



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO. 35 OF 2015**

**JOHN ENEMAI BIBILONDO .....CLAIMANT**

**VERSUS**

**LYDIA WANGARE KARIUKI MUNENE.....RESPONDENT**

**JUDGEMENT**

**Claim**

The claimant filed his claim on 17<sup>th</sup> February, 2015 on the grounds that he was employed by the respondent on 4<sup>th</sup> November, 2013 as a night watchman at the plot situate at Kenlands Estate Nakuru for ksh.5,000.00 per month. Work hours were 7.30pm to 6.45am all being 11 hours and 15 minutes for 7 days a week without a break, rest or compensation for the over hours worked.

The claim is also that on 4<sup>th</sup> November, 2014 the claimant was terminated in his employment by the respondent. on 31<sup>st</sup> October, 2014 the claimant got a phone call from his son working in Mombasa to the effect that he was sick. The claimant went to seek for permission from the employer to attend to his sick child but the respondent was asleep and did not wish to be disturbed and so the claimant left a note message of his sick son and that he had travelled to Mombasa.

The claimant attended to his sick child for 3 days and upon return on 4<sup>th</sup> November, 2014 but the respondent did not want to see the claimant and that had hired company guards. Employment was effectively terminated. Despite the emergency facing the claimant he was not given a hearing or notice or paid his terminal dues.

For the duration of employment the claimant was underpaid and contrary to the Wage orders. The claims made are as follows;

- a) Notice pay Ksh.11,633.55;
- b) Underpayment Ksh.79,602.60;
- c) Annual leave ksh.8,430.10;
- d) Off days ksh.57,065.50;
- e) Public holidays Ksh.11,879.99;
- f) Overtime work Ksh.63,498.30;
- g) October, 2014 salary ksh.11,633.30;
- h) Compensation; and
- i) Costs.

The claimant testified in support of his claims. his employment was done verbally but would sing on a book every time he reported and left work. Such record was kept by the respondent. the premises he was guarding was a residential apartment with several units and the respondent was one of the residents. When he got news of his sick son in Mombasa, he wrote a note to *Mama* and left it as she was asleep.

Upon return he was told employment had terminated.

## **Defence**

In response the defence comprise mere denials save the defence that the claimant was never an employee of the respondent as a watchman or paid a wage of Ksh.4, 000.00 at her plot as alleged.

No witness was called by the respondent.

Both parties filed written submissions.

The claimant submitted that he was employed by the respondent as watchman at her plot at kenlands known as Madam Lyndia's plot. He worked for 11 hours 15 minutes for 7 days without leave or off days. There was no compensation for the overtime hours and off days not taken. The failure to issue the claimant with written employment terms and conditions as required under section 10 of the Employment Act, 2007. The respondent failed to abide the mandatory provisions of the law. terminated employment unfairly and contrary to the provisions of section 41, 43 and 45 and the remedies set out under section 49 of the Employment Act, 2007 as claimed should be awarded.

The respondent submitted that she never employed the claimant at her residence and did not prove his case and the claims made. Without an employer and employee relationship, even where the defence did not call evidence, such cannot support the claims made. A court cannot vary terms of a contract once agreed upon by the parties. As for housing, the salary given was part of the basic salary as provided under section 31(2) (a).

## **Determination**

As noted above the defence comprise mere denials. No witness was called. No work record was filed. In submissions, the respondent avers that the salary paid to the claimant was inclusive of his housing. Thus the claims made remain uncontroverted.

Causal employment is allowed under the provisions of section 8 and 9 of the Employment Act, 2007 and which must be read together with section 10 thereof. An employee who is employed on causal terms and remains at work for over two months must have such employment reduced into writing setting out the terms and conditions of the employment. The burden is upon the employer to ensure these provisions of the law are met. They are mandatory. Non-compliance has consequences. The result is the claims made are not challenged in any material way.

A Statement of Defence that does not disclose any defence or raise any triable issues, but is evasive, vague, and is merely aimed at temporising a matter should be dismissed instantly. The defence herein stands out as a sham; it's frivolous and is merely intended to delay the finalization of this suit. The fact of the defence not calling any witness or filing any work records particularly the wages paid and stated to be inclusive of the house allowance leaves the court with a sham defence. See Veteran **Pharmaceuticals Ltd versus Kangundo Level 4 Hospital & another [2016] eKLR**.

Without any palpable defence, the claims made shall be assessed on their merits and based on the applicable law.

The claim is that the claimant got a message that his son in Mombasa was sick, the respondent was sleeping and therefore he left a note to *mama* and left. Upon return after 3 days, he was dismissed.

Absence from work without permission by the employer is not justified. Such is a sufficient ground for summary dismissal under the provisions of section 44(4) (a) of the Employment Act, 2007. Where the claimant was the employee of the respondent and required to attend to an emergency, the reason aside, absence from work should have been with the approval and or permission of the employer. Desertion of duty on the basis that the respondent was asleep is not sufficient defence under the provisions of section 44 of the Employment Act, 2007.

However, before the claimant was dismissed for being absent form work without permission, the respondent had the duty to abide the provisions of section 41(2) of the Employment Act, 2007. Hear the claimant in his defence however short the notice. Such hearing of the employee is mandatory before the sanction of summary dismissal can issue.

The claimant claim that he was paid a wage of Ksh.5, 000.00 per month is challenged by the respondent under paragraph 3 of the defence that he was paid Ksh.4, 000.00. I take it the claimant is telling the truth noting the sham defence. The wage was Ksh.5, 000.00.

Under the general wage orders applicable to the claimant as a watchman for the period of 4<sup>th</sup> November, 2013 to 4<sup>th</sup> November, 2014 was ksh. 9,024.15 and the claimant was paid less Ksh.4, 024.00 and for the 12 months at work he is owed Ksh.48, 288.00 in underpayments.

Annual leave is due to an employee who has continuously served for a full month and for the 12 months the claimant is entitled to 21 days. Based on the due wage the claimant is entitled to ksh.6, 316.80.

Without any record that the claimant took an off day for the duration of his employment, he is entitled to a day off each week at work. Section 27(2) of the Employment Act, 2007 requires the allocation of such rest day or payment in lieu thereof. The claimant is awarded ksh.14, 438.40.

Similar, work during gazetted public holidays should be compensated. The claimant asserts there were 10 such public holidays where he worked and was not compensated. On the due wage he is awarded ksh.3, 008.00.

The claim for overtime hours is not challenged in any material way. A night watchman work is for 60 hours a week and factoring the rest day due, the claimant ought to have been at work for 6 days per week the 60 hours spread to 10 hours a day. For work at 11 hours he did an extra hour each day all being 7 hours per week. For the extra hours the claimant is entitled to a rate of 1.5 all being Ksh.9, 360.00.

Where employment terminated on 4<sup>th</sup> November, 2014 and the wage due for October, 2014 was not paid, such is due for work done. The claimant is entitled to ksh.9, 024.15.

On the basis that summary dismissal was applicable where the claimant left work without prior permission, compensation is not due but notice pay is available for upon the respondent's non-compliance with section 41(2) of the Employment Act, 2007. Such notice pay is awarded at ksh.9, 024.15.

**Accordingly, judgement is entered for the claimant in the following terms;**

- a) Notice pay ksh.9, 024.15;**
- b) Unpaid wage for October, 2014 ksh.9, 024.15;**
- c) Leave pay Ksh.6, 316.80;**
- d) Underpayment Ksh.48, 288.88;**
- e) Rest day's ksh.14, 438.40;**
- f) Overtime pay ksh.9, 360.00;**
- g) Public holidays ksh.3, 008.00; and**
- h) Costs of the suit.**

**Delivered in open court at Nakuru this 11<sup>th</sup> July, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistants: ..... & .....

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