



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 575 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 24th September, 2019)

JIMMY HAGGAI ELUNGATA.....CLAIMANT

VERSUS

KLEEN HOMES SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. On 12th April 2016, the Claimant filed this cause challenging the termination of his employment while seeking compensation for underpayment of his dues and the Respondent's failure to pay his terminal dues. In particular, the Claimant seeks the following prayers:-

a. Claimant be paid all underpayments balances, house allowance, salary of January 2016, overtimes, holidays and offs of KShs. 846,151.85 as tabulated below:-

i. One-month lieu in notice in the sum of KShs. 12,221.10.

ii. Salary for January 2016 inclusive of house allowance in the sum of KShs. 14,054.25.

iii. Leave for 5 years (5 x 26 x 12,221) amounting to KShs. 52,957.10.

iv. Underpayment from 1st May 2010 to 30th July 2010 (KShs. 7,523 – KShs. 4,610= 2,913 x 3 months) amounting to KShs. 8,739.00.

v. Underpayment in August 2010 (KShs. 7,523 – KShs. 5,610) in the sum of KShs. 1,913.00.

vi. Underpayment from 1st September 2010 to 30th April 2011 (KShs. 7,523 – KShs. 6,360 = 1,163 x 8 months) amounting to KShs. 9,304.00.

vii. House allowance from 1st May 2010 to 30th April 2013 amounting to KShs. 13,341.40

(KShs. 7,523 x 1 x 15% = 1,128 x 12 months).

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viii. Overtime worked from May 2010 to 30th April 2011 amounting to KShs. 52,360.00 (KShs. 7,523 x 87 hours x 1.5 hours (half rate) x 12 months) 225 hours recommended per month

ix. Off days for 12 months and holidays of 58 days amounting to KShs. 46,542.30 (KShs. 7,523 x 2 hours (double) x 696 hours) 225 hours recommended per month

x. Underpayment from 1st May 2011 to 30th April 2012 amounting to KShs. 20,376.00 (KShs. 8,463 – KShs. 6,765= 1,698 x 12 months).

xi. House allowance from 1st May 2011 to 30th April 2012 in the sum of KShs. 15,233.40 (KShs. 8,463 x 15 = 1,269.45 x 12 months).

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xii. Off duties and holidays worked from 1st May 2011 to 30th April 2012 amounting to 43,330.50 (KShs. 8,463 x 2 x 576 hours) 225 hours recommended per month

xiii. Overtime worked for 12 months from 1st May 2011 to 30th April 2012 amounting to KShs. 58,902.50.

(KShs. 8,463 x 87 hrs. per month x 1.5 hrs. (1 ½ rate) x 12 months) 225 hours recommended per month

xiv. Underpayment from 1st May 2013 to 30th April 2015 amounting to KShs. 57,880.80 (KShs. 10,911.70 – 8,500 = 2,411.70 x 24 months).

xv. House allowance for 24 months in the sum of KShs. 39,282.210 (KShs.10,911.70 x 15 x 24).

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xvi. 20 holidays and 96 off days from May 2013 to 30th April 2015 amounting to KShs.135,041.10. (KShs. 10,911.70 x 2 hours (double) x 1392 hours) 225 hours recommended per month

xvii. Overtime worked for 24 months from 1st May 2013 to 30th April 2015 amounting to KShs. 151,890.80. (KShs. 10,911.70 x 87 hrs. per month x 1.5 hrs. (1 ½ rate) x 24 months) 225 hours recommended per month

xviii. Underpayment from May 2015 to 30th January 2016 in the sum of KShs. 33,489.90 (KShs. 12,221.10 – 8,500 = 3,721.10 x 9).

xix. Overtime worked from 1st May 2015 to 30th January 2016 amounting to KShs. 63,794.10 (KShs. 12,221.10 x 87 hrs. per month x 1.5 hrs. (1 ½ rate) x 9 months) 225 hours recommended per month

xx. House allowance for 9 months in the sum of KShs. 16,498.50 (KShs. 12,221.10 x 15 x 9).

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b. Claimant be compensated 12 months' salary for unlawful dismissal in KShs. 146,653.20.

c. Declarations that withheld (sic) of Claimant's underpayment balances amounts to unfair termination by the meaning of section 45 (4) (b) of the Employment Act.

d. Declaration that to deny Claimant his underpayment balances, house allowance and salary for January 2016 by Respondent in its reply to demand letter amounts to violation of general wage order, section 48 (1) (2) (3) of the Labour Institution Act 2007 and Section 15 (5) of the Industrial Court Act.

e. Declaration that putting Claimants underpayment balances conditional with threats by Respondent in its reply to demand letter until Claimant access justice before Court amounts to breach of contract and contravention of section 25 of Employment Act 2007.

f. That under payments, house allowance, salary of January 2016/award to attract interest above Court's rate from the date of employment until suit is determined.

g. That the Court do issue such orders as it may deem fit and just to grant to meet the end of justice.

h. Respondent to meet cost of the suit.

2. The Claimant's case is that vide an oral agreement made in May 2010, he was employed by the Respondent as a night guard earning a salary of KShs. 4,610.00. He was never issued with a letter of appointment. He served the Respondent diligently until 29th February 2016 when his employment was terminated. He avers that his salary was below the minimum wage for night guards and was exclusive of house allowance.

3. It is the Claimant's position that the termination of his employment was unlawful. It is his averment that the loss of his employment and the Respondent's blackmail has caused him psychological torture, loss and damages.

