



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 89 OF 2017

(Before Hon. Justice Mathews N. Nduma)

MOSES ACHACHA.....CLAIMANT

VERSUS

PRIDE KINGS SERVICES LTD.....RESPONDENT

JUDGMENT

1. The claimant seeks a declaration that his dismissal was unlawful and unfair and he be awarded maximum compensation in respect thereof. The claimant further seeks payment of terminal benefits including:

- (a) Arrear salary Kshs. 50,000.
- (b) Underpayments Kshs. 115,000
- (c) Three months salary in lieu of notice.
- (d) Payment for public holidays worked.
- (e) Costs and interest.

2. CW1 testified that he was employed by the respondent in February 2013 as a guard and supervisor later. That he worked continuously until October 2016. That he was based in Kisumu until he was transferred to Migori in June 20th 2016 and worked there till October 2016. That on 18th October 2016, the Director Mr. Onsado called him by phone and asked him to transfer to HomaBay as the Branch Manager. That he was sent Kshs 500 transport on Mpesa to go. The claimant did not get a letter of appointment or one for promotion and transfer.

3. That upon reporting to Homa Bay, he did not have facilities in his rented house. He slept on the floor. The claimant called Mr. Morris Onsado to assist him. Mr. Onsado sent him a further Kshs. 500 by mpesa. The claimant called the General Manager to get permission to go to Migori and collect his luggage. The general manager gave him the go ahead. That at the time he could not afford to buy food. The claimant left behind a supervisor named John.

4. Whilst the claimant was at home in Migori, one Mr. Johnstone called him and informed him to hand over to the supervisor and return to Kisumu. The following day he met the operations manager at the Kisumu Office named Fredrick Machuke. The claimant spent the night at the office that night.

5. On 31st November 2016, Mr. Machuke informed the claimant that he had been dismissed from work. The claimant went to the Director, Mr. Onsado who in turn told the claimant that he had deserted work. The claimant explained to him that he had obtained authority to go and pick his luggage in vain. The claimant got no letter of dismissal. He was not given notice nor paid in lieu of notice. The claimant went to the Labour Office Kisumu who referred him to an advocate hence the suit.

6. The claimant stated that his new salary as Branch Manager was Kshs. 25,000 per month from the year 2014. That in the year 2013, he was paid Kshs. 8,000. That at the time he was Assistant Manager. That he got no pay slip but his salary was paid through his bank account. That the salary was increased to Kshs. 15,000 and finally to Kshs. 25,000. The claimant produced a Bank statement to show payments by the respondent to his account at Equity bank.

7. Claimant told the court that the payment was irregular and was often not paid in full. That at time he got Kshs. 15,000 and other times Kshs. 16,000.

8. The claimant added that he was not paid in the month of June and September 2016 in the sum of Kshs. 50,000. The claimant said he had a good record. Had no warning and was dismissed for no valid reason and the respondent did not follow a fair procedure in dismissing him from work.

9. The claimant added further that in the years 2013 to 2016, he was underpaid by a sum of Kshs 115,000 in terms of the General Wages order for a supervisor in the security service.

10. That he was owed 120 leave days not taken at the time of dismissal.

11. That he worked 24 hours including during public holidays. That he was not paid double salary during holidays and was not paid in lieu of leave days not taken.

12. That he was often forced to sleep at work on his desk or in a company car. He claims three months salary in lieu of notice in the sum of Kshs. 75,000.

13. The claimant denied that he deserted work and says he has suffered loss and damage and the court to award him the reliefs set out in the memorandum of claim. The claimant produced documents showing his responsibilities as a Manager as exhibit '1'. He also produced minutes marked exhibit '8' to show that he served as a manager. That as at 2nd March 2014, he was an assistant Project manager. He produced a letter of interdiction to this effect.

14. The claimant also prays for grant of a certificate of service. He relied on his witness statement dated 3rd March 2017 as his additional evidence in chief.

15. The claimant was closely cross examined by advocate Odeny for the respondent. He produced identification cards depicting him as a manager. He insisted his salary was Kshs. 25,000. He denied that all salaries were paid. He denied he absconded work. He insisted that he worked all public holidays and did not receive double salary in terms of the law. He said respondent paid him irregular amounts to the account but his final salary was Kshs. 25,000. That in the last day it was Kshs. 15,000 and initially was Kshs. 8,000.

16. RW1 Fredrick Mashuke testified that he was the Human Resource Manager of the Respondent. He said that he has never met the claimant and relied on official records. RW1 told the court that the claimant deserted duty on 31st October 2016 and that his employment was not terminated. That respondent wrote a letter dated 14th November 2016 to the County Labour Office notifying them of the desertion by the claimant. That the claimant was a supervisor and not a manager. That respondent paid his salary and he was not owed arrears. That on 30th October 2016, the claimant was sent Kshs 500 for Airtime but it was not for upkeep. That the claimant was paid salary on 4th June as per his statement.

17. RW1 stated that the letter of introduction merely showed his roles and did not designate him as manager. RW1 stated that the claimant got no letter of appointment. His duties were given verbally. That he was never promoted. That the claimant deserted whilst stationed at HomaBay. RW1 said there was no letter of transfer or facilitation. RW1 insisted that the claimant was to report to one Jackson in HomaBay but he did not report. RW1 denied that the claimant was recalled to Kisumu and then dismissed. RW1 prays the suit be dismissed with costs.

Determination

18. The issues for determination are:

(a) Whether the claimant was unlawfully dismissed from work or he deserted.

(b) Whether the claimant is entitled to the reliefs sought.

Issue A

19. The testimony by the claimant that he was transferred to HomaBay on 18th October 2016 and only given Kshs. 500 on mpesa for upkeep is compelling. The claimant was not afforded opportunity and means to relocate his house hold goods. The court believes the claimant's testimony that he was forced to sleep on the floor without a bed at HomaBay until 31st October 2016 when he went back to Migori to bring his house hold goods. The respondent considered this to be desertion and recalled the claimant to Kisumu head office where the claimant was made to spend an unpleasant night at the office desk and was fired the following day. This testimony is compelling and truthful. The claimant had no reason to desert work when according to him he had been promoted from supervisor to a manager at Migori and HomaBay.

20. It is the court's considered finding that the claimant was unlawfully and unfairly dismissed from work. He was kept without funds and denied opportunity to relocate his luggage to Homa-Bay. There was no evidence that the claimant deserted work. The court rejects this testimony by RW1 who in any event did not have firsthand information on what transpired and had never personally met the claimant. There is no explanation why the Director Mr. Onsado who had dealt with the claimant was not available to testify. Similarly, the supervisor to whom the claimant had handed over at Homa-Bay Mr. Johnstone was also not called to testify.

21. The court finds that the respondent violated *Sections 41, 43 and 45 of the Employment Act*, in the manner it dismissed the claimant from employment for no valid reason and without following a fair procedure. The claimant is entitled to compensation in terms of *Section 49(1)(c) and (4) of the Employment Act 2007*.

22. The claimant served the respondent for about three (3) years in which period he was moved from Kisumu to Migori and to Homa-Bay.
23. The respondent did not present any credible adverse record against the claimant. The claimant's work was frustrated by lack of facilitation by the respondent and was victimized for wanting to get himself prepared to relocate to Homa-Bay.
24. The claimant wished to continue working for the respondent. The claimant was not paid terminal benefits upon dismissal. The claimant did not get notice nor any payment in lieu of notice. The claimant got no hearing at all and was forced to stay in squaller conditions at Homa-Bay.
25. The court awards the claimant the equivalent of six (6) months salary in compensation for the unlawful and unfair dismissal. The court finds that the claimant was able to demonstrate through bank statements that he was paid maximum of Kshs. 15,451.15 per month. In other months the amount varied to Kshs. 15,345.15 and Kshs. 15,225.65.
26. The respondent did not provide pay slips to confirm the actual salary paid to the claimant. The claimant testified that he was earning Kshs 25,000 upon promotion to manager position. There was no documentary proof to this effect.
27. The court utilizes a monthly salary of Kshs. 15,345.15 for purposes of computing compensation. The total award is Kshs. 92,070.90. The claimant is also entitled to one month salary in lieu of notice in the sum of Kshs. 15,345.15. RW1 was unable to refute that the claimant had worked 40 public holidays and was not paid double salary. The court awards the claimant Kshs 20,460.20. The claimant was also owed two months arrear salary in the sum of Kshs. 30,690.30 and is awarded accordingly.
28. The claim for underpayment was not proved and is rejected.
29. In the final analysis, judgment is entered in favour of claimant as against the respondent as follows:
- (a) Kshs. 92,070.90 in compensation.
 - (b) Kshs. 15,345.15 in lieu of notice.
 - (c) Kshs. 20,460.20 being salary for 40 public holidays worked and not paid double salary.
 - (d) Kshs. 30,690.30 being two months arrear salary.
- Total award Kshs. 158,565.80.
- (e) Interest at court rates from date of judgment till payment in full in respect of (a) above and from date of filing suit in respect of (b), (c) and (d) above.
 - (f) Costs of the suit.

Judgment Dated, Signed and delivered this 7th day of May, 2019

Mathews N. Nduma

Judge

Appearances

M/S Aroni for claimant

Mr. Odeny for Respondent

Chrispo – Court Clerk