



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 675 OF 2017

BETWEEN

JUMA IHA BENSON.....CLAIMANT

VERSUS

PROTECTIVE CUSTODY LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

C. O. Tolo & Company Advocates for the Claimant

Oduor Simiyu & Company Advocates for the Respondent

JUDGMENT

1. In his Statement of Claim filed on 18th August 2017, the Claimant seeks Judgment against the Respondent in the following terms:-

- a. 1 month salary in lieu of notice at Kshs. 4,000.
- b. Leave of 8 years at Kshs. 32,000.
- c. Arrears of house allowance at Kshs. 62,400.
- d. Public holidays at Kshs. 25,230.
- e. Unremitted N.S.S.F contributions at Kshs. 36,000.
- f. Overtime at Kshs. 260,000.
- g. Underpayment of salary at Kshs. 232,739.
- h. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 48,000.

Total...Kshs. 700,369

- i. Declaration that termination was unfair.
- j. Costs.
- k. Interest.

2. The Claimant avers that he was employed by the Respondent in July 2006, as a security guard. He was initially paid Kshs. 3000 monthly. His salary was raised to Kshs. 4,000 monthly in 2013. He sought financial assistance from the Respondent in early January 2015, to enable him take his daughter to secondary school. Management responded with a lot of hostility, asking the Claimant to resign if he so wished. On 2nd February 2015, the Claimant found a new Guard had been assigned his guarding area at Mkomani, Mombasa. He was locked out, and attempts to call Management were not successful.
 3. Termination violated the Employment Act and Protective Security Services Order. The Claimant was not allowed to take annual leave. He was denied house allowance. He worked on Public Holidays without compensation. On normal days he put in excess hours, without overtime pay. N.S.S.F. was deducted, but not remitted. His salary was underpaid.
 4. The Respondent filed its statement of Response and Counter-Claim, on 10th October 2017.
 5. It is conceded that the Claimant was employed by the Respondent. His gross salary was Kshs. 11,000, which came to Kshs. 4,000 after deduction. He deserted duty. He did not work on Public Holidays. He lied to a colleague on 5th November 2014, that the Respondent had granted him 3 months' leave. The Respondent, un-aware that the Claimant had deserted, continued to pay Claimant's salary and benefits for 3 months ending February 2015. The Respondent made a missing person report to the Police, as shown in OB number 6/24/1/2015. The Respondent counterclaims basic salary, house allowance, meal allowance and medical allowance of 3 months, amounting to Kshs. 64,000 from the Claimant. The Respondent prays the Court to allow the Counterclaim, dismiss the Claim, with costs to the Respondent.
 6. The Claimant filed Response to the Counter-Claim on 29th November 2017. He did not desert duty. He was not paid salary, house allowance and meal allowance, as alleged in the Counter-Claim.
 7. The Claimant gave evidence, and closed his case on 29th October 2018. The Respondent applied for adjournment on the same date, intimating it had 2 Witnesses, who were not present in Court. The Claimant objected to the application, submitting that there was not a single Statement of any Witness filed by the Respondent, as of 29th October 2018. The Respondent was granted leave, way back on 30th November 2017, to file Witness Statements.
 8. The Court agreed with the Claimant, ordered proceedings closed, and Parties to file their Closing Submissions, within 14 days each.
 9. They confirmed filing of Submissions, on 4th February 2019.
 10. The Claimant adopted his Witness Statement, which is a re-run of his Statement of Claim, as summarized at the outset of this Judgment.
 11. He asked the Respondent for financial assistance, he was told there was no money. He returned on 2nd February 2015, and was asked to go home, he would be recalled. He was never recalled. He did not desert. There was no hearing in any shape or form. There was no notice. He was denied overtime pay. N.S.S.F. contributions were partly remitted. The salary of Kshs. 4,000 was way below the legal minimum.
 12. Cross-examination was quite brief. The Claimant had cordial working relationship with the Respondent. He worked with another Guard. His child was joining Secondary School. He was accommodated at the place of work.
- The Court Finds:**
13. The Claimant was employed by the Respondent as a Security Guard, between July 2006, and 2nd February 2015.
 14. His first salary was kshs. 3000 monthly, and last Kshs. 4,000 monthly.
 15. There is no evidence in any form showing, as alleged by the Respondent, that the Claimant was paid a total salary of Kshs. 11,000, and that Kshs. 4,000 was net salary.
 16. The amount of Kshs. 4,000 paid to the Claimant in monthly salary, defied the minimum wage applicable under various Wage Orders, over the period of service.
 17. The Claimant conceded in his evidence, that he was accommodated by the Respondent. His prayer for house allowance has no foundation.
 18. Similarly, the Statements of Account availed to the Court show that N.S.S.F. contributions were consistently remitted. If any deduction was made, and not remitted, at any one time, the Claimant should follow up payment with the N.S.S.F., instead of seeking to have refund, of what is clearly a statutory payment.
 19. His evidence does not establish the number of excess hours worked, to justify overtime pay of Kshs. 260,000. There is no attendance register or other form of clocking system, showing excess hours worked. The Claimant did not supply evidence sufficient to establish the prayer of overtime pay.
 20. This applies to the payer for Public Holidays. There is no evidence that the Claimant was on duty on any Public Holidays.
 21. The prayer for underpayment of salary is supported by various Wage Orders exhibited by the Claimant. The Claimant also gave

