



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 174 OF 2018

CONSOLIDATED WITH CAUSE NOS. 175, 176, 177 & 178 OF 2018

PATRICK WAWERU MANG'ERE & 4 OTHERS.....CLAIMANTS

VERSUS

GILLY SECURITY AND INVESTIGATIONS SERVICES....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent for unlawful termination without notice. The Claimants brought separate individual suits being Cause No. 174 of 2018 Patrick Waweru Mang'ere, Cause No. 175 of 2018 Joseph Irungu Kamau, Cause No. 176 of 2018 James Kang'ethe Kihara, Cause No. 177 of 2018 John Chege Mang'ere and Cause No. 178 of 2018 Wilson Kuria Maina. All these suits were consolidated for purposes of hearing and this file was the lead file. The 1st Claimant averred that he was employed by the Respondent as a guard on 13th April 2012 earning Kshs. 6,500/- a month. At the time of termination he earned Kshs. 11,000/-. The Claimant averred that the Respondent deducted Kshs. 400/- a month as NSSF dues never remitted the same to the NSSF account. The Claimant averred that he worked tirelessly for more than 12 hours and including holidays but he was never paid overtime and neither was he paid in lieu of leave. He averred that his services were terminated sometime in April 2016 and that the Respondent relocated its offices to Nairobi without notifying him. The Claimant prays for judgment against the Respondent and a declaration that his termination was unlawful, Kshs 108,748 being terminal dues for non-payment of public holidays, underpayment of salary, house allowance and severance pay, damages for unlawful dismissal as well as costs of the suit.

2. In its defence, the Respondent averred that it paid the NSSF dues for the Claimants faithfully. It averred that the Claimants absconded duty and they were therefore not terminated as alleged. The Respondent averred that the claims were time barred under Section 90 of the Employment Act. It asserts that the suits are frivolous, vexatious and an abuse of the court process. The Respondent averred that the Claimants are not entitled to the reliefs sought and the suits should be dismissed with costs.

3. The Claimants all testified. They adopted their statements and produced their bundles of documents while the Respondent called one witness. In cross-examination, Patrick Waweru Mang'ere, the Claimant in Cause No. 174 of 2018 confirmed that his salary was Kshs. 8,000/- a month and that he used to work on all days except one day per week that he would have an off day. He stated that he used to work on all holidays and was not paid any extra amount for holidays. He stated that NSSF and NHIF were sometimes paid and sometimes these were not paid. He testified that nobody informed him that his contract had come to an end and that the Respondent just disappeared and only came to collect the uniform. He also stated that the Respondent never used to pay him house allowance and confirmed that he was employed in 2011.

4. Next up was Joseph Irungu Kamau, the Claimant in Cause No. 175 of 2018. He testified that he was employed in May 2012 and was earning Kshs. 8,300/- a month. He stated that he used to go on off and he used to work on holidays but was not paid for holidays worked. He testified that the Respondent left and Brinks Security took over and that he joined Brinks Security in May 2016 where he is earning a salary of Kshs. 13,000/- a month. He confirmed not everyone continued working with the new company. He also stated that there were NSSF payments that were not made but confirmed that NHIF payments were made.

5. James Kang'ethe Kihara, the Claimant in Cause No. 176 of 2018 stated that he was employed in 2013 and that they used to go on off, he stated that he worked on all public holidays. He confirmed that Brinks Security took over from the Respondent but they were not told to go to Brinks for redeployment. However, he was employed by Brinks Security in May 2016. He contended that NSSF and NHIF were paid but with gaps.

6. John Chege Mang'ere, the Claimant in Cause No. 177 of 2018 stated that he worked daily and he never used to go on off. He earned Kshs. 10,000/- as at the time of termination and he stated that he was never paid for all public holidays worked. He was then employed by Brinks Security on his request for employment. He confirmed that the Respondent used to pay NHIF and NSSF dues. He also said that he used to work from Sunday to Sunday for the four years that he worked for the Respondent. He testified that the Respondent took the uniforms and

the dog that he was handling and he was left without a job. He denied having missed work even for a day.

7. Wilson Kuria Maina, the Claimant in Cause No. 178 of 2018 testified that at the time of termination he was earning Kshs. 8,500/-. He confirmed that he used to go on off for a day every week and that NHIF and NSSF were paid. He further averred that he was not paid for holidays worked and there was no house allowance.

8. The Respondent's witness was Japheth Kaundo HR Manager of the Respondent. He adopted his statement and the list of documents and testified that after the company got a termination notice indicating that their contract had ended, they advised the employees to go to the head office for deployment. He testified that none of the employees showed up for redeployment and when the Respondent did a follow up, it realized that the Claimants had been absorbed by Brinks Security which took over from the Respondent. He confirmed that all the Claimants were given one off day per week. He also confirmed that sometimes the Claimants worked on holidays but they were compensated as reflected in their payslips. He also stated that the salary paid was inclusive of house allowances and denied that the Claimants were underpaid. Further, he stated that immediately the company received the termination notice, it alerted the Claimants and picked their uniforms two days after advising them and it was at that time the company realized that the Claimants had been absorbed by the newcomer. He confirmed that the Respondent used to remit NSSF for the Claimants. He also stated that all employees were not working at one place. He contended that the Claimants were not wrongfully terminated and that if the Claimants had reported to the office they would refunded the expenses used in travel to the head office. He said that the claims in the Claimants' claims are time barred as they should have been filed within 12 months.

9. The Claimants submitted that they never absconded from duty and urged the court to find that the version stated by the Respondent was malicious and made in bad faith. The Claimants submitted that the Respondent should have issued the Claimants with a letter informing them that they had been summarily dismissed. The Claimants submitted that Section 90 of the Employment Act cannot be invoked in this case. They submitted that there was implied termination which was not in accordance with Section 45 of the Employment Act and Article 41(1) and 50 of the Constitution. The Claimants submitted that the Respondent was unable to prove to the Court that the Claimants were paid extra for working on public holidays and the Claimants should therefore be duly compensated. The Claimants submitted that they were entitled to annual leaves not taken, rest days, public holidays, house allowance, severance pay and damages for unlawful termination.

10. The Respondent submitted that the Claimants sought for reliefs and/or benefits that were not pleaded. These reliefs include annual leave not given and rest days. The Respondent submitted that the reliefs are time barred. It relied on the case of **John Mugalla Mwaduma v Braeburn Schools Ltd T/A Braeburn International School Mombasa [2015] eKLR**. The Respondent submitted that the benefits sought in the claim are of continuous nature and that the suits ought to have been filed within one year from the date of termination. The Respondent submitted that the Claimants contradicted themselves while giving evidence and it stated that these contradictions came about because their evidence was based on lies. It stated that its witness was consistent in the sense that the witness testified that the Claimants were paid for extra days worked and that is why it showed in their slip that they were paid for 31 days and sometimes 32 days. The Respondent submitted that when the contract suddenly came to an end, it informed the Claimants immediately and informed the Claimants to go to the head office for redeployment but the Claimants never turned up. The Respondent submitted that the Claimants were at pains to explain why they were paid for extra days other than the normal 30 days. The Respondent submitted that the testimony by the Claimants was contradictory as to when they were employed and some contradicted themselves as to when they were terminated. The Respondent urging the issue of contradiction by the Claimants relied on the case of **Joseph Njoroge Kiama v Summer Ltd [2014] eKLR**. On the issue of severance pay, the Respondent submitted that it dutifully submitted NSSF on behalf of the Claimants and that severance pay is therefore not payable in the circumstances. The Respondent placed reliance in the case of **John Mulinge Mutuku v Kartasi Industries Limited [2019] eKLR**. On the issue of holidays, the Respondent submitted that the Claimants did not specify on which holidays they worked and hence they are not entitled to any relief sought. It also submitted that their payslips clearly indicated payments for extra days worked. The Respondent denied underpaying the Claimants and submitted that the Claimants worked outside the Murang'a Municipality and the minimum wage as at the time of the alleged termination was Kshs. 5,844/- a month. It submitted that the Claimants' salary was inclusive of house allowance and that is why it was over and above the minimum wage. The Respondent submitted that the Claimants claim should be dismissed with costs.

11. The Claimants were employees of the Respondent until the Respondent's contract was terminated. All the Claimants save for John Chege Mang'ere the Claimant in Cause No. 177 of 2018 did not avail their NSSF statements. None of the Claimants attached the NHIF statements thus disentitling the Claimants to any relief for the alleged non-payment of NHIF deductions. John Chege Mang'ere only managed to prove that the Respondent failed to remit NSSF dues for April 2016. As such the only liability the Respondent would have to meet in respect of NSSF is Kshs. 400/- on account of John Chege Mang'ere. All the Claimants joined Brinks Security the company that took over the work the Respondent was undertaking and there was mitigation of losses. The Respondent asserts that the Claimants declined to report to the head office for redeployment after its assignment was terminated by the client. Instead, the Respondent asserts, the Claimants obtained employment with the company that took over. In its view the Claimants thus mitigated their losses and cannot now seek recompense from it. The Claimants were not dismissed but abandoned their employer. Instead of going for redeployment the Claimants opted to join the company that took over and as such were not entitled to recompense for the alleged dismissal as none took place. The Respondent failed to make payments John Chege Mang'ere at NSSF. I therefore order that proof of payment of Kshs. 400/- on account of his NSSF dues for April 2016 be availed within 7 days failing which the Respondent will pay the Claimant John Chege Mang'ere Kshs. 10,000/- for the failure. The upshot of the foregoing is that the suits are devoid of merit save for the issue of NSSF in respect of one Claimant. The suits are dismissed and each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 29th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar