



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.166 OF 2016

PENINA JELIMO BETT.....CLAIMANT

VERSUS

INTERCITY SECURE HOMES LTD.....RESPONDENT

JUDGEMENT

On 18th September, 2018 parties attended court for hearing directions and hearing was scheduled for 18th February, 2019 by consent. On the due date the respondent was absent and the claimant was heard on her case and hearing closed.

Upon closing the hearing, parties were allowed to file written submissions which both parties filed including the respondent.

Claim

On 1st July, 2013 the claimant was employed by the respondent as a day/night guard at a salary of ksh.7, 500.00 per month. The claimant worked until 10th January, 2015 when her employment was terminated without notice or payment of terminal dues.

Work hours were 6am to 6pm and vice versa based on the shift allocated.

On 10th January, 2015 upon end of shift the claimant received a call from her supervisor Mr Sammy who informed her not to report to work on 11th January, 2015 without giving any reasons. The claimant made effort to find out when she should report back to work but the respondent failed to issue any communication.

Upon the unlawful termination of employment the claimant is seeking the payment of terminal dues based on the fact she was working on all public holidays, worked overtime and such work was without compensation. The claimant remained at work for a full week and no rest days were allocated or paid for. no annual leave was allowed or paid in lieu thereof. For the salary due in December, 2014 and 10 days worked in January, 2015 she was not paid.

The claims are for the payment of the following;

- a) Salary for December, 2014 ksh.11,633.50;
- b) 10 days worked January, 2015 ksh.4,879.00;
- c) Compensation ksh.139,602.00;
- d) Underpayments ksh.65,411.28;
- e) Off days/rest days 104,522.52;
- f) Public holidays Ksh.22,909.05;
- g) Notice pay ksh.11,633.50;
- h) Annual leave ksh.8,143.10;
- i) Overtime pay ksh.183,988.27;

j) Uniform refund ksh.3,000.00; and

k) Certificate of service

The claimant testified that upon employment by the respondent she was deducted ksh.3, 000.00 for uniform. She was placed at Egerton university campus to search students and employees entering the building and supervised by Sammy. She was paid a wage of ksh.7, 500.00 per month through the bank but no payment statement was issued. Upon reporting to work she was clock in and out and the respondent kept the work records and the overtime hours worked were not paid for. Sammy called here on 10th January, 2015 after leaving work and directed not to report back to work. No terminal dues have been paid.

Defence

The respondent filed defence and avers that the claimant was employed on 1st July, 2013 to 10th December, 2015 while earning ksh.7, 500.00 per month. Work hours were 6am to 6pm and placed at Egerton university for duty. Supervision was not by Sammy as alleged. The claimant was under a written contract of employment and paid a wage proportionate to her duties.

The defence is also that the allegations that there was work during public holidays is baseless as employment was by a private institution and was not forced to work during such days.

The claimant had been issued with warnings due to incompetence and failure to perform duty and failed to improve. As a guard the claimant was required to work with due diligence in handling the property of Egerton university. The respondent spent money to repay for stolen property stolen at the time the claimant as on duty. This was gross misconduct and employment could not be sustained.

The gross misconduct was brought to the attention of the claimant but chose to ignore and no response was given and for this reason the respondent could not retain the claimant in its service due to the duty positions at Egerton University becoming obsolete due to her actions of abusing office and negligence which led to theft.

There was a valid reason for dismissing the claimant.

There is no pay due to the claimant for time not at work of compensation.

The claimant contributed to termination of her employment and the claims made are not justified. Certificate of service can only be issued upon conclusion of the suit herein.

The claimant was dismissed under the provisions of section 17(a) and (c) of the Employment Act, 2007. Claims made should be dismissed with costs.

No evidence was called by the respondent as they remained absent at the scheduled hearing.

work records were filed by the respondent as required under section 10(6) and (7) of the Employment Act, 2007 only include the notice of termination of employment dated 10th January, 2015 and a payment schedule.

Both parties filed written submissions.

On the pleadings, the evidence and written submissions the issues which emerge for determination can be summarised as follows;

Whether the summary dismissed was justified;

Whether the remedies sought are due;

Whether certificate of service should issue; and

Whether costs should be awarded.

Summary dismissal of an employee is allowed under the provisions of section 44 of the Employment Act, 2007 read together with section 41(2) of the Act. upon committing gross misconduct in the nature of negligence of duty, causing the loss of the property of the employer, the employer is justified to dismiss the employer. However, the employee has the right to be given a hearing before such sanction can issue as regulated under section 41 of the Act.

In this case, the respondent under bullets 5 and 6 page 3 of the defence asserts that;

The respondent denies the claim herein in its entirety since the claimant absconded her duties as clearly admitted in her claimant and as such, she ought to be stopped from alleging that she was unfairly and unlawfully terminated.

Indeed the respondent avers that, it summarily dismissed the claimant as per the provisions of the Employment act, 2007, section 17(a) & (c).

Section 17 of the Employment Act, 2007 relates to the payment of wage and not summary dismissal. Where the respondent applied these provisions to effect termination of employment this is in gross error. It is a misnomer.

As a guard, the claimant was required to attend to her duties as allocated by the respondent. where the claimant failed to attend such duty, there is no record of such work place misconduct. from the defence paragraphs cited above, to sustain a case for desertion, the respondent ought to have called for evidence of submitted work records with regard to such matters. Without any evidence, the court is only left with the claimant's evidence that she left work on 10th January, 2015 and was later called and directed not to report back on 11th January, 2015.

Save for the defence paragraphs cited above, the defence is also that;

The respondent spent its own monies in re-payment of the stolen property of Egerton university, which properties were stolen at the time the claimant was on duty.

...

The gross misconduct was brought to the attention of the claimant by the respondent via warnings and notices, but the claimant chose to ignore and no response was received by the respondent.

These are very serious allegations made by the respondent against the claimant. However, these allegations are left empty without any work records being filed. Such allegations are left bare and of no value to challenge the claims made in any material way or to controvert the evidence called by the claimant.

The court finds the respondent failed to adhere with the mandatory provisions of the law as required under section 41, 43 and 45 of the Employment Act, 2007. There was no due process in the termination of the claimant's employment, there was no genuine and valid reason(s) given and the same resulted in unfair termination of employment.

Compensation is due to the claimant.

As noted above, the failure by the respondent to file any work records with regard to hours of work, compensation for work during public holidays, payment for wages due in December, 2014 and for 10 days worked in January, 2015 and that the claimant was allocated annual leave or paid in lieu therefore, such payments are due and shall be assessed on their merits.

Under the Regulation of Wages (General) (Amendment) Orders applicable in the year 2013 the minimum wage due to the claimant as a guard was Ksh.9, 024.15 for day guard and ksh.10, 315.95 for a night guard. The claimant has analysed the underpayment due based on the wage due for a night guard. This is not challenged by the respondent and no work records have been filed to challenge the same.

The claimant testified the wage paid was ksh.7, 500.00 and On the assessment by the court for the underpayments due is for 19 months of service is 53,475.00.

Notice pay is due to the claimant upon the finding that due process was not followed in termination of employment all assessed at one month pay at ksh.10, 315.15.

For December, 2014 the due wage is ksh.10, 315.15 and for the 10 days worked in January, 2015 the wage due is Ksh.3, 435.00 the due unpaid wages is ksh.13, 753.00.

Under the Regulation of Wages (General) (Amendment) Orders the claimant was required to work for 54 hours per week and for the overtime hours a payment is due. the defence that the claimant agreed to work for a private institution and did not complain is not sufficient to fail to pay for the overtime work.

The 2,056 overtime hours based on the payable wage at Ksh.10, 315.15 The claimant is warded as claimed at ksh.163, 335.60.

For the due off days not taken the same is due. this is assessed at ksh.92, 676.30.

On the claim for payment for work during public holidays this is due. however the claimant had made a general claim for 16 days without setting out how this was arrived at.

Section 28 of the Employment Act, 2007 requires the employer to ensure the employee has taken the due annual leave or the same is paid in lieu thereof. Without any work record of the claimant taking such leave or being paid for the same pay for 21 days is due and pro-rated leave for 5 months is all 26 days of annual leave assessed at ksh.8, 935.60.

On the claim for the refund of uniform, the employer has the duty to provide to the employee the work tools. Where the claimant was required to pay for the uniform used at work and paid ksh.3, 000.00 such is due back to her.

A certificate of service issued together with the letter and or notice terminating employment and in accordance with section 51 of the Employment Act, 2007. Such certificate should not wait for judicial proceedings to end or be determined. Where an employee is unable to secure new employment due to failure by the employer to issue the due Certificate of Service, upon evidence of such matter, such can be redressed by the court with an appropriate award. Such is not the case here save such certificate is due and should be issued accordingly.

Cost are due to the claims on good basis noting there was demand and terminal dues have not been paid since employment terminated.

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

- a) A declaration employment terminated unfairly;**
- b) Compensation is hereby awarded at one month salary ksh.10,315.15;**
- c) Notice pay ksh.10,315.15;**
- d) Salary due for December, 2014 Kshs.10,315.15;**
- e) 10 days unpaid for January, 2015 Ksh.3,435.00;**
- f) Underpayment ksh.53,475.00;**
- g) Overtime Ksh.163,335.60;**
- h) Off days/rest days ksh.92,676.30;**
- i) Leave pay ksh.8,935.60;**
- j) Uniform refund ksh.3,000.00;**
- k) Dues above (b) to (j) shall be subject to taxation;**
- l) Certificate of service be issued;**
- m) Costs of the suit.**

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

M. MBARU

JUDGE

In the presence of: