



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE 271 OF 2015

EDWARD OMBATI SOSSI.....CLAIMANT

VERSUS

MOCAM SECURITY SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant averred that he was employed by the respondent as Security Guard Supervisor from 7th August, 2013 and worked until 15th June, 2014 when his services were terminated by the respondent. Upon termination the respondent failed to pay his terminal dues which included house allowance, overtime, public holidays worked, underpayment and uniform refund.

2. The claimant averred that as supervisor it was verbally agreed that his monthly salary would be Kshs 25,000/= per month and a daily meal allowance of Kshs 200/= yet the respondent only paid him Kshs 15,000/= per month. The claimant further pleaded that he worked daily from 6.00 p.m. to 7.00 p.m. worked 5 hours overtime.

3. In response, the respondent stated that the claimant was not employed until 6th November, 2013 as claimed. The respondent further averred that it never terminated the claimant's services and that the claimant on his own volition deserted work breaking the code of conduct with the respondent. According to the respondent, they agreed with the claimant that he would be paid a salary of Kshs 15,000/= during probation which was 3 months subject to review after probation.

4. It was further agreed that the claimant's salary would be increased on 6th November, 2013 when he was to sign a new contract if the respondent was satisfied with his performance. In the month of August, 2013 the claimant worked for only 16 days and on 23rd August, 2013 the claimant resigned from work as he was going for studies on full time basis. On 1st November, 2013 the claimant had a meeting with the Operations Manager in which they agreed to reengage the claimant as a supervisor at Ridgeways mall. The basic salary was agreed at Kshs 15,000/= per month. On 1st December, 2013 after reviewing the claimants work he was paid Kshs 18,000/= per month.

5. On the month of November 2013 and March 2014 the claimant worked at Ridgeways Mall but was rejected by management because he was not taking into consideration client's complaints. The claimant was therefore in the month of April, 2014 deployed to H. Young company along Funzi Road. The claimant thereafter deserted duties after requesting on 28th May, 2014 for an off-day to visit his son in school. He never returned to work. The respondent further counterclaimed the sum of Kshs 17,000/= being a loan advanced to the claimant upon his request.

6. In his oral evidence the claimant further stated that he worked for the respondent close to one year and that there was interruption because he was terminated. He worked until 15th June, 2014. He was never given a reason for termination nor any notice. Previously he was reporting to work but was never deployed. He was told the company was running short of work and was told he would be called when there was work. He further stated that he applied for a loan of Kshs 15,000/= which he was given. He signed for the loan. On 8th May, 2014 he applied for another loan of Kshs 20,000 which he was never given.

7. He denied receiving Kshs 17,000/= as alleged. He further denied deserting duty on 28th May, 2014. According to him his uncle died and he asked for permission to attend the funeral. He was given two days off. He resumed work on 30th May, 2014. The claimant further stated that he mostly used to work at night from 6 pm to 6 am and was never paid overtime or public holidays. His official working hours were 8.

8. In cross-examination he stated that he worked for around 9 months and that he was not paid for September and October, 2013 because he was on unpaid study leave. He denied resigning and that he wrote asking why he was not paid Kshs 25,000/= as other supervisors. He continued to receive Kshs 15,000/= and denied that his salary was increased to Kshs 18,000/=.

9. The respondent's witness Mr Elijah Kirwa stated that the respondent did not terminate the claimant's service and that he deserted work. It was further his evidence that the claimant never reported to work in the month of June. It was further his evidence that the claimant owed the respondent about Kshs 20,000/= and that he was advanced Kshs 17,000/=. He further denied that there was an agreement to pay the claimant Kshs 25,000/=. Further that the claimant's salary was inclusive of all allowances including house allowance.

10. At the conclusion of this case it was not quite clear how the parties herein separated. Whereas the claimant alleges that the respondent told him to stay away that he would be called when work is available he at the same time claims the respondent terminated his services. The respondent on the other hand avers the claimant deserted duties.

11. Under the Act, the burden of proof that a proper termination took place rests on the employer. The respondent claims the claimant deserted work but did not tender any evidence to show that any effort was made to seek the whereabouts of the claimant at the point of dismissal for absconding duty. That being the case, the court is not convinced that the respondent has discharged the burden cast upon it by law. The court will therefore in the circumstances award the claimant four months salary as compensation for unfair termination of service.

12. On the other claims for overtime and underpayment and leave, the claimant did not adequately prove these claims. First of all the claimant had worked for approximately 9 months with breaks in between for studies and also to attend funeral hence it was not clear whether leave had accrued. On the issue of underpayments the claimant never produced or pleaded any relevant minimum wage guidelines to show there was any under payment for a person of his category. The court therefore disallows these heads of claim.

13. In conclusion the court awards the claimant the sum of Kshs 60,000/= being four months' salary as compensation for unfair termination. The claimant shall further have costs of the suit. The award shall attract interest at court rates from date of judgement but shall be subject to taxes and statutory deductions.

14. It is ordered.

Dated at Nairobi this 14th day of June, 2019

Abuodha J. N.

Judge

Delivered this 14th day of June, 2019

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.