dues payable to the claimant shall be paid less the loan and salary advances of ksh.9, 120.00 and Ksh.920.00 respectively.

(g) No orders on costs.

Delivered at Nakuru this 7th day of March, 2019.

M. MBARU JUDGE

In the presence of:.....