



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.155 OF 2016**

**JOSEPH MANYARA..... CLAIMANT**

**VERSUS**

**MAWE MBILI LTD..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent as a general worker. The claimant had started work as a mason assistant on 10<sup>th</sup> October, 2007 and paid ksh.250.00 daily.

On 13<sup>th</sup> April, 2013 the claimant as trained as a security guard and after which he was paid ksh.350.00 per day until his summary dismissal on 20<sup>th</sup> October, 2013 when the respondent hired a security firm to do duties which the claimant was formerly undertaking.

The claim is that the claimant was unfairly dismissed from his employment in a manner which was discriminatory as he had no notice and his terminal dues were not paid.

The claim is also that the work hours were pm to 6am for 6 days a week; no housing or an allowance were provided and such should be paid.

The claims made as follows;

- a) Notice pay at Ksh.10,500.00;
- b) Overtime pay ksh.417,602.40;
- c) Leave allowance ksh.43,125.00;
- d) Service pay ksh.18,750.00;
- e) Unpaid house allowance ksh.82,125.00;
- f) Compensation;
- g) General damages; and
- h) Costs.

The claimant testified that he was employed by the respondent from the year 2007 and worked continuously until the year 2013. His start wage was Ksh.250.00 per day and this was increased to ksh.450.00 per day.

In the year 2013 he went for patrol and got injured by a buffalo and was admitted in hospital and was to return to work after 14 days. He filed a claim against the Kenya Wildlife Service (KWS) and which required the respondent as the employer to approve and when he did this he was dismissed from his employment. The respondent paid for the medical bills as he was injured while at work. There was no warning or hearing before the dismissal. The defence given that the claimant was dismissed after stealing the property of the respondent is not true and no charcoal was found on him.

Defence

The defence is that the claimant was hired as a guard in April, 2012 and worked as a casual employee. The claimant was dismissed after being found with charcoal stolen from the respondent. The claimant had become a liability when he was found to be engaged in theft leading to losses by the respondent. The claims made are without merit and should be dismissed.

Peter Karori testified that he is chief accountant for the respondent and the claimant was employed as a guard from the year 2012 and before had been an assistant mason on casual basis. The respondent had hired Patriotic Guards for night security while the claimant was at work during the day from 6am to 6pm for 6 days a week and paid a daily wage. The claimant had no night duties as alleged and was paid a higher wage than under the wage orders which provided for Ksh.263.40. The claims for underpayment are not due as the claimant was paid more to accommodate such overtime work.

Mr Karori also testified that the claimant was not injured by a buffalo. He was dismissed following theft of charcoal and property of the respondent. The respondent conducted investigations and established that the claimant facilitated the theft of charcoal at Soy Sambu ranch and was invited for a hearing and he failed to give a good defence.

The pleadings and the evidence by the claimant are at variance.

The pleadings are premised on the facts that the claimant was employed as a security guard and the respondent introduced a firm offering security services and upon which the claimant was dismissed. The evidence by the claimant was that he was dismissed after he was injured by a buffalo and when he filed a claim against KWS and submitted the same to the respondent to approve as the employer there was fear that he would also file a claim against the respondent as he employer and therefore opted to dismiss him.

The defence is that the claimant was dismissed after being found with stolen goods and charcoal.

Upon cross-examination, the claimant denied his statement and claim that he was dismissed for the reasons of the respondent hiring a security firm. It is clear that the pleadings and the evidence are not in tandem.

Such variance in the pleadings and evidence go to the core of the entire claims made. This is because the claimant pleaded that he was paid a wage of ksh.250.00 per day and which was increased to ksh.350.00 per day but in his evidence he testified under oath that he was paid a daily wage of ksh.450.00 per day.

What is clear to the court is that the claimant was aware that he was found with charcoal, which was the property of the respondent and for which he was invited to a hearing on 16<sup>th</sup> September, 2013 and 2<sup>nd</sup> October, 2013 and 10<sup>th</sup> October, 2013. The proceedings for such hearing and the reasons were not challenged in any material way.

The reason leading to dismissal is therefore the theft of charcoal and not the introduction of a security firm or due to injury by a buffalo.

Summary dismissal is allowed under the provisions of section 44(4) of the Employment Act, 2007 where the employee is found to have committed an act which is of a criminal nature or has acted in a manner as to put the employer to loss. The claimant was notified of the stolen charcoal and invited to a hearing as required under section 41(2) of the Act. He cannot then change the events from himself to the respondent on a defence that he was unfairly dismissed for being injured by a buffalo. Far from it. He was found culpable of having stolen the property of the respondent and the sanction issued of summary dismissal is lawful and justified. No compensation or notice pay is due.

On the claims made for overtime work, the claimant is seeking for the payment of ksh.417,602.40 on the grounds that he was working from 6pm to 6am for 6 days a week. The defence is that the claimant was a day guard as there was a security firm offering night security.

The respondent has filed work sheets for April, March, May, June, July, September, and October, 2013. The logs show the claimant was not on full time employment of the respondent. In October, 2013 he was at work for 5 days, September, 2013 was erratic, July, 2013 for a few days and similarly for the other months. For every day at work, the claimant was paid a wage of ksh.350.00.

Under the Regulation of Wages (General) (Amendment) Order, 2013 and shall be deemed to have come into operation on 1st May, 2013 the due wage for a security guard was Ksh.264.50 daily. With the claimant paid ksh.350.00 per day as pleaded or ksh.450.00 as he testified, such was way above the minimum wage due daily in whichever case. Where there was any overtime worked in the alleged 6 days at work weekly or daily, on the payment made the claimant was adequately compensated.

On the work records filed and on the same not being continuous, a casual employee is entitled to a day off after work for a full week. The claimant admitted that he only worked for 6 days a week.

The other aspect of the claimant's evidence is that he was accommodated by the respondent. He was offered living quarters and despite his dislike of the same and preference to travel home, the respondent complied with the minimum in terms of section 31 of the Employment Act, 2007. To claim for house allowance whereas there was accommodation and housing provided would be to negate the very principle of the law at section 31 of the Act.

The rationale for the claim for service pay is not set out. This is not an automatic claim for the court to grant, the basis must be established by the employee. The court finds no justification.

**Save for the issuance of a Certificate of Service in accordance with section 51 of the Employment Act, 2007 the claims made are**

hereby dismissed with costs to the respondent. Such costs are hereby assessed at Ksh.10,000.00.

Delivered at Nakuru this 25<sup>th</sup> day of April, 2019.

M. MBARU

JUDGE

In the presence of: .....