



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.287 OF 2016

SIMEON OMARIBA ORANGI.....CLAIMANT

VERSUS

ROBINSON INVESTMENT LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent, a security service provider on 2nd January, 2011 as a day/night watchman at a salary of Ksh.5,500.00 per month and which was enhanced to Ksh.6,500.00 in May, 2012 to Ksh.7,000.00 in May, 2013, to ksh.7,500.00 in May, 2014 and to Ksh.8,500.00 in May, 2015.

The work hours were from 6am to 6pm on a day shift or 6pm to 6am for the night shift.

The claimant was underpaid and made to work overtime without compensation. There was no off day or annual leave taken or compensation thereof. The uniform deposit was not refunded. The claimant has therefore suffered for the non-payment of his terminal dues.

The claims are for the due underpayments at Ksh.180,986.71;

Off days/rest days all at ksh.153,350.00

Overtime worked all at Ksh.24,654.30;

Annual leave Ksh.32,544.87;

Normal overtime Ksh.5366,727.09;

Uniform refund Ksh.600.00; and

Certificate of service.

The claimant testified in support of his claims that upon his employment by the respondent he was guarding motor vehicle at Gilanis supermarket and supervised by James. His wage was paid through the bank and was graduated over the years from Ksh.5,500.00 and his last wage was Ksh.8,500.00 in May, 2016 and was issued with payment slips.

The claimant also testified that he was resident at Kaptembwa and without a house allowance and would be at work from 6am to 6pm without a break, off day or taking leave. The supervisor would take his time schedules and was not paid for overtime work. In a month he only got two (2) days off and during the public holidays he would remain at work and without a compensation.

The claimant only took his annual leave once and for the 5 years and 5 months' work with the respondent he was not compensated in lieu of taking his annual leave.

The claimant also testified that he got sick and informed the respondent. He gave notice and his reasons by attaching the provincial hospital report vide letter dated 8th June, 2016 and 27th December, 2014. The respondent directed that such notice should be for 3 months which the claimant did but was not paid his terminal dues.

The defence that the respondent paid the terminal dues is not correct as he only got Ksh.3,000.00 after he was unable to pay his rent and the

respondent made him sign for such amount but not as payment of his final dues.

Defence

The respondent in reply is that the claimant was a day watchman and took his off days, leave and was paid for days worked. A certificate of service was issued upon clearance on 2th June, 2016.

The claim was filed prematurely as there was no referral to the labour officer and suit should be dismissed.

The defence is also that the claimant resigned from his employment with the respondent and handed over his uniform on 2nd June, 2016 and was paid a refund of ksh.600.00 and he acknowledged receipt. A certificate of service has since been issued and claimant paid ksh.3,000.00 in terminal dues and singed voucher dated 15th June, 2016.

The defence is also that the claimant is not entitled to any pay for days off. He took all leave days due the last being for 6th January, 2016.

The claimant was paid as agreed at ksh.5,500.00 as he was unskilled labourer and the claims made are not justified. The time worked is in accordance with the law for 10 hours and the claim that he was to work for 8 hours is erroneous.

In evidence Agnes Mukami Rutinu testified that she is a director of the respondent and employed the claimant as an unskilled employee from 2011 to 2013 with work stoppage and then he resumed to the same position. the claimant had no skill and was trained by the respondent twice a week to be able to deliver on his duties. Upon interviewing he claimant he accepted the wage offered. the certificate of service was issued for the duration of employment from 18th January, 2013 to 2nd June, 2016.

The claimant resigned on 2nd June, 2016 which was accepted by the respondent. the letter was dated 2nd March, 2016 but with effect from 1st may, 2016 and thus submitted after notice period. The claimant was refunded Ksh.600.00 for his uniform.

The claimant would take all his off days and leave and none were pending at the time of resignation. In final settlement the respondent paid the claimant ksh.3,000.00 as a send-off and goodwill for his service. the claims made for overtime work are not due as the claimant worked within the legal hours.

The claims made for house allowance not due as the claimant agreed on his wage and had no complaint for the duration of his employment with the respondent.

At the close off the hearing the court directed the respondent to file the following records;

- (1) Worksheet for the months of January, April, May, June, October and December for the years 2014, 2015 up to February, 2016;
- (2) Record of leave days taken; and
- (3) Record of off days taken.

The respondent complied with the record from January, 2013.

The parties also filed written submissions.

The court has taken into account the pleadings, the evidence, filed written submissions and the work records filed by the respondent with regard to the claimant's employment and the issues which emerge for determination are;

Whether the claimant is entitled to the claims made for underpayment, overtime, leave days, certificate of service;

Whether cost should be paid.

Determination

The claimant's case is premised on the facts that he was employed by the respondent on 2nd January, 2011 as a watchman and he resigned from his employment on 2nd June, 2016. That the due terminal dues for underpayments, overtime, off and rests day and annual leave not taken were not paid. The defence asserted that the claimant was employed on and off until 18th January, 2013 when he was employed as an unskilled employee and paid all his due wages until he resigned and his letter accepted on 2nd June, 2016.

In this regard the court acknowledges the *Private Security Regulation Act, 2016* and the application of the term *Security Guard*. See **Republic v Cabinet Secretary, Labour, Social Security and Protection Ex Parte Isaac G.M. Andabwa, the National general Secretary of the Kenya National Private Security Workers Union [2018] eKLR.**

The claimant was issued with Certificate of Service by the respondent for the period of 18th January, 2013 to 1st January, 2016 as the duration of employment.

The claimant also field his payment slips for February and March, 2012. These slips indicate the wage paid at ksh.5,500.00.

The respondent witness and Ms Rutinu testified that the claimant was employed from the year 2011 to 2016. In her witness statement he avers that employment was November, 2016 to June 2016 a contradiction save that at her paragraph 6 she avers that employment was from the year 2011 and the claimant was paid an agreed wage of Ksh.4,348.00. The Certificate of Service issued to the claimant relates to a work period of 18th January, 2013 to 1st June, 2016. Without an employment contract, letter of appointment or any particular record to set out the commencement of employment, noting the claimant has attached various payment slips for February and March, 2012 and on the evidence of Ms Rutinu, employment commenced in the year 2011 to the year 2016.

The claims made shall thus be assessed effectively January, 2011.

On the claims for underpayments, the *Principal Order* with regard to the payment for security guard is the Regulation of Wages (Protective Security Services) (Amendment) Order and which regulate the payment, hours of work and rest days in the sector. Where an employee accepts a given wage, the duty to pay the legal and minimum wage is upon the employer. To go contrary to the Wage Orders and pay less is an underpayment.

For the period of employment;

In January, 2011 the applicable Wage Orders and Legal Notice No.98 of May, 2010 the minimum wage for a security guard was ksh.6,221.00. such wage is exclusive of house allowance for Nakuru area. the claimant was paid ksh.5,500.00 with an underpayment of Ksh.721.00 and for the 4 months to April, 2011 he is entitled to ksh2,884.00.

From May, 2011 to April, 2012 the due wage was Ksh.6,999.00 and the claimant was paid ksh.5,500.00 and underpayment of ksh.1,499.00 and for 12 months the total underpayment is ksh.17,988.00;

From May, 2012 to April, 2013 the due wage was Ksh.7,915.00 and the claimant was paid Ksh.6,500.00 an underpayment of Ksh.1,415.00 all being Ksh.16,980.00;

From May, 2013 to April, 2014 the minimum wage was Ksh.9,024.15 and the claimant was paid Ksh.7,000.00 an underpayment of Ksh.2,024.15 all being 24,288.00;

From May, 2014 to April, 2015 the minimum wage was Ksh.9,024.15 and the claimant was paid Ksh.7,500.00 an underpayment of Ksh.1,524.00 all being Ksh.18,288.00;

From May, 2015 to May, 2016 the minimum wage was Ksh.10,107.10 and the claimant was paid ksh.8,500.00 an underpayment of Ksh.1,607.00 all being Ksh.19,284.00.

This being ksh.99,712.00. Of the total due underpayment there is a house allowance due on each year at 15%. The Tabulation by the claimant is therefore correct and hereby awarded total underpayments at ksh.180,986.71.

With regard to overtime claims for work for 12 hours each day, the Principle Wage Orders and applicable for the period before the enactment of the Private Security Regulation Act, 2016 which fundamentally reviewed the *Regulation of Wages (Protective Security Services) Order, 1998* and read together with The General Order LN/No. 120/82 provides for sixty hours of work, spread over six days a week for night guards. However the practice had been for various employers to vary terms and conditions giving employees and security guards various benefits in this regard and applying different work hours. The legal minimum only changed with the enactment of *Private Security Regulation Act, 2016*. See **Kenya National Private Security Workers' Union versus Kenya Kazi Security Services Limited [2013] eKLR** the claims premised on overtime, these being regulated, the court finds no basis.

In this regard, on a random check of the work sheet the court finds the following;

On 19th January, 2013 the claimant reported at work at 0826 hours and left at 1508hours a period of 7 ½ hours;

On 20th January, 2013 the claimant reported at 1013hours to 1357hour a time of 3 hours;

On 8th April, 2013 the claimant reported at 0822 hours to 1512hours all at 7hours;

On 22nd May, 2014 the claimant reported at 0817hours to 1524hours being 8hours;

26th January, 2015 the claimant reported at 0912hours to 1350hour being 5hours;

30th April, 2015 the claimant reported at 1018hours to1408hours being 4hours.

Using this random check at no time did the claimant work for over 8 hours on any given day. To claim overtime in this regard and premised on the applicable Wage Orders, the claims for overtime are without basis.

On the claims for off and rest days, the claimant admitted that each months he was allocated 2 days of rest. From the records filed the court

finds the following details;

In April, 2016 the claimant was at work for 20 days only;

December, 2015 22 days;

February, 2016 0 days;

June, 2014 22 days.

Using the same assessment, on average the claimant was at work for 22 to 21 days each month. In a given month of 31 or 30 days, an employee has a provision of 26 days at work factoring the taking of off or rest days. To take over 9 days each month off for rest, such must go to the annual leave due.

In this regard the claim for rest days not paid is not justified the claimant having taken rest days over and above allowed.

On the claim for annual leave, the claimant last took his annual leave from 6th January, 2016 to 30th January, 2016. Such leave was approved with comments that there were no off or leave days owing. The claimant has signed in acknowledgement. Such signature is similar to the signature appended to the Verifying Affidavit in support of the claims made. The court finds no other leave days owing to the claimant.

Unfirms refund at Ksh.600.00 is paid and acknowledged. Nothing is due in this regard.

As noted above, the Certificate of service issued is erroneous noting the duration of employment. An appropriate certificate shall issue to the claimant.

The claimant has also been paid an amount of Ksh.3,000.00 as goodwill and upon request for his rent to be paid. Such amount though called 'goodwill' and 'payment in full settlement' shall be deducted from the total claims allowed.

Accordingly, court enters judgement for the claimant for the payment of owing underpayment all at Ksh.180,986.71 which sum shall be paid less Ksh.3,000.00 paid and acknowledged. These dues shall be paid less statutory deductions.

Certificate of Service shall be re-issued for the entire duration of service and covering January, 2011 to June, 2016.

The claimant shall be paid 50% of his costs.

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

M. MBAR?

JUDGE

In the presence of: