



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.610 OF 2014

JACKSON MUSEMBI MUNYILU.....CLAIMANT

AND

CAUSE NO.614 OF 2014

CHARLES KIPRONO.....CLAIMANT

AND

CAUSE NO.615 OF 2014

MILTON LELEBOO.....CLAIMANT

VERSUS

RILEY FALCON SECURITY LIMITED.....RESPONDENT

JUDGEMENT

The judgement herein is a consolidation of three (3) files and claims arising out of Causes No.610 of 2014, 614 of 2014 and 615 of 2014 for Jackson Musembi Kinyilu, Charles Kiprono and Milton Leleboo against the respondent. the matters related to the same cause of action and against the same respondent as the employer.

The claimants were employed by the respondent as security guards on 23rd May, 2008, 26th June, 2004 and 17th June, 2007 respectively. The claimants worked until 30th June, 2014 when employment was terminated on the grounds of redundancy and each earning a gross wage of ksh.7,940.00 per month.

The termination of employment was without notice or payment of the lawful dues in a case of redundancy. The claimants had worked diligently without any record of indiscipline and for lack of due process, there was unfair termination of employment.

The claimants are seeking payment of their terminal dues. the claims relates to notice pay, pay for days worked, travelling allowances, a salary deduction in September, and October, 2013 which was without an explanation, uniform deductions, house allowances not paid for the duration of employment and severance pay for the period of service together with compensation for unfair termination of employment.

Each claimant gave evidence.

Upon employment, the claimant were allocated duties by the respondent and the last such allocation was at Naivasha with Orpower 4, Inc and client of the respondent. the claimants were assigned duty to guard and secure the residences of the company employee. On 30th May, 2014 the respondent's manager came at the work site at 9am and informed the claimants that the tender with the client Orpower 4, Inc had ended and they were required to hand over and go home. There was no redeployment or indication as to what was to happen to the employment. The ending of tender with the client had nothing to do with their employment, no notice had been issued and or hearing with regard to termination of employment.

The claimants also testified that the respondent's head office is in Kisumu and were being given oral instructions by the manager situated in Nakuru. The manager travelled to Naivasha and informed them that work had ended. The manager would visit the site occasionally to monitor work but on this day he said work had ended. The defence that the contract with Orpower 4, Inc had ended was not brought to the attention of the claimants and where such contract ended, there was no redeployment.

The defence is comprised of mere denials without substance. Employment is denied and on without prejudice the defence is that there was no declaration of redundancy as alleged and employment terminated after the client where the claimants were working terminated the contract. The claimants were required to report to the office for redeployment but they failed to attend. The claims made are without justification and should be dismissed.

The respondent filed the letter from Orpower 4, Inc terminating contract.

No work records with regard to the claimants are filed.

In evidence the respondent called Frida Lumadi the human resource officer who testified that the claimants were employed on 6 months contract renewable and deployed at Orpower 4, Inc. it was a term of the contract that should the client terminate the contract with the respondent the same would result in the termination of employment for the claimants. Based on the contract with orpower4, Inc. the claimants were employed.

By letter dated 15th April, 2014 the client gave the respondent notice to terminate contract with effect from 30th April, 2014 and did not require the 5 guards placed with them by the respondent. The claimants were recalled back to the office to be allocated new assignments at Nakuru branch but they failed to attend.

The claimants stopped attending work from 30th April, 2014. They were directed to hand over their uniforms and company property which they did and were cleared at the Nakuru branch office.

The claim for uniform deductions is due as the claimants did clear. The claimants were to collect the wage due but failed to do so. The respondent is willing to pay Ksh.31,000.00.

The claims for travelling allowance is not a term of employment and not due. the respondent had arranged accommodation for the claimant and paid a basic wage together with a house allowance. There was standard payment for overtime paid monthly at ksh.2,322.00 and the claimed leave is part of what the claimant was owed. There was no redundancy as employment terminated for the reasons of end of contract and the claimants failed to report for redeployment.

At the close of the hearing, both parties filed written submissions.

As noted above, the respondent did not file any work records. Part of the work records are filed with the written submissions. This is procedurally wrong as this is meant to deny the claimants a fair chance to address the same. Such work records are to be filed Under the provisions of Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and as part of the defence or response to the claimant and to be available during the hearing for interrogation by the claimants.

