



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 295 OF 2014

ISAAC MULI MUASYA.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2019)

JUDGMENT

The claimant filed the statement of claim on 03.03.2014 through Waweru Kihara & Company Advocate. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant was wrongfully and unlawfully dismissed from employment.
- b) Kshs.123, 480.00 (being Kshs.16, 000.00 one month pay in lieu of notice; 4 months underpayment of salary Kshs.26, 480.00; unpaid dues for the days worked December Kshs.8, 000.00; 3 months compensation for unfair termination Kshs.48, 000.00; refund on uniform and boots Kshs.2, 800.00; house allowance for 7 months Kshs.35, 000.00; and unpaid 12 leave days Kshs.7, 200.00).
- c) Certificate of service.
- d) Any other or further relief including underpayments in salary that the court may deem appropriate.

The respondent filed the memorandum of response through Masika & Koross Advocate. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that the parties were in a contract of service. The respondent employed the claimant on 01.06.2012. The claimant states that he was employed to be in charge of operations of guards at Athi River. He testified that he was told that he was the Assistant Operations Manager and later told that he was a supervisor. He testified that he served as a supervisor from June 2012 to 15.12.2012 and the contract was verbal. He testified that he was never told that he was serving on probationary terms. As a supervisor, the claimant testified that he was to be paid Kshs.18, 000.00 but instead he was paid Kshs. 9, 380.00 per month. He testified that he severally complained about the pay both verbally and in writing and the complaint letters were held on his personal file in the respondent's custody and none had been filed in Court. That the salary was later increased to Kshs.14, 500.00. It was his evidence that in June, July, and August 2012 he was paid Kshs.9, 380.00 and in September 2012 his salary was increased to Kshs.14, 500.00 per month. Further in October 2012 he was paid Kshs.16, 110.00 and not Kshs.18, 000.00 paid to all other supervisors. In November the salary came down to Kshs.15, 900.00 and the claimant testified that he complained again. In the circumstances, the accountant summoned him at head office and verbally terminated his employment by telling him that his services were no longer needed. He was paid salary for days worked up to 15.12.2012. The claimant testified that the termination was without notice and without a certificate of service.

He claimed a refund of Kshs.2, 800.00 because he was deducted for uniform but the uniform was never provided. He claimed house allowance for the period worked of 5 months from 01.06.2012 to 15.12.2012. He also claimed pay for 12 leave days.

The respondent's witness (RW) was Salome Otiende Omondi, the respondent's human resource manager. Her evidence was that the claimant was initially employed as a guard and in September 2012 he was elevated to a supervisor but he failed to perform as was expected and his probationary service as a supervisor was terminated when he deserted and never came back. The arrears indicated on the pay slip were part of the uniform refund which had been deducted for only 3 months. As a guard he was paid Kshs. 9, 380.00 and as a supervisor Kshs. 14, 500.00 per month.

The Court has considered the pleadings, the evidence and the submissions and determines the matters in dispute as follows:

1) The evidence is that the claimant's contract of service was terminated on 15.12.2012. The suit was filed on 03.03.2014. The Court finds that the claims for underpayment and house allowance were both continuing injuries which ceased on 15.12.2012 when the cause of action also accrued as per section 90 of the Employment Act, 2007. The Court returns that for the continuing injuries, the cause of action for such claims was time barred as the 12 months of limitation had already lapsed as at time of filing suit. The Court will not therefore go into merits of the two claims.

2) RW testified that the claimant deserted and never came back to work again. The respondent has not given a reason why the appropriate disciplinary proceedings were not preferred against the claimant. RW further contradicted herself by testifying that the probationary contract was terminated for unsatisfactory performance. Such contradictory evidence cannot be trusted. The Court finds that the claimant was unfairly terminated when he complained about the underpayment and the reason for termination was unfair under section 46 of the Act, namely, initiating a valid complaint. The Court has considered that the claimant had served for only 5.5 months and he is awarded 2 months salaries at Kshs. 15, 900.00 as per November pay slip making **Kshs. 31, 800.00** for unfair termination under section 49 of the Act. He is further awarded one month pay in lieu of termination notice **Kshs.15, 900.00**. He is also awarded half month salary **Kshs.7, 950.00** for days worked up to 15.12.2012.

3) The respondent did not deny liability to refund uniform but alleged that the same was refunded as salary arrears. The Court finds that nothing stopped the respondent from itemising uniform refund as such in the payslips and the Court returns that the claimant has established that **Kshs. 2, 800.00** for uniform refund is due.

4) The claimant is not entitled to annual leave because he had not worked for 12 months and leave had not accrued per section 28(1) (a) as submitted for the respondent.

5) The claimant is entitled to a certificate of service as per section 51 of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.
- b) The respondent to pay the claimant a sum of **Kshs. 58, 450.00** by 01.08.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.
- c) The respondent to deliver to the claimant by 01.08.2019 the certificate of service per section 51 of the Act.
- d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 28th June, 2019.

BYRAM ONGAYA

JUDGE