persuasive evidence on the rate of Kshs. 3,000 and Kshs. 4,000, paid as first and last salary respectively. These rates violated the minimum wage standards, and denied the Claimant a living wage.

22. The legal notices exhibited by the Claimant, and his computation of underpayment of salary under paragraph 16 (vii) of his Statement of Claim, **are sufficient to enable the Court allow the prayer for underpayment of salary, at Kshs. 232,739.**

23. There is no evidence presented by the Respondent to show that the Claimant deserted. No Witnesses were called by the Respondent to support this position. The account given by the Claimant is that he was locked out, and replaced, after he asked the Respondent for financial assistance, to take his daughter to secondary school. The Respondent paid the Claimant a salary way below the minimum standard. When he was unable to finance his daughter's secondary education, he implored the Respondent to assist. Instead, the Respondent asked the Claimant to resign if he so wished, before dismissing him, and assigning his job to a new Guard.

24. There was no notice. There was no valid reason. There was no hearing. And no charges. Termination was unfair, under Section 41,43 and 45 of the Employment Act.

25. **The Claimant is granted 1 month salary in lieu of notice at Kshs. 10,911, based on the Regulation of Wages (General) (Amendment) Order 2013.**

26. Compensation for unfair termination ought to be made, based on the legal minimum payable, not the unlawful rate of Kshs. 4,000 paid monthly to the Claimant. **He is granted equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 130,932.**

27. The Respondent failed to supply Claimant's annual leave records to discount his claim, that he never went on leave, or get compensated in lieu thereof.

28. His computation of annual leave pay ought to be pegged to 21 days over a period of 8 years. The applicable rate ought to be based on the minimum salary payable, under the relevant Wage Orders. The Claimant has not done his computation properly based on the correct, legal, basis but instead adopts a monthly salary of Kshs. 4,000 for 8 years, as annual leave pay. Unlike the prayers for compensation and notice pay, where the Court has assisted the Claimant by adopting the monthly salary lastly payable to the Claimant, the Court is not in a position to work out annual leave payable under the various Wage Orders, running back to 2006. It is likely the total sum of annual leave pay would outstrip the sum of Kshs. 32,000 pleaded by the Claimant, had the Claimant placed faithful reliance, on the various Wage Orders. **He is allowed the bare minimum of annual leave pay as pleaded, at Kshs. 32,000.**

29. There is absolutely no evidence in any form to support the Counter-claim. There is no evidence of desertion. Even if there was, it is not shown that the Claimant was paid a sum of Kshs. 64,000 by the Respondent, warranting refund. There is no evidence of irregular payment.

IN SUM, IT IS ORDERED: -

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: underpayment of salary at Kshs. 232,739; 1 month salary in lieu of notice at Kshs. 10,911; equivalent of the payable 12 months' salary in compensation for unfair termination at Kshs. 130,932; and annual leave pay Kshs. 32,000 – total Kshs. 406,582.

c. Costs to the Claimant.

d. Interest allowed at 14% per annum, from the date of Judgment till payment in made full.

e. The Counterclaim is not supported by evidence and is rejected.

Dated and delivered at Mombasa this 20th day of June, 2019.

James Rika

Judge