To file the work records after close of hearing is prejudicial to the other party. Such material should be expunged and not put into account.

With abundance of caution and taking into account the objectives of the court under section 3 of the Employment and Labour Relations Court Act, 2011 a look at the filed work records together with written submissions by the respondents relates to employment contracts issued to the claimants for 6 months for periods ending in the year 2009. Under such contracts there is clause 6 which provides that should work under the contract cease to exist, the claimants would only be paid for days worked.

These contract ended on their terms in the year 2009. There is no indication as to renewal or the subsisting arrangement after such lapse.

The other document filed in the payment schedule. It is dated 26th January, 2016. The claim herein was filed on 21st November, 2014 and defence filed 31st January, 2015. No such matter was addressed in defence. Where the set out dues were found due to the claimant, nothing stopped the respondent from making the payments or engaging the claimants in this regard.

The computation of these dues two years after employment terminated only serves to demonstrate there was unfair termination of employment for failure to issue notice or pay the due terminal dues. these are matters the court is invited to taken into account under section 45(5) of the Employment Act, 2007;

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee

In addressing the above provisions, the court has in several cases found the failure to adhere to the mandatory provisions of the law only invites a finding of unfair termination of employment. See **Kenya Plantation and Agricultural Workers Union versus Unilever Tea (K) Limited [2018] eKLR**; **Titus Ominde versus Mediamax Network Ltd [2016] eKLR** and in the judgement of the Court of Appeal in **Nation Media Group Limited versus Onesmus Kilonzo [2017] eKLR**.

The failure to file the work records by an employer denies the court crucial and important materials in the assessment of a given case. Such is contrary to the law as under section 10 of the Employment Act, 2007. Such failure removes crucial evidence from the record.

There is no dispute that the claimants' employment terminated after the respondent was issued notice by its client, Orpower 4, Inc to end contract with effect on 30th April, 2014.

The defence that the claimants had a 6 months renewable contract and which stipulated that their employment would also terminate where the client failed to renew the contract with the respondent is devoid of any evidence. The filed notice from Orpower 4, Inc sent to the respondent and dated 15th April, 2014 is not copied to the claimants. Even where it may have been copied which is not the case here, there are no contracts of employment premised on the ending of such contract issued to the claimants. This is the material not filed by the respondent. To link a contract of employment based on the renewal of contract with the client is to engage in an unfair labour contract.

Where the respondent was aware of the contract with Orpower 4, Inc notice to end contract with them, nothing stopped them from issuing the claimants with the requisite notice terminating their employment. The allegations that the claimants were required to report to the office at Nakuru for redeployment is equally devoid of any evidence. No notice to this effect was filed. Without such record, the court must believe the claimants on the evidence that they were only required to hand over their uniforms and any company materials and go home.

The defence was also that the claimants were required to report to the Nakuru office for redeployment but they failed to attend and therefore by their conduct terminated employment. The duty is upon the employer to ensure the employee attends work and failure to do so is a matter subject to section 44(4) of the Employment Act, 2007. Such should attract summary dismissal upon invitation for hearing and failure to attend in accordance with section 41(2) of the Act.

This evidence is empty. No notice was issued for the claimants to attend work or report for redeployment at Nakuru. Upon failure to attend as directed, there is no notice terminating employment. In this regard the respondent has relied on the case of **Samuel Muigai Ng'ang'a versus The Minister for Justice, National Cohesion**

& Constitutional Affairs & another [2013] eKLR but the facts therein and leading to the cited findings are fundamentally different as herein. Equally in the case of **Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR** the facts and findings therein can clearly be contradistinguished from herein and the citation of these cases only attend to demonstrate the respondent failed in its mandate as the employer. Such cases do not aid the defence at all. The prerogative to discipline an employee has its context where an employee has misconducted self which was not the case for the claimants herein. The evidence before court does not relate to a case of misconduct. The case stands out as one where the respondent as the employer failed to ensure substantive and procedural justice to its employees and ended in undertaking an unfair termination of employment.

Without the requisite notice being issued in accordance with section 35 of the Employment Act, 2007 that employment would terminate upon the end of contract with the subject client and there being no reasons given to the claimants with regard to why employment had to terminate abruptly, the respondent failed to meet the procedural and substantive requirements of section 41, 43 and 45 of the Employment Act, 2007. The resulting termination of employment is hereby found substantively and procedurally unfair. There is no justification for the same.

On the defence that the respondent is willing to pay ksh.31,000.00 the breakdown or tabulation as to how this was arrived at is not given.

No payment statements were filed by the respondent. The figures stated by the claimants and the few payment statements shall be used in the tabulation of the owing terminal dues.

Notice pay is due to the claimant as there was no notice issued before employment terminated. The last paid gross wage was Ksh.7,940.00 and such shall apply as due in notice pay.

The evidence that there was work for 5 days unpaid was admitted by the respondent. Purely on the admissions, this claim is confirmed at ksh.1,323.00.

Leave is due under the provisions of section 28 of the Employment Act, 2007. On the filed statements by the claimant, the slot for leave is noted as nought/zero. Without corresponding payment statements that the claimants were paid for the due annual leave or record of taking such leave as a right in law, the claimant payment in lieu thereof is due. Such includes prorated leave days due for 5 months.

On the claim for travelling allowance, no evidence was led in this regard. This was not shown as due under the law or any written contract or the practice of the respondent.

The claim for salary deductions in September, and October are equally not with evidence. The claimants have filed some payment statements but the ones relating to the alleged deductions are not filed.

The claim for uniform refund is admitted by the respondent as due.

Overtime pay claimed for the period of employment but the claimants filed some payment statements setting out various amounts for normal

overtime pay. Despite the respondent not filing any work records from the materials availed to the court, in this regard the respondent was compliant.

On the payment statements, there was an allowance paid for house allowance. Such claims are declined.

On the claims for severance pay, such pay is due with regard to redundancy. The evidence and testimony by the claimants is that employment terminated by the unfair conduct of the respondent. despite the contract with client ending, they were not issued with redeployment notices or notices terminating employment. On the finding there was unfair termination of employment and resulting end of contract, this shall be put into account in assessing the due compensation to the claimants. However this case does not stand out as one where there was a redundancy.

On the compensation due, the case herein stands out as one where maximum payment of 12 months in compensation should be awarded. The respondent failed to meet the substantive justice due to the claimants and further went out to frustrate their employment by failing to adhere to procedural justice. Each claimant is hereby awarded 12 months gross wage in compensation.

Accordingly judgement is hereby entered for the claimants against the respondent with a finding there was unfair termination of employment and the following awards are hereby ordered as due;

Jackson Musembi Munyilu

- a) Notice pay at ksh.7,940.00;
- b) Pay for 5 days worked and unpaid Ksh.1,323.00;
- c) Pay for leave days earned for 6 years Ksh.38,478.00;
- d) Prorata leave for 5 months ksh.3,500.00;
- e) Uniform deduction Ksh.6,120.00;
- f) Compensation Ksh.95,280.00;
- g) Certificate of service be issued in accordance with section 51 of the Employment Act, 2007;
- h) Costs of the suit.

Charles Kiprono

- a) One month pay in lieu of notice kshs.7,940;
- b) Days worked and not paid kshs.1,323.00;
- c) Leave earned and not taken kshs.64,131.00;
- d) Uniform deduction refunds kshs.10,200.00;
- e) Prorata leave 5 months kshs.3,500.00;
- f) Compensation Ksh.95,280.00;
- g) Certificate of service be issued in accordance with section 51 of the Employment Act, 2007.
- h) Costs of the suit.

Milton Leleboo

- a) One month pay in lieu of notice kshs.7,940.00;
- b) Days worked and not paid kshs.1,323.00;
- c) Leave earned and not taken kshs.44,942.00;
- d) Uniform deduction refunds kshs.7,140.00;
- e) Prorata leave 5 months kshs.3,500.00;

f) Compensation Ksh.95,280.00;

g) Certificate of service be issued in accordance with section 51 of the Employment Act, 2007;

h) Costs of the suit.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU

JUDGE

In the presence of: