



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.458 OF 2016

STEPHEN OMBAKI MOMANYI.....CLAIMANT

VERSUS

BEDROCK HOLDINGS LIMITED.....RESPONDENT

JUDGEMENT

The judgement herein was due on 28th March, 2019 but this was deferred for the County Labour Officer to assist the court is establishing the claimant's employment with the respondent and the entity of Skypak Security noting the work history and details with regard to the claimant's employment. This did not yield much as the claimant attended before the County Labour Officer and insisted that he never worked for any other entity save for the respondent.

The County labour Officer has since filed his report dated 11th September, 2019.

Claim

The claim is that the claimant was employed by the respondent on 19th March, 2015 as a night guard at a wage of Ksh.5, 200.00 and posted to Nakuru County where he worked until 20th September, 2016 when his employment terminated following a redundancy. That such redundancy was unfair for the reasons that in the month of July 2016 the respondent brought in a new employee to be trained by the claimant and thereafter and on 19th September, 2016 the claimant was informed that there was no work and had to hand over his duties.

The claim is also that the redundancy undertaken by the respondent did not follow the provisions of section 40 of the Employment Act and was unfair. He was not paid his terminal dues. For the period of employment the claimant was underpaid; he worked overtime without compensation and was not paid for work in September, 2016.

The claimant is seeking payment for 20 days unpaid in September, 2016 at ksh.11, 221.70;

- a) Compensation for 12 months at ksh.156, 355.20;
- b) Notice pay ksh.13, 029.60;
- c) Underpayments ksh.131, 707.10;
- d) Overtime pay Ksh.197, 648.95;
- e) Off days ksh.113, 071.35;
- f) Public holiday's ksh.17, 640.07;
- g) Annual leave ksh.15, 785.86;
- h) Service pay/severance pay ksh.11, 275.61;
- i) Certificate of service.

The claimant testified that upon employment by the respondent as a security guard he was not issued with a contract of service and was posted for work in Nakuru County gearing Lake Gas in Free Area and was supervised by Jacob Ateka. He was paid ksh.5, 200.00 per month through the bank but was not issued with a payment statement. He was not provided with housing or paid a house allowance.

The work hours were 6pm to 6am each day and for 7 days each week without a break, rest or annual leave and which time was not compensated.

The claimant also testified that on 19th September, 2016 he was introduced to Samson Koech and directed to train him as a guard and which he did and then directed to hand over to him. Jacob gave these directions. There was no prior notice that employment would terminate and the owing terminal dues were not paid. There were no valid reasons for termination of employment.

The respondent entered appearance on 26th January, 2017. No defence was filed until 19th March, 2019 when a defence was filed *under protest*.

The *defence under protest* is that the respondent is a stranger to the claimant and had never employed the claimant as alleged and that from the records the claimant was an employee of *Skypack Security Services* and not the respondent and the suit against the respondent should be dismissed.

Despite filing such defence there was no attendance during the hearing. No witness was called.

The claimant filed his written submissions.

The claimant filed his memorandum of claim on 14th November, 2016 against the respondent *Bedrock Holdings Limited* and on the basis that he was employed by the respondent and on oral contract from 19th March, 2015 to 20th September, 2016 when he was declared redundant. To support his claims, the claimant attached various documents and of importance he attached appendixes 12 which are NSSF Statement dated 28th October, 2016 and covering the period 1st January to 28th February, 2015 and noting that for this period he was employed by *Skypack Security Services Limited*.

The period of employment under the entity of *Skypack Security Services Limited* is therefore outside the period covered for work with the respondent from 19th March, 2015.

Without the respondent calling any evidence and the option to file *defence under protest* the claim as filed is not challenged in any material way. The failure by the respondent to attend or file its work records noting the nature of claims made by the claimant only left the court with a one-sided claim, that of the claimant.

In his evidence, the claimant testified that in July, 2016 Samson Koech was introduced to him and was required to train him and then told to hand over to him his duties. He was then told by Jacob his supervisor that there was no work. He returned the uniform on 20th September, 2016.

On the basis of this evidence, the claimant was made aware of changes at his workplace and the need to train Mr Koech who was to take over from him. On the alleged declaration of redundancy, for whatever reasons the claimant has pleaded such, and as held in the case of **Africa Nazarene University versus David Mutevu**

& 103 others [2017] eKLR once the employee is made aware, whether in writing or orally that there will be work stoppage, such notification is sufficient. This position is reiterated by the Court of Appeal in the case of **Heritage Insurance Company Limited versus Christopher Onyango & 23 others [2018] eKLR**

Where employment thus terminated following notice of redundancy and the claimant was directed to train and undertake a handover from July to September, 2016 save for the wage due for days worked, the notification given was sufficient and there was a reasons leading to end of employment. Notice pay and compensations are not due.

With regard to the claimant working as a security guard within Nakuru County, for the period of March, 2015 to September, 2016 he was entitled to pay in accordance with the Wage Orders applicable for his area.

The wage due in March, 2015 was ksh.10, 116.00 and the claimant was paid ksh.5, 200.00 less by Ksh.4, 916.00 or the month of April, 2015 worked in full.

From May, 2015 to April, 2016 the wage due was ksh.11,330.00 and the claimant was paid ksh.5,200.00 less by Ksh.6,130.00 and for the 15 months all being Ksh.91,950.00.

Total underpayments are ksh.96, 866.00.

A security guard under the Wage Guidelines has 12 work hours spread over 6 days allowing for a rest day. The claimant testified that he worked for 7 days each week. Save for the extra day each week the time allocation is addressed with consideration for work without a rest day. The tabulation of such rest days is premised on basic wage and not gross. The claimant ought to have last earned ksh.11,33.00 per month and for the 16 full months worked the rest days due at one day per week is 64 days of work all at ksh.24,170.70.

The claim for work during public holidays is generalised and without particulars. The work for rest days put into account, to award in general terms would be an unjust enrichment.

On the claim for service pay, without any record of statutory payments, under section 35 of the Employment Act, 2007 the claimant is entitled to pay for 15 days for each full year worked. In this case he only worked for one (1) full year all being ksh.5, 665.00.

On the claim for severance pay, this was interchangeably applied with service pay.

One has to give way.

For the 20 days worked in September, 2016 and without any evidence by the respondent to challenge the same or evidence that for such time the claimant was paid, the sum of ksh.7, 540.00.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

a) Pay for 20 days worked in September, 2016 ksh.7,500.00;

b) Underpayments awarded at ksh. 96,866.00;

c) Rests days' pay ksh.24,170.70;

d) Service pay ksh.5,665.00;

e) A certificate of service shall issue;

f) Each party to bear own costs.

Delivered at Nakuru this 24th day of October, 2019.

M. MBAR?

JUDGE

In the presence of: