



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

CAUSE NUMBER 2008 OF 2015

BETWEEN

WILFRIDAH KEROSI MOCHERE.....CLAIMANT

VERSUS

FALCON SECURITY SERVICES LIMITED....RESPONDENT

Rika J

Court Assistant: Lawrence Osotsi

Nyabena Nyakundi & Company Advocates for the Claimant

Owiti, Otieno & Ragot, Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 11th November 2015. She states she was employed by the Respondent Company, on or about 1st June 2013, as a Security Guard, on a monthly salary of Kshs. 10,874. The Respondent terminated her contract on or about 31st May 2015. Termination was without notice or valid reason. She seeks Judgment against the Respondent in the following terms:-

- a. 1 month salary in lieu of notice at Kshs. 10,874.
- b. Service gratuity at 15 days' salary for each complete year at Kshs. 10,874.
- c. House allowance at 15% of the basic at Kshs. 24,466.
- d. Uniform refund at Kshs. 50 monthly, for 24 months, at Kshs. 1,200.
- e. Money illegally deducted while on sick leave at Kshs. 6,681.
- f. 12 months' salary in compensation for unfair termination at Kshs. 130,488.
- g. Salary for 14 days worked in June 2015 [unspecified]
- h. Overtime over a period of 24 months, for 4 hours daily, 6 days weekly, at Kshs. 156,556.

Total... Kshs. 346,216

- i. Original school and college certificates.

- j. Certificate of service.
- k. Declaration that termination was unfair.
- l. Costs.
- m. Interest.
- n. Any other suitable relief.

2. The Respondent filed its Statement of Response on 21st July 2016. The Respondent concedes to have employed the Claimant as a Guard. She initially worked on 1 year contract, beginning 26th June 2013, ending 25th June 2014. The contract was renewed from 26th June 2014 to 25th June 2015. There was no legally binding contract after 25th June 2015. The Claimant was assigned duty at KCB Capital Centre ATM, on 29th June 2015. She was found to be absent when her Supervisor made a routine visit at the site. The Respondent was compelled to assign guarding duty at the ATM to another Officer. The Claimant emerged after 1 ½ hours, explaining that she had taken a tea-break. She was not supposed to leave the ATM unguarded. She was asked to report to Respondent's Office for disciplinary processing. She never did so. The Respondent made attempts to trace her without success. She deserted. Her Claim has no merit. The Respondent urges the Court to dismiss the Claim with costs.

3. The Claimant, and Respondent's Human Resource Officer Mary Undisa Oyangi, both gave evidence on 3rd April 2019 during the Court's Service Week at Nairobi.

4. The Claimant restated in her evidence, her employment history, details, terms and condition of service. She was not paid house allowance until the year 2015. She was not given a letter of termination. There was no notice, and no reasons were given justifying termination. She was told by her Supervisor Muritu, on 31st May 2015, that there was no more work. It is not true that the Claimant deserted. She signed some documents in 2014. The Respondent did not tell her what the documents were about. She received her school and college certificates and no longer wished to pursue this prayer.

5. On cross-examination the Claimant told the Court that she signed a document on recruitment before she was taken to the site. She understood this was a contract. The contract shows the applicable period. There was no rest, Monday to Sunday. The contract provided for 1 rest day. She never went on annual leave. She worked from 6.00 to 6.00. She was not paid house allowance and overtime. Her April 2015 pay slip showed she received basic salary of Kshs. 9,542 and house allowance of Kshs. 1,431. In December 2014, there was single salary shown at Kshs. 10,874. The contract stated her monthly salary was consolidated. She was not advised what consolidated, means. The contract stated the Employee would notify the Employer about any salary discrepancy within 7 days of noticing the discrepancy. She was dismissed on 31st May 2015. The Supervisor found her at the ATM. She did not desert when invited for disciplinary processing. She was not paid overtime except in 2015. She has not pleaded overtime for 2013-2014. She did not work in June 2015. In February 2014, she is shown to have received overtime of Kshs. 2,088. Pay slip for July 2014 does not reflect any illegal deductions. She did not wish to pursue the prayer for salary for 14 days worked in June 2015. She testified that she worked 7 days a week. Her Pleadings state she worked 6 days a week. N.S.S.F contributions were deducted from her salary. She did not know if they were remitted. She returned the work uniform.

6. Redirected, she testified that she was hospitalized when illegal deductions were made from her salary. Her salary was not consolidated. She worked 7 days a week, but had 4 continuous rest days in a month.

7. Mary Undisa Oyangi confirmed that the Claimant was an Employee of the Respondent. She was employed on 2 different annual contracts, between 2013-2014 and 2014-2015. Her salary was consolidated. She was to work 225 hours in a month, as provided for under Protective Security Services Wage Order. The Respondent deducted from her salary, the hours she was absent. She never gave evidence of illness or hospitalization, for the period she alleges to have been hospitalized and deducted salary illegally. The Claimant was not allowed to take tea-break from her assigned duty at KCB ATM. Supervisors found her absent. One Supervisor was assigned duty at the ATM. When the Claimant returned after 1 ½ hours, she was asked by the Supervisor to report to the Office for disciplinary hearing. She disappeared. Attempts by the Respondent to reach her were fruitless. The Respondent did not terminate her contract. She went away with the uniform. She did not clear with the Respondent.

8. Cross-examined, Oyangi told the Court she did not draw the contract of employment on record. She did not know if the Claimant was availed copies. She was employed in June 2013. She worked 6 days a week. 4 continuous days of rest were given in a month. She was paid for overtime hours. The Respondent did not have in Court, the attendance register. Guards signed in and out every day. The Respondent did not issue notice to show cause. There was no notice of termination, because the Respondent did not terminate. The Claimant was asked to attend disciplinary hearing. She disappeared. Oyangi called the Claimant. Her phone did not go through. The Respondent did not write to the Claimant, not even after the Respondent received demand letter from Claimant's Advocates. Redirected, Oyangi testified that the Claimant did not ask for production of the attendance register.

The Court Finds:-

9. The Claimant worked for the Respondent for 2 years. She first worked on a year contract, running from 26th June 2013 to 25th June 2014. The second covered the period 26th June 2014 to 25th June 2015.

10. The Claimant did not complete her second contract, having left employment on 31st May 2015, in contentious circumstances.

11. She has withdrawn her claim for return of her original school and college certificates.

12. Similarly she conceded in her evidence that she did not work in the month of June 2015, and her claim for salary for 14 days worked in June 2015, shall similarly be treated as having been withdrawn.
13. There is persuasive evidence given by Respondent's Witness to show that the Claimant received overtime pay, as and when she worked overtime. There is payment of overtime reflected in more than one pay slip on record. She has not justified her claim for overtime for the entire period of 24 months. The prayer for overtime has no merit.
14. The Respondent exhibits the second contract which described Claimant's salary as consolidated. The pay slips for 2015 however show a split basic salary and house allowance. In February 2015, the Claimant was for instance paid basic salary of Kshs 9,542 and house allowance of Kshs. 1,431. In June 2015, she was paid, presumably salary for May 2015, at a basic of Kshs. 10,687 and house allowance of Kshs. 1,603. In December 2014, house allowance is shown at nil, and basic salary is shown at Kshs. 10,874.
15. The Respondent's use of the term 'consolidated salary' in the second contract is befuddled. It is stated that overtime pay as well as house allowance is included in this consolidated salary. This does not make sense in light of the explanation by the Respondent, which the Court has accepted, on payment of overtime. It does not make sense viewed against the different pay slips, where salary is split into basic and house allowance, or shown as basic alone with house allowance indicated as nil.
16. The confusion must be resolved in favour of the Claimant. There is no evidence that she was paid house allowance for the period June 2013 to December 2014, a period of 18 months. Her basic salary for December 2014 was Kshs. 10,874. 15% of this for 18 months, results in house allowance arrears of Kshs. 29,359. **The Claimant is granted house allowance in arrears at Kshs. 29,359.**
17. There is no evidence that there were illegal deductions made upon Claimant's salary. She alleges she was hospitalized and deductions made for her absence. She did not give evidence to show she had sick leave. Did she supply the Respondent with medical evidence and was she allowed sick leave? If there was deduction made, and she has not shown deduction was made, it would not be illegal because she was away without the knowledge and authorization of the Respondent. The prayer for refund of illegal deduction is declined.
18. Gratuity under the Protective Security Services Order 1998, is payable to Guards who have completed 5 years of service. The Claimant worked for 2 years, and is not entitled to gratuity. The clause does not provide for pro-rata gratuity. Under the service pay regime created through Section 35 of the Employment Act, the Claimant is not eligible for service pay. Her pay slips show she was subscribed to the N.S.S.F. She testified that contributions were deducted from on her salary, but that she did not know whether they were remitted. She has not established her claim for service pay, or gratuity payable in the protective security services industry.
19. The Protective Security Services Order requires that Guards are provided with Uniforms, and that they return such Uniforms upon termination. The Claimant was issued Uniform and deducted a sum of Kshs. 50 monthly, as the cost of the Uniform. She would be entitled to refund of this uniform deduction, upon return of the Uniform. She testified that she gave the Uniform to Respondent's Advocates who deny receiving such Uniform. The Court is of the view that the Claimant has not established she returned the Uniform to the Respondent. She claims Kshs. 1,200. In event it is true that she left the Uniform with Respondent's Advocates, the Court can only leave it to the conscience of Respondent's Advocates to release the amount of Kshs. 1,200 to the Security Guard. Of what benefit would a Security Guard's Uniform be to an Advocate? There is no basis however, for a specific order of uniform refund, issued against the Respondent.
20. Lastly is the question whether the Claimant's contract was terminated unfairly.
21. She was assigned duty at KCB ATM. She was found to be absent for 1½ hours when her Supervisors made their routine rounds. It is not clear from the evidence of the Parties when the incident occurred. The Respondent in its report on record states this was on 29th June 2015. The last contract lapsed 25th June 2015. The Claimant states her contract was terminated on 31st May 2015, and she did not work in June 2015.
22. She was found absent from the KCB ATM. One of the Supervisors took over the unattended site. The Claimant showed up after 1½ hours and explained she had gone to take tea. The Supervisor took over, advising the Claimant to report to the Office for disciplinary hearing. The Claimant disappeared.
23. The Claimant on her part states that she was told by the Supervisor that there was no more work.
24. The Court notes that the Claimant's contract was to lapse on 25th June 2015. If she was dismissed on 31st May 2015, she had 25 days left in her contract. If she was dismissed on 29th June 2015, her contract had already expired and the Respondent correctly told her, there was no more work.
25. She left her assigned place of work, unguarded. Called upon to account, she placed herself out of the reach of the Respondent. The Respondent would have valid reason in terminating her contract 25 days earlier than contracted.
26. The Court does not think in the circumstances, that prayers for compensation for unfair termination and notice are justified.
27. **Certificate of Service to issue.**
28. **No order on the costs.**
29. **Interest allowed at 14% from the end of the contract period, 25th June 2015, till payment is made in full.**

IN SUM, IT IS ORDERED: -

- a. **The Respondent shall pay to the Claimant arrears of house allowance at Kshs. 29,359.**
- b. **Certificate of Service to issue.**
- c. **No order on the costs.**
- d. **Interest allowed at 14% per annum from the end of the last contract, 25th June 2015, till payment is made in full.**

Dated and signed at Mombasa this 3rd day of June 2019

James Rika

Judge

Dated, delivered and signed at Nairobi this 14th day of June 2019.

Byram Ongaya

Judge