



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.144 OF 2016

NELSON OKUMU ODUORCLAIMANT

VERSUS

MWAKI SACCO.....RESPONDENT

JUDGEMENT

The claimant is an adult male and the respondent is a registered Saco under the Co-operatives Act and operating as Mwaki Sacco.

The claim is that on 5th May, 2015 the claimant was employed by the respondent as a night guard at a wage of Ksh.10,000.00 per month. Work hours were 6pm to 6am daily. The claimant worked until 5th November, 2015 when his services were terminated without any justifiable cause or reasons being given.

The claim is also that on 2nd November, 2015 at 11am one Mr Paul a work colleague of the claimant called him with information that a vehicle in the petrol station where he was guarding had its spare wheel missing. The claimant decided to go back to his work place and found Paul and who repeated the same information.

The claimant recalled the lorry had been parked at the fuel station on 30th October, 2015 and there was no spare wheel and the doors were locked. Where there was a report of a missing spare wheel to Paul this was not brought to the attention of the claimant. The lorry had been parked at the same sport for 4 days from 30th October, to 2nd November, 2015.

The Sacco chairman Mr George Njenga was called and who commented that some time conductor and lorry drivers usually leave spare wheel elsewhere and once at the station blame the guards. The claimant was directed to return home and not return until he got a call.

The claimant was not called back to work until 7th November, 2015 when Paul gave him ksh.5,000.00 being half salary and that the balance was being used to pay for the spare wheel. The claimant was also informed that his employment was terminated. Such was unfair and contrary to section 41, 43 and 45 of the Employment Act and he opted to report the matter to the labour officer but the respondent refused to attend.

The claimant is seeking to be paid his terminal dues

- a. Notice pay at Ksh.22,330.10;
- b. Prorate leave ksh.4,575.90;
- c. Underpayment of wages Ksh.15,153.00;
- d. Off duties ksh.17,928.90;
- e. Public holidays Ksh.2,241.10;
- f. October half pay ksh.8,030.60

The claimant is also seeking compensation for unfair termination of his employment; certificate of service and costs.

The claimant testified in support of his claims. there was no written contract. he was at work from 6pm to 6am and the allegations that he was on probation is not supported. All lorries parked at the station he was guarding would be inspected and since the subject vehicle was parked during the day he was not aware that there was a spare wheel left behind until Paul called him with information that it was missing yet the vehicle had not been broken into. The claimant then reiterated his claim.

In defence the respondent reply comprise mere denials.

In evidence Paul Gatama Ndegwa testified that he is the manager and worked with the claimant who was the night guard from 5th June, 2015 until 2nd November, 2015 when he deserted. The claimant had been on probation for 6 months and once confirmed an employment letter is issued. The claimant was only with the respondent for 5 months and 2 days on probation. There was no dismissal but desertion.

Mr Ndegwa also testified that lorry number KCC 931W was parked at the fuel station where the claimant was guarding and a spare wheel went missing. On 30th October, 2015 the vehicle was parked and the practice was that for the period of such parking the guard had to check it and confirm what was missing and make a report which the claimant failed to do. When the owner of the vehicle returned the spare wheel was missing and the claimant had no good explanation. The claimant insisted that he had no knowledge of the missing spare wheel and the respondent offered to pay the owner for the missing spare wheel and the claimant was to pay for it in instalments all totalling to ksh.15,000.00 instead of the matter being reported to the police. The claimant was deducted ksh.5,000.00 and deserted before the balance could be paid.

The claim that there was underpayment is not correct as the claimant was on probation and there was an agreement to pay him ksh.10,000.00 per month.

The claimant had his off day on Monday which he took. The claimed leave was not due as the claimant had not served for a full year to earn annual leave.

Both parties filed written submissions.

The court has put into account the pleadings, the evidence and the written submissions.

The fact of the claimant being employed as a night security guard is not in issue. What is contested is the reasons leading to termination of employment and the terms of engagement with regard to underpayments, overtime, probation, off days and annual leave.

The failure by an employer to issue an employee with a written contract of employment only exposes such an employer. Such is a fundamental breach in the employment relationship and contrary to the provisions of sections 8 and 9 of the Employment Act, 2007 read together with section 10 of the Act. the employer who keeps into its service an employee for over 30 days and cumulatively for over two months is required to issue such an employee with written terms and conditions of employment. Such written terms are not only to protect the employee but to aid the employer when there is a dispute such as this.

Section 42 of the Employment Act, 2007 allow an employer to place the employee under probation for a stated period. Such period must be done in writing to allow for the assessment of the employee and confirmation of the employee upon end of the stated period. Where the employer finds the employee to have unperformed within the probation period, the law allow for the extension of probations for a period not exceeding 12 months with the consent of the employee. It is therefore imperative that the employee is made aware of the terms of probation and the need for extension.

Without a written contract of employment, the defence that the claimant was under probation and that termination of employment occurred within such period or there was desertion of employment while the claimant was on probation has no probative value. As noted above, the failure to issue a written contract of employment only serve to the disadvantage of the employer.

On the admission by the respondent's witness Mr Ndegwa that the claimant was employed form 5th May, to 2nd November, 2015 such term being continuous and without a break, even where there was no written contract of employment, the claimant is entitled to the rights and benefits under the Employment Act, 2007 and in accordance with section 37 thereof.

A security guard serving the respondent from May to November, 2015 was entitled to a minimum wage of ksh.10,107.00 per month. Where the claimant was paid ksh.10,000.00 per month there was an underpayment inclusive of house allowance all at Ksh.1,516.00 total being Ksh.11,623.00. the claimant was underpaid by Ksh.1,623.00 for the period of 5 months all being 8,115.00.

On the claim for rest/off days, the claimant testified that he was at work for 7 days each week. The respondent witness Mr Ndegwa testified that the claimant had his off day on Monday. Indeed the claimant testified that on the material day he was called from home following the alleged loss of a spare wheel to a vehicle parked at the fuel station he was guarding was on the evidence that the vehicle was parked at such station on 30th October, 2015 and when there was handing over he was absent. This was a Monday, 30th October, 2015 and the evidence that this was the claimant's day off is given credence. To thus claim for pay over rest days following the taking of such time off is without justification. On the claim for work during public holidays, the claimant did set out that he worked on 1st June, during IDD holiday and 20th October, 2015. 1st June 2015 fell on a Monday his day off thus with two days of work during public holidays. On the due wage of Ksh.10,107.00 the claimant is entitled to ksh.1,329.10.

Leave is due to an employee prorated for the period of service at where service is less than 12 consecutive months and pursuant to the provisions of section 28 (1)(b) of the Employment Act, 2007;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

For the 5 months the claimant was in service of the respondent he is entitled to 8.75 days of leave and on the basic wage due all totals to Ksh.2,947.90.

The claimant asserted that spare wheel to motor vehicle KCC 931W got lost, he was called from home and Paul insisted that such spare wheel got lost while he was on duty. The claimant denied such claims and insisted that the vehicle was parked in his absence and he had no way of knowing what items were included.

Mr Ndegwa for the respondent asserted that the claimant was not able to explain how the spare wheel to a vehicle parked at the fuel station he was guarding got lost. The owner of the vehicle KCC 931W insisted that he had to be paid for the same and it was agreed in order to avoid involving the police the respondent would pay for its cost at Ksh.15,000.00 and the claimant was to pay the same in instalments and there was a deduction of ksh.5,000.00 from his wage. The failure by the respondent to involve the police to investigate a serious matter and loss of property is not justified. To make the claimant pay for lost goods over circumstances that were not clear as to the handing over of vehicle KCC 931W and the contents therein is to engage in unfair labour practices.

Section 19(1)(b) allow for the deduction from the employee's wage for damage, loss of property occasioned by the wilful default of the employee;

(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

Such deduction must follow a lawful cause upon interrogation that there was a wilful default of the employee. In a matter that the respondent had the option to refer the police so as to establish the culpability of the claimant but opted to investigate and pass a sanction was to place the claimant under an obligation without evidence. to proceed and make a 50% deduction of his wage was contrary to section 17 of the Employment act, 2007. Such was to further drive him out of employment.

The allegation that the claimant desert work is therefore lost. It is not logical at all. Following the unfair labour practice visited upon the claimant by the respondent as the employer, his evidence is found credible that he was sent away and advised to wait and be called back which never happened.

Further, where the claimant was required to pay for the lost spare wheel to Vehicle KCC 931W and he deserted duty and therefore unable to pay, there is no action shown by the respondent in an effort to reach out to the claimant to resume his duties. Desertion of work is a matter subject to summary dismissal. No such cause is shown by the respondent as the employer.

By leaving the claimant at large, the assertion that he was sent away by Paul and was to wait to be called back is given credence. This resulted in unfair termination of employment. Section 45 read together with section 49 of the Employment Act, 2007 unfair termination of employment is redressed by compensation.

In the circumstances of the claimant's case, having served for 5 months only, he is entitled to the wage deducted for October, 2015 at ksh.5,000.00 and compensation is reasonably awarded at one month pay at ksh.11,623.00.

In this regard also, notice pay is due to the claimant for one month all at ksh.11,623.00.

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

- (a) Compensation at ksh.11,623.00;**
- (b) Notice pay ksh.11,623.00;**
- (c) Deducted wage ksh.5,000.00;**
- (d) Underpayment ksh.8,115.00;**
- (e) Public holidays ksh.1,329.10;**
- (f) 50% of costs.**

Delivered at Nakuru this 17th day of October, 2019.

M. MBARU

JUDGE

In the presence of:

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