



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1531 OF 2014

BETWEEN

WILBERFORCE ANDREW OLANDO.....CLAIMANT

VERSUS

JAPA PROTECTION SYSTEMS LIMITED.....RESPONDENT

Rika J

Court Assistant: Lawrence Osotsi

Namada & Company Advocates for the Claimant

Respondent in Person

JUDGMENT

1. The Claimant filed his Statement of Claim on 2nd September 2014. He states that he was employed by the Respondent as a Security Guard, earning a monthly salary of Kshs. 6,760.

2. He was summarily dismissed by the Respondent through its Operations Manager, on 22nd April 2014, on allegation that he was involved in criminal activities. He was not heard before termination. He was not given notice. He prays the Court to find termination was unfair, and grant him Judgment in the following terms:-

- a) Underpayment of salary for 3 years being Kshs. 8,463 -6,760 = Kshs. 1,703 x 12 x 3 years = Kshs. 61,308.
- b) Salary for 22 days worked in April 2014 at Kshs. 6,206.
- c) Gratuity at 15 days' salary for each of the 3 years completed in service at Kshs. 25,389.
- d) Off days at Kshs. 108,326
- e) Overtime of 4 hours daily for the entire period at Kshs. 2,437,344.
- f) 12 months' salary in compensation for unfair termination.
- g) Costs and interest.

3. The Respondent filed its Response through its Director, Patrick Waswa, on 14th October 2014. His position is that the Respondent employed the Claimant as a Guard. There was theft at the site where the Claimant was assigned guarding duty. Waswa advised the Claimant to see him the following date, to be assigned duty at a different site. The Claimant did not show up as instructed. The Operations Manager did not have authority to dismiss the Claimant. The Claimant did not bother to look for Waswa who could have resolved the dispute. The Respondent prays the Court to dismiss the Claim with costs.

4. The matter was first heard in the absence of the Respondent on 18th October 2018. The Court, in a Ruling dated 23rd November 2018 set

aside ex parte proceedings, having found out that service upon the Respondent was defective. The matter was rescheduled for hearing during the Service Week at Nairobi, on 2nd April 2019. The Respondent was served with the Hearing Notice in Person by Claimant's Advocates, and by the Court, but did attend Court for the hearing. Previously, the Respondent was represented by George Owino Okatch Advocate, who has since been struck off the roll of Advocates.

5. The Claimant restated in his evidence, the contents of his Statement of Claim. He explained that he was assigned duty at a College. The College Principal alleged a car had been stolen from the College. The Claimant was arrested and taken to Kamukunji Police Station. He was granted cash bail of Kshs. 20,000 by the Police, but was never taken to Court. Later on he was told by the Operations Manager that he was a criminal. He was asked to return his uniform and leave. He was not called to any disciplinary hearing. He was underpaid; was not issued notice; was denied salary for days worked in April 2014; did not go on annual leave; was not subscribed to N.S.S.F; and worked excess hours without pay.

The Court Finds:-

6. The Claimant was employed by the Respondent as a Security Guard. He was summarily dismissed by the Respondent, on 22nd April 2014, following an allegation made by the Principal of Kenya Institute of Professional Studies, where the Claimant had been assigned guard duties that a car was missing from the Institute's parking lot. This incident happened on 11th April 2014.

7. The Claimant was arrested by Police Officers attached to Kamukunji Police Station. He was never arraigned in Court. He was branded a criminal by the Operations Manager when he resumed work on 22nd April 2014. He was summarily dismissed.

8. The Director Waswa states that the Operations Manager had no authority to dismiss the Claimant. Waswa does not state if this was so, why he did not recall the Claimant, and take action against the Operations Manager. The Operations Manager was a Senior Management Officer, whose word or action, could reasonably be taken by an Employee as the word or action of the Respondent. It was not expected that the Claimant would go looking out for the Director, to confirm the decision of the Operations Manager. It is also unlikely that between 11th April 2014 and 22nd April 2014, the Director Waswa did not come to learn of the incident leading to the arrest of the Claimant, and eventually to the Claimant's loss of employment.

9. There is no evidence to establish the allegation by the Respondent that, the Claimant deserted. He was arrested at the instigation of the Respondent. Upon release he returned to work and was branded a criminal. He was ordered by the Respondent to return his working apparel and leave. He was not granted the opportunity to be heard. **It is declared that termination was unfair.**

10. He was paid a salary of Kshs. 6,760 monthly. This was below the minimum salary payable to Night Watchmen under the Regulation of Wages [General] [Amendment] Orders for 2011, 2012 and 2013, covering the period of service.

11. He was employed on 15th August 2011. The applicable Wage Order for the period August 2011 to April 2012, set the minimum salary for Night Watchmen, working at Nairobi, at Kshs. 8,463. For the period May 2012 to April 2013, the minimum salary applicable to the Claimant was Kshs. 9,571, while he should have earned a minimum monthly salary of Kshs. 10,911 for the period between May 2013 and 22nd April 2014 when he was summarily dismissed. He is granted underpayment of salary for the period August 2011 to April 2012 at Kshs. 8,463 – Kshs. 6,760 x 8 months = Kshs. 13,624; May 2012 to April 2013 at Kshs. 9,571 – 6,760 x 12 months = Kshs. 33,732; and May 2013 to March 2014 at Kshs. 10,911 – Kshs. 6,760 x 11 months = Kshs. 45,661. **In total the prayer for underpayment of salary is allowed at Kshs. 93,017.**

12. **The Claimant is granted 1 month salary in lieu of notice at Kshs. 10,911.**

13. In assessing the level of compensation, the Court has taken into account that the Claimant had worked for 2 years and 8 months. His record was clean. The Director states he did not sanction dismissal of the Claimant by the Operations Manager. The Claimant did not contribute in any way, to the circumstances leading to his loss of employment. **He is allowed the prayer for compensation for unfair termination, equivalent to 12 months' salary at Kshs. 130,932.**

14. It is clear the Claimant worked for 22 days in April 2014 and should have received his salary for the days worked. **He is allowed salary for 22 days at Kshs. 9,232.**

15. The Claimant did not go on leave for the entire period of 3 years worked. The Court has not seen any leave records filed by the Respondent, to contradict the Claimant on his prayer for annual leave pay. The Regulation of Wages [Protective Security Services] Order 1998, grants under clause 10, a minimum of 26 days of annual leave to Security Guards. **The Court grants to him the minimum 26 days of annual leave over a period of 2 years and 8 months [71.5 days] amounting to Kshs. 30,005.**

16. The Respondent did not give any evidence on Claimant's social security status. There is no evidence to challenge the claim that the Claimant was not subscribed to N.S.S.F. He merits service pay under Section 35 [5] of the Employment Act 2007. The rate applicable for gratuity under the above Wage Order is 18 days' salary for every complete year of service. The Court shall adopt this rate for purposes of computing service pay. He worked 2 complete years. **He is granted service pay at 18 days' salary for 2 complete years of service at Kshs. 15,107.**

17. There is insufficient proof of overtime worked and rest days not taken. The prayer for overtime pay in particular, at Kshs. 2.4 million, looks overstated. It is not supported by the evidence given by the Claimant. It was not in the letter of demand issued upon the Respondent by Claimant's Advocate, dated 30th May 2014. Similarly the prayer for rest days was not part of the Claimant's demands before litigation. These prayers were made in afterthought. They are unsupported in evidence and are rejected.

18. *Costs to the Claimant.*

19. *Interest allowed at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: underpayment of salary at Kshs. 93,017; notice at Kshs. 10,911; compensation for unfair termination equivalent of 12 months' salary at Kshs. 130,932; salary for 22 days worked in April 2014 at Kshs. 9,232; annual leave at Kshs. 30,005; and service at Kshs. 15,107 – total Kshs.289,204.

c) Costs to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and signed at Mombasa this 2nd day of July 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 5th day of July 2019.

Byram Ongaya

Judge