



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 915 OF 2016

BETWEEN

DAVID NYANGOTO OSIEMOCLAIMANT

VERSUS

RADAR LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gichana Bw'Omwando & Company Advocates for the Claimant

Mulwa Nduya & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 1st December 2016. He avers, he was employed by the Respondent Security Company as a Security Officer, effective January 2013. He worked until 9th September 2016 when the Respondent terminated his contract, without assigning any reasonable cause. He was earning as of the date of termination, a salary of Kshs. 11, 800 monthly. He avers, his salary under the Wage Order, ought to have been Kshs. 12,221 monthly. He was denied house allowance, leave, and compensation for holidays worked. He prays for compensation for unfair termination. His prayers include:-

- a) Notice at Kshs. 12,221.
- b) Underpayment of salary at Kshs. 18,945.
- c) House allowance at Kshs. 82,485.
- d) Terminal dues at Kshs. 17,700.
- e) Leave allowance at Kshs. 36,663.
- f) Salary for 6 days worked in March and 4 days worked in September at Kshs. 4,830.
- g) Holidays at Kshs. 28,980.
- h) Compensation at Kshs. 146,652.
- i) Punitive damages.
- j) Return of Claimant's original academic certificates.

2. The Respondent filed its Statement of Response on 23rd March 2017. Its position is that the Claimant worked on a fixed term contract of 90 days. It was not continuously renewed. His employment was punctuated with high levels of inefficiency, absenteeism, and poor performance. He absented himself on 29th and 30th June 2016. He was warned about this in a letter dated 7th July 2016. He was given the benefit of a refresher course, but on 28th and 29th August 2016, was again absent without leave or lawful cause. This prompted the Respondent to convene a meeting, inviting the Claimant to show cause why, disciplinary action should not be taken against him. The Respondent issued the letter dated 9th September 2016, asking the Claimant to return Respondent's property in his custody. He violated the Code of Conduct and was dismissed fairly. The Respondent prays the Court to dismiss the Claim.

3. The Claimant gave evidence, and closed his case, on 27th November 2017. Assistant Operations Manager, Phillip Mwangunga, gave evidence for the Respondent on 10th June 2019, closing the hearing. The Claim was last mentioned on 19th September 2019, when Parties confirmed the filing of their Submissions.

4. The Claimant restated the averments in his Statement of Claim, in his oral evidence, with regard to his employment history with the Respondent, and the terms, conditions and particulars of employment.

5. His Child was ill on 30th and 31st August 2016. He was allowed to attend to his Child. He returned to work and was on duty from 1st to 4th September 2016. He took off-duty of 4 days on 5th September 2016, to resume on 9th September 2016. On resumption, he was advised not to work, but to report to Respondent's Office. At the Office, he was asked to surrender his work uniform and tools of trade and leave. He was dismissed. He never went on annual leave. He was underpaid his salary.

6. Cross-examined, the Claimant told the Court that he was employed in 2012, and was issued a work identification card. He did not sign any contract. He worked 30 days a month. He conceded some pay slips on record, showed he worked 17 and 18 days in a month, respectively. He had travelled upcountry for burials on the dates he was shown to be absent. He did not skip duty without authority. He was not absent without leave, from his site, Equip Agencies, on 29th and 30th June 2016. He was supposed to be guarding Continental Hotel on 30th and 31st August 2016. He was at the Respondent's Offices when asked to return Respondent's uniform. He did not react angrily when asked to explain his absence without leave. It is not true that he worked on 3-months' fixed term contracts. Redirected, the Claimant told the Court he never worked on 3-months' contracts. He worked a full 3 years and 6 months. He was never warned for absence. His Child was unwell as shown in the medical records exhibited by the Claimant. This was the reason why he did not report at Continental Hotel on 31st August 2016. He attended burial on days reflected as having been absent.

7. Phillip Mwangunga confirmed that the Claimant was Respondent's Security Guard. The Claimant used to be placed under periodic contracts of 3 months. The last was from 1st July 2015 to 28th September 2015, exhibited by the Respondent. He worked at various sites, including Continental Beach Hotel. He performed well, but as time went by, started missing duty. He was issued warning letters for absenteeism. He did not change. Mwangunga convened a Disciplinary Meeting. The Claimant attended and rudely stormed out. The Witness did not see the Claimant again until the Parties met in Court. He was paid salary for March 2016. He was not issued notice, because the Respondent did not terminate his contract.

8. Mwangunga told the Court on cross-examination that he has served as Supervisor, Assistant Operations Manager and Operations Controller, before becoming Operations Manager. All Guards were under his control. The Claimant was paid salary for March 2016 as shown in the pay slip. He was issued warning letters. On 9th September 2016, the Claimant was physically at the Respondent's Offices. He was invited to the Disciplinary Meeting, attended and stormed out angrily. There are no minutes capturing this meeting. He signed the letters of warning. The signatures are different from the one on his employment letter. He last reported on 27th August 2016. The Respondent treated him as an Employee in September 2016, because the Respondent was waiting for the Claimant to report back. He did not give reasons for his absence on 28th and 29th August 2016. Public holidays worked were included in the relevant monthly salary. The Respondent does not pay house allowance. Its Employees are casuals. The Claimant did not go on annual leave. He worked from 6 p.m. to 6 a.m. The Respondent retained Claimant's academic certificates. Redirected, Mwangunga told the Court that all the incidents were recorded in Respondent's Occurrence Book. The Claimant was called when he went missing from Continental Hotel on 28th and 29th August 2016. He did not answer Respondent's calls. He showed up later, without any sick sheets and angrily stormed out of the Disciplinary Meeting. He did not work in continuity.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Security Guard, between January 2013 and September 2016. He was placed on 3-months' contracts on certain occasions, while on other periods, he seems to have continued to work without a formal contract. This is clear from the evidence of the Respondent. Exhibited is a contract, which Mwangunga told the Court was the last contract issued the Claimant, running from July 2015, to September 2015. After September 2015, the Claimant went on working until September 2016. No contracts for the period before July 2015 have been exhibited. It is fair to assume the Claimant worked from January 2013 to September 2016, on both oral and formal contracts. His last salary was Kshs. 11,800 monthly.

10. He left employment in September 2016 ostensibly on account of his persistent absence from duty. He does not deny that he was absent on various dates. He attributed his absence to the illness of his Child, and on other occasions, to his having to attend burial.

11. On all occasions when the Claimant was absent, he did not show that he had the leave of his Employer, or lawful cause to be absent. He exhibited a receipt from an institution named St Paul's Medical Clinic for Kshs. 1,500 issued to one Lennah [or Lemmah] David. If this person is the Claimant's Child, why was it necessary for the Claimant to be away at night from his guard duties, given that he worked from 6 p.m. to 6 a.m.? The receipt seems dated 24th August 2016, which is not the date the Claimant is alleged to have taken French Leave. There are no treatment records. There is no explanation why the Claimant did not write to the Respondent on any one occasion, seeking leave. Why would he be attending a burial for the better part of the month, without the leave of his Employer? The Respondent issued the Claimant warning letters, and even took the Claimant for refresher course, but there was no change. The Court is satisfied that the Claimant was a

habitual absentee, and the Respondent had valid reason under Section 43 and 44 of the Employment Act, to terminate his contract.

12. There is no evidence that the Claimant was invited in writing or otherwise, to a disciplinary hearing. He was not supplied with written charges, and asked to respond to the charges. He was not heard. The Respondent was not able to produce in Court, any minutes recording a disciplinary hearing. The warnings issued upon the Claimant did not take away his right to be heard under Section 41 of the Employment Act. **Procedure was flawed, and to this extent, termination was unfair.**

13. The Claimant did not in his evidence or submissions, direct the mind of the Court on the Wage Order entitling him to a monthly salary of Kshs 12,221. The Court is not able to agree with him, in the absence of this submission and evidence, that he was underpaid. He needed to direct the mind of the Court to relevant Wage Orders, over specific periods in his service. Minimum wages are not static and cannot be uniform for about 3 years the Claimant worked.

14. He was not paid house allowance. Mwangunga stated that the Respondent has a policy of not paying house allowance. This policy violates Section 31 of the Employment Act on provision of housing or house allowance. **He is allowed the prayer for house allowance in arrears of 45 months, at 15% of his basic salary of Kshs. 11,800, at Kshs. 79,650.**

15. The prayer for notice pay is rejected, as the Respondent had reason to justify summary dismissal, under Section 44 [4] of the Employment Act 2007.

16. The prayer for terminal dues is unclear. The term is broad enough to entail a whole range of benefits, some which have been pleaded and considered separately in this Judgment. The prayer is declined for want of clarity.

17. Mwangunga testified that the Claimant did not go on annual leave. If he did not, then there is no reason not to allow the prayer for annual leave pay, which is erroneously pleaded as leave allowance. He is allowed the statutory minimum of 21 days per year. He did not show to the Court that he was entitled to more days of annual leave, by his contract, collective agreement or other wage instruments. **He is granted annual leave pay over a period of 3 years, at Kshs. 28,592.**

18. His prayer for unpaid salary for 6 days March and 4 days in September is unclear. The year is not pleaded. It was not clear which was the salary for March, and which was for September. It is not shown that the Claimant was denied salary for days worked. Similarly the prayer for holiday pay lacks evidential support. The Claimant has not supplied evidence showing that he worked on holidays. He claims Kshs. 483 per day, without disclosing how he has arrived at this rate of holiday pay.

19. Compensation is merited on account of the flaws found in the procedure. The Claimant worked for about 3 years. He had warnings. His record was blemished. He did not display a potential for long term service. He was absent without leave on various occasions. **He is allowed compensation equivalent of 3 months' salary, at Kshs. 35,400.**

20. There is no basis for an award of punitive damages.

21. The Respondent conceded to holding onto Claimant's academic certificates. This is in serious violation of the Claimant's property rights. It is similarly in violation of the Claimant's right to fair labour practices. Without his academic certificates, he is limited in the labour market, in his search for other job opportunities. The Respondent has no reason whatsoever, to withhold academic certificates of its former Employee. **The academic certificates shall be released to the Claimant immediately.**

22. **No order on the costs.**

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

IN SUM, IT IS ORDERED: -

a) Termination was unfair on account of flawed procedure.

b) The Respondent shall pay to the Claimant: arrears of house allowance at Kshs. 79,650; annual leave at Kshs. 28,592; and compensation at Kshs. 35,400 – total Kshs. 143,642.

c) The Respondent shall release to the Claimant his academic certificates forthwith.

d) No order on the costs.

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

Dated and delivered at Mombasa this 18th day of October 2019.

James Rika

Judge