



**REPUBLIC OF KENYA**

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

**CAUSE NO.399 OF 2017**

**STEPHEN BABU ONYANGO.....CLAIMANT**

**VERSUS**

**PALMAC AGRICULTURAL SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

On 1<sup>st</sup> May, 2014 the claimant was employed by the respondent as a security supervisor at a wage of Ksh.5, 692.00 and house allowance of Ksh.1, 500.00 per month.

The claim is that on 1<sup>st</sup> July, 2017 employment was terminated orally without notice and without reason. That during the employment there was underpayment, overtime work without compensation and the deductions made for NSSF were not remitted.

The claim is for the payment of the following dues;

- a) One month notice pay ksh.10,107.00;
- b) Underpayments Ksh.881,107.00;
- c) Accrued leave Ksh.81,107.00;
- d) Overtime pay ksh.202,500.00;
- e) Unremitted statutory dues Ksh.800.00;
- f) Compensation; and
- g) Costs.

The claimant testified that on 24<sup>th</sup> June, 2017 he was dismissed without notice or being given a hearing and his terminal dues were not paid. At the time he was in the night shift when his boss came on foot and entered the farm and locked the premises from inside.

The claimant also testified that he took his annual leave every year.

In the year 2014 his starting salary was ksh.8, 000.00 plus a house allowance of Ksh.1, 500.00 per month. On the night his boss locked him in the premises, the human resource manager called him and removed from the security gate to the farm which the claimant declined as being sent to the farm was unfair. He was not found asleep while at work as alleged.

**Defence**

The defence is that the claimant was an employee of the respondent from 1<sup>st</sup> May, 2014 where he was paid a wage of ksh.5, 692.00 and a house allowance of ksh.1, 500.00 and in January, 2015 this was increased to ksh.5, 992.00 and house allowance of Ksh.1, 500.00 per month. In September, 2015 the wage was increased to ksh.6, 142.00 and all payments were in compliance with the wage orders.

The claimant was employed as a watchman and not security supervisor as alleged and termination of employment on 1<sup>st</sup> July, 2017 was lawful and procedural where the claimant was called to explain his misconduct when he had been found drunk and asleep while at work.

The defence is also that there was no underpayment of the claimant as alleged as the respondent complied with the wage orders applicable for the year 2013 to 2017. The claimant went on leave on full pay and was given ksh.2, 000.00 as leave travelling allowance. He worked for 60 hours per week all being 12 hours for 5 days in a week and then given 2 days off as provided for under the Agricultural Wage Orders. All the NSSF deductions made were remitted for the claimant and other employee.

The claimant was paid Ksh.6, 142.00 in lieu of notice and pay for 10 days accrued leave amounting to ksh.2, 040.00 upon termination of employment. The claims made are without merit and should be dismissed.

In evidence the respondent called Peter kabuba Njihia the human resource manager who worked with the claimant and on the morning of 24<sup>th</sup> June, 2017 he was informed that the claimant had been found asleep while at work. The claimant was given a chance to defend himself and he wrote a defence but the manager was not satisfied as he had found the claimant asleep and locked him.

Mr Njihia also testified that upon hearing the claimant's defence he decided to transfer him from the gate to the farm but the claimant declined to go to the farm and the manager said that such refusal to move should be taken as refusal to work and on this basis the claimant was paid in lieu of notice and for days accrued for leave. There was no overtime pay as the claimant was in a shift of 12 hours' work per day for 5 days a week and 2 days forest. The shifts were arranged in a manner which allowed every employee to work within the regulations. There was no underpayment as the respondent complied with the Wage Orders.

#### Determination

The respondent as the employer has submitted the contract of employment which had terms and conditions of employment for the claimant. He was employed as a watchman and not as a security supervisor. The wages paid addressed under the wage orders were appropriate.

By his own evidence, the claimant admitted that he went on annual leave. The claims made in this regard are therefore not justified.

The claimant was paid for the 10 days of leave which had accrued.

The claimant also admitted that on the night his boss locked him at his station, the next day he was called by the human resource manager and his station changed from gate security to the farm which he declined to take. He was emphatic that the allocated changes were unfair on him and therefore he declined to attend as directed. The claim for unfair termination of employment on this evidence is lost. Where the claimant was allocated work by the employer and he chose to do that which he found suitable to him and not as operationally required by the employer, he frustrated his own employment. He cannot be found to blame the respondent by claiming compensation.

The claimant in his submissions relied on the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2014] eKLR** on the basis that before termination of employment the employee should be allowed to attend a the hearing with the union representative. However this case is premised on different facts as against the cited case. The claimant admitted he was called to the office and given a hearing whereupon it was decided that his work station would be changed from the gate to the farm but he declined.

Employment did not terminate at the instance of the employer. The claimant by his own actions terminated his employment. Refusal to attend duty as directed by the employer is tantamount to a breach of the employment contract pursuant to the provisions of section 44(3) of the Employment Act, 2007;

*(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service*

By his conduct, the claimant should have been summarily dismissed. The payment in lieu of notice for one month was unnecessary in this instance.

Even where the defence is that the claimant was found drunk and asleep at work and there was a hearing which the claimant challenged, by his own evidence he compromised any unfairness which may have arisen by admitting that upon being called by the human resource manager his duty station was changed from the gate to the farm, a change he did not like. That compromised employment and therefore removed the respondent from blame.

The claims made for underpayment; overtime pay and compensation are not due.

The claimant ought to pay the costs due to the respondent.

**Accordingly the claim is hereby found without merit and is hereby dismissed with costs to the respondent.**

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

**M. MBARU JUDGE**

In the presence of: .....