4. In his witness statement filed on 12th April 2016, the Claimant avers that he would work from 6pm to 6am without overtime pay or any means of transport as required by the protective security order. He further avers that he never took any leave days in the duration he worked for the Respondent save for 2012 when he took 10 leave days.
5. It is his case that on 29th January 2019, he requested for permission to take his brother to hospital. The permission was granted and he notified the client that he would be absent. However, when he reported to work the next day, he found that his position had been assigned to another person. He requested to be assigned duties but it was never done and days later his employment was terminated.
6. During cross examination, the Claimant conceded that he never raised the issue of underpayment. It was his testimony that a day after informing the Respondent that his brother was unwell, he was denied entry into the Respondent's premises and referred to the Operations Manager. He reported to work after 6 days and was given the option of termination or being relocated to Athi River. Since it was impractical for him to commute to work, his employment was terminated. He admitted to omitting this fact from his statement.
7. During re-examination, the Claimant testified that the Respondent had promised to pay him KShs. 8,000 and not the KShs. 4,610.00 he earned at the commencement of his contract.
8. The Respondent filed a response on 12th January 2018 where they denied the allegations set out in the claim and instead averred that the Claimant absconded work on 30th January 2016 for a period of 4 days without any notification. He reported back to work on 3rd February 2016, explaining that he had travelled home to attend to his sick brother. When he was told to produce evidence to back up his claim, he left the premises promising to bring them. The Respondent followed up and the Claimant informed them of the impending suit for the termination of his services. Consequently, the Respondent was served with a demand letter on 11th February 2016.
9. During cross examination, Richard Obiero Bosire and RW1, contended that the Claimant was never dismissed from employment. He admitted that the Claimant was never issued with a warning letter or a notice. He also conceded that they did not have any evidence to prove that they had asked the Claimant to give them documents proving that he had gone to see a sick patient.
10. In re-examination, he maintained that the Claimant never reported to work when he was asked to provide proof of his claims.
11. Parties, thereafter, filed their submissions with the Claimant filing his on 24th June 2019 and the Respondent filed theirs on 9th July 2019.
12. It is the Claimant's submissions that he has proved his case on a balance of probabilities for this Honourable Court to award him the reliefs sought. He further submits that the Respondent has not disputed that he was underpaid. Pursuant to section 46 and 48 (1), (2) and (3) of the Labour Relations Act, the Respondent ought not to have paid him below the minimum wage.
13. The Claimant further submits that his termination was unjustified as he never did anything that warranted such action. He relies on the cases of **Vincent Shimenga vs. Qui Occasions [2017] eKLR** and **John Rioba Mugo vs. Riley Falcon Security Services Limited [2016] eKLR**.
14. It is his submissions that he is entitled to payment of gratuity having worked for 5 years, off days, public holidays and overtime worked, leave pay for the leave days not taken and house allowance which is payable under Section 31 of the Employment Act 2007.
15. On the other hand, the Respondent submits that the Claimant's services were not terminated. They have pointed out that he admitted in his cross examination that, he had absented himself from work when he was transferred to Athi River. As such, the Respondent concluded that he had resigned hence he is not entitled to any of the reliefs sought.
16. I have examined all evidence and submissions of both Parties. From the Respondent's evidence, the Claimant is said to have absconded duty. The Respondent however admitted that they did not serve him with any notice to explain why he should not be dismissed for absconding duty.
17. The Respondent despite indicating that they asked him to show proof that he had gone to attend to his brother, never had evidence that they did ask him to explain his absence. In any case, a person who was considered to have absconded duty would not have been present to explain that he had been attending to his brother. The Respondent's evidence does not therefore add up and their contention that the Claimant absconded duty is not true.
18. Given the above finding the reasons for terminating the Claimant is not established and therefore I find that the Respondent did not have a valid reason to terminate the Claimant's services.
19. The Respondents have also not established that they gave the Claimant an opportunity to explain himself as per Section 41 of Employment Act 2007. It is therefore my finding that the Claimant's termination was unfair and unjustified as envisaged under Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

20. In terms of remedies, the Claimant sought various remedies including payment of his unpaid salary in form of underpayments. He told Court that he was being paid 4,610 instead of 7,523/= according to Legal Notice No.98 of 1/5/2010. The Claimant exhibited his bank statement which show how he was paid every month and the salary paid ranged from 4,610 in 2010 to 8,583/= in December 2015.

21. As per Legal Notice No. 98 of 1/5/2010, salary for a night watchman was 7,523/=. In 2011, May, the amount rose to 8,463/= as per the Legal Notice of 1/5/2011. This amount rose again to 9,571.6 in 2012 and 10,911.70 in 2013 and 12,221.10 in 2015. It is therefore apparent that the Claimant was underpaid in salaries during the period he served the Respondent.

22. He has calculated the underpayment as per his paragraph 5 of his Claim which I find to be 326,947.40 as prayed.

23. Other than the underpayment in salary, the Claimant was also not paid house allowance which I calculate at 15% of salary for 3 years the rest of the Claim being time barred= $15\% \times 12,221 \times 36 \text{ months} = 65,993.4$

24. I also award Claimant 8 months' salary as compensation for the unlawful termination = $8 \times 12,221.10 = 97,769/=$

Total awarded = 502,930/=

25. Claim for overtime is not proved and so is not awarded.

26. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 24th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties