



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC CAUSE NO. 1569 OF 2010**

**(Before Hon. Justice Hellen S. Wasilwa on 9<sup>th</sup> July, 2019)**

**KENYA UNION OF COMMERCIAL**

**FOOD AND ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**SPURS SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant commenced this suit on behalf of the Respondent's employees vide the Memorandum filed on 10<sup>th</sup> December 2010 to challenge the underpayment of their wages, non-issuance of appointment letters and pay slips, non-payment of public holidays and overtime. They seek the following reliefs:

- 1. That the Respondent to pay salary arrears to the affected employees due to underpayment of wages immediately to date.***
- 2. That all employees to be issued with appointment letters and pay slips on or before the last working day of the month.***
- 3. That all employees who have worked on public holiday to be paid in arrears to date.***
- 4. That any employee who worked overtime and was not paid to be in arrears.***
- 5. That all monies pending with the Respondent to be paid to the employees with current interest rates as per Barclays Bank of Kenya in the market.***

2. The Claimant's case is that the grievants were employed on diverse dates between 2001 and 2010 as security guards, earning different salaries which were below the minimum wage payable to a security guard. The Claimant avers that on 30<sup>th</sup> March 2007, they met with the Respondent over underpayment of wages, non-issuance of appointment letters and pay slips, non-payment of public holidays and overtime.

3. On 20<sup>th</sup> June 2007, the Claimant wrote to the District Labour Officer so as to discuss the matter. However, the Respondents did not attend the Conciliation meeting on the scheduled date. Subsequently, the District Labour Officer wrote to the Respondent demanding employee records so as to conduct a labour inspection. It is their case that they reported the existence of a trade dispute and were issued with a Certificate indicating that the dispute remained unresolved.

4. It is their position that the Respondent did not comply with the terms and conditions of services as stipulated in the Regulation of Wages (Protective Security Services) Order 2003.

5. The case was first heard *ex parte* on 8<sup>th</sup> November 2011 and an award delivered by the Hon. Justice Rika on 1<sup>st</sup> August 2012. However, by consent, the award was set aside on 16<sup>th</sup> July 2015 and the Respondent granted leave to file their Response by Hon. Justice Nzioki wa Makau.

6. In its Statement of Response filed on 31<sup>st</sup> July 2015, the Respondent contended that the suit was frivolous, scandalous, vexatious and concocted as the list of employees filed by the Claimant was fictitious since it contained 33 ghost workers, 9 employees who commenced their employment with the Respondent after the institution of the claim, 6 employees whose names were inserted without their consent, 2

deceased employees and 7 employees who had deserted employment without notice. They denied being in breach of any statutory or contractual duties or ever engaging any of the grievants who had not been disclosed, and urged this Honourable Court to dismiss the claim with costs.

7. On 12<sup>th</sup> June 2017, the Claimant filed a Schedule of Names of the Claimants and their particulars of claims. The Claimants were: Richard Kaka claiming a sum of KShs. 739,737.00, Simon Chebet claiming a sum of KShs. 424,928.00, Alfred Oduki claiming a sum of KShs. 145,084.00, Peter Mbithi claiming a sum of KShs. 144,514.00, Peter Kabiru Kimanzi claiming a sum of KShs. 238,460.00, Fredrick Kiio claiming a sum of KShs. 420,571.00, Andrew Simiyu Mwisukha claiming a sum of KShs. 268,470.00, Joseph Kioko claiming a sum of KShs. 485,048.00, Atanus Wakhu claiming a sum of KShs. 732,431.00, Harrison Mambala claiming a sum of KShs. 732,431.00, Raphael Mungai claiming a sum of KShs. 701,763.00, John Kaita claiming a sum of KShs. 447,655.00, Joseph Luseka claiming a sum of KShs. 724,034.00 and Langi Kioko claiming a sum of KShs. 744,468.00.

8. Harrison, John Gaita and Peter Mbithi withdrew their claims as they were engaged in negotiations with the Respondent.

9. In their witness statements: Raphael Kaka stated that at the time of employment he was earning a salary of KShs. 3,000.00 that was later increased to KShs. 9,000.00 but was below the required KShs. 10,954.00 and claimed KShs. 1,643,370.00. At the time of employment, Andrew Simiyu Mwisukha was earning a salary of KShs. 4,500 which was later increased to KShs. 6000.00 but was below the required KShs. 9,780.00 and claimed KShs. 541,964.00. At the commencement of his employment, Raphael Mburu was earning a salary of KShs. 3,000.00 which was later increased to KShs. 10,954.00 and claimed KShs.1,605,395.00. Joseph Mumo filed an incomplete statement where he claimed KShs. 289,646.00. Alfred Oduki stated that at the time of employment he was earning a salary of KShs. 3,000.00 which was increased to KShs. 4,500.00 but was still below the required KShs. 6,743.00 and claimed the sum of KShs. 390,446.00.

10. At the commencement of his employment, Simon Chebet was earning KShs. 3,000.00 which was later increased to KShs. 6,000.00 but was still below the required KShs. 9,780.00 and claimed the sum of KShs. 1,032,164.00. At the time of employment, Atanus Wakhu was earning KShs. 3,000.00, which was increased to KShs. 8,000.00 but still below the required KShs. 10,954.00 and claimed the sum of KShs. 2,013,977.00. At the time of employment, Joseph Kioko Langi was earning a salary of KShs. 3,000.00, which was later increased to KShs. 6,000.00 but still below the required KShs. 9,780.00 and claimed the sum of KShs. 1,418,453.00. Fredrick Kiio was earning a salary of KShs. 4,500.00 at the commencement of his employment which was increased to KShs. 7,000.00 but still below the required KShs. 9,780.00 and claimed KShs. 961,059.00.

11. At the time of employment, Peter Kivilu Kimanzi was earning a salary of KShs. 4,500.00 which increased to KShs. 7,000.00 but below the required KShs. 9,780.00 and claimed KShs. 578,703.00. Kizito Ekwaro was earning a salary of KShs. 4,500.00 at the time employment, which was increased to KShs. 5,000.00 but was below KShs. 8,579.00 and claimed KShs. 268,117.00. Joseph Luseka was earning a salary of KShs. 4,500.00 which was increased to KShs. 9,000.00 but less than KShs. 10,954.00 and claimed KShs. 1,911,831.00.

12. The Claimant's case was heard on 9<sup>th</sup> July 2018 and 14<sup>th</sup> March 2019 where Raphael Kaka testified on behalf of the Claimants save for Alfred Oduki, Joseph Mumo and Langi Kioko who did not sign the Letter of Authority filed on 31<sup>st</sup> October 2018 authorizing him to execute the requisite documents or give evidence on their behalf. He adopted their witness statements as evidence.

13. During cross-examination of his case, he stated that his work ID got burnt in the house. He also stated that he was first paid cash but was later paid through bank but did not have bank statements to prove such payment. He maintained that he was underpaid and that he was working overtime. Upon re-examination, he clarified that his name was Raphael and not Richard and that only the muster roll could prove he was the Respondent's employee as he was never issued with an appointment letter.

14. At the further hearing, he clarified that he was employed in February and not January, that Simon Chebet was employed on 15<sup>th</sup> July 2005 and not 1<sup>st</sup> July 2005 and Joseph Kioko Langi was employed on 17<sup>th</sup> March 2005 and not 2001.

15. The Respondent did not present their case as they were not present in Court despite the date being issued in their presence.

#### **Submissions by the Parties**

16. The Claimant in its submissions dated 16<sup>th</sup> April 2019, submits that the Respondent did not provide evidence to prove that the grievants were not its employees. As such, their evidence was not rebutted due to the Respondent's failure to adduce employment records as required by Section 74 of the Employment Act.

17. They further submit that the Respondent failed to remunerate them as required by law and contrary Article 41 of the Constitution, Section 17 of the Employment Act 2007 and the Regulation of Wages Order. It was their position that they had proved the case for salary underpayment, unpaid house allowance, overtime, untaken leave and the amount deducted on account of their uniform. They rely on the cases of **Kathra Hussein Noor vs. Another vs. Kaderdina Hajee Essak Limited [2016] eKLR** and **John Rioba Maugo vs. Riley Falcon Security Services Limited [2016] eKLR**.

18. The Respondent did not file its submissions.

19. I have examined all the evidence and submissions of the Parties as filed. The Respondents failed to present any evidence before this Court. They also failed to file submissions.

20. From the Claimant's case, their main contention is that they were under paid salaries, were never paid house allowance and overtime. They also contend that they never took leave and were deducted 6,500/= for uniforms issued to them which amount was to be refunded to them. From the evidence of the grievants, they were being paid below minimum wage.

21. They were also not paid house allowance nor allowed to proceed on leave or off. In this claim, the grievants were about 195 persons. The matter was referred to conciliation and the Conciliator found in favour of the grievants. The Parties entered a consent, which was never honoured by the Respondent.

22. Going by the submissions of the grievants, they were underpaid. The Claimant submitted that the Respondent was paying the grievants 4500/= against Legal Notice 98 which gave the night guards a salary of 7523 with 15% house allowance being 1128.45 all totalling = 8,651.45. The grievants were thus underpaid by 4151.45 every month from 2010 May to December 2010 for 7 months when this Claim was filed =  $4151.45 \times 7 = 29,060.15/=$  for each grievant.

23. The grievants also sought to be paid for working on public holidays which claim was not particularised. The grievants sought to file statements of witnesses whose claim run to 2018 and beyond the prayer in the main claim thus departing from their pleadings.

24. The Claimants did not seek leave of Court to amend their pleadings and they have to be held by their claim as filed on 10/12/2010.

25. I therefore find inclusion of prayer from 2011 to 2018 is not proper and departs from the Statement of Claim filed by the Claimant. The only prayer I find tenable is for underpayment of salary for the grievants from 2010 May to December 2010 which I find to be 29,060.15 for each grievant.

26. The Respondent will pay costs of this suit plus interest at Court rates with effect from the time of filing this Claim.

**Dated and delivered in open Court this 9<sup>th</sup> day of July, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mukeli holding brief Mulaku for Claimant

Respondent – Absent