



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 405 OF 2017**

**EUPHRAIM MUDAVADI SAVALA.....CLAIMANT**

**VERSUS**

**MWEIGA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent seeking recompense for the alleged unlawful termination and refusal to pay salary and terminal benefits. The Claimant averred that he was employed by the Respondent as a guard in June 2009 and averred that he was dismissed 3<sup>rd</sup> April 2017 verbally. He averred that when he returned on 5<sup>th</sup> April 2017 to collect his terminal dues he was directed to take up the job of a gardener (shamba boy) and he declined stating that was not part of his terms of contract of service. He held the Respondent to be in breach of his employment agreement during the subsistence of his employment and upon termination of the same. The Claimant gave particulars of breach of contract and prayed for compensation damages for the breach as well as pay for 2 days worked in April 2017 – Kshs. 755.34, 3 months payment in lieu of notice – Kshs. 33,990/-, accumulated house allowance – Kshs. 222,500/-, payment in lieu of untaken leave days – Kshs. 73,645/-, under payments – Kshs. 205,109.16, payment for holidays worked – Kshs. 36,256.32, unremunerated but worked one rest day per week for 344 weeks – Kshs. 137,746.96, 12 months salary compensation – Kshs. 135,960/-, certificate of service and costs of the suit plus interest.

2. The Respondent's defence was that the Claimant's claim was vexatious, scandalous and that it would apply for the dismissal of the claim at the earliest. The Respondent denied that the Claimant was its employee as a security guard. It denied that the Claimant's services were terminated by flouting the guidelines in cases of termination for gross misconduct. The Respondent averred that the Claimant was treated in accordance with the internal procedures of the Respondent. It averred that the Claimant disappeared from his workplace during the night as witnessed by the estate manager and reported to the Claimant's supervisor. The Respondent averred that the Claimant collaborated with persons stealing the Respondent's pasture and he would escort them to safety contrary to his work requirements. The Respondent averred that when the Claimant was working at the factory gate work station he facilitated the unauthorized release of goats that had strayed into the Respondent's premises. The Respondent averred that the Claimant was accorded an opportunity to give an explanation but his explanation was found to be unsatisfactory and therefore the Claimant was summarily dismissed from employment. The Respondent averred that it had substantive reasons for the dismissal of the Claimant and he was notified of the incidents before his dismissal. The Respondent averred that the Claimant though not entitled to any terminal dues was paid the same reasons wherefore the Respondent sought the suit's dismissal with costs.

3. The Claimant testified that he worked with the Respondent for 8 years and was not notified of the reasons for the dismissal. He stated that he was a security guard and that he guarded the Respondent's property. He stated that he was dismissed after the manager called him and told him that he was to be transferred to the shamba. He said that one cannot take a teacher and make him a doctor. He testified that he was not paid his dues and that he left with nothing as he was given 2 hours to leave. He said he even had 2 chicken he was raising and had to sell them for 100/- as he had to leave. He stated that he never went on leave or for public holidays and that he would rest for 2 days in a month. He was cross-examined and he testified that he could read some English. He was referred to the payslip and stated that it indicated that he was employed as a casual and that the salary was Kshs. 9,248/-. He stated that there were deductions for NSSF and NHIF as well as Kenya Plantation Workers Union fee. He testified that he was a union member. He stated that there was payment of holidays, overtime. He testified that there was no overtime paid but he had nothing to show overtime was not paid. He stated that he raised chicken and that he was housed at work. He testified that he was not aware if there were arrangements with the Union. He stated that he was not given a letter of dismissal and that he was not dismissed for gross misconduct. He stated that nothing transpired the night before and that he was serving Mr. Kamau at the time. He testified that he guarded the manager's office and that he recalled Benjamin Musili the supervisor. He stated that he is the one that called the vehicle to take the employee to hospital. He stated that he did not know the relationship between the employer and the Union. He testified he was a union member and did not know of the CBA with the employer and confirmed that his salary increased over the years. He stated that the days he claimed were not on the payslip. In re-examination he testified that he had not seen the notice before court and that there was no signature to show he had received it. He stated the December payslip indicated payment for 2 holidays yet December had 3 holidays – 12<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> December. He stated that he worked for 31 days in March as indicated on the payslip and there was no holiday showed in March. He stated that he did not know of any CBA between the employer and the union. He testified that he was asked about an incident the night before he was dismissed. He stated that a vehicle was requested for and the person who gave the vehicle was Madam Flora. The Respondent did not call any witness and closed its case. That marked the end of oral testimony.

4. The parties filed written submissions and the Claimant submitted that he was arbitrarily dismissed by the Respondent. The Claimant submitted that the Respondent did not follow due process in the termination. He submitted that under Section 45 of the Employment Act a termination of employment is considered unfair where the employer fails to prove that the termination was for a valid season and that the reason for termination was a fair reason. He submitted that there was no notice of the intention to terminate served upon him in terms of Section 41 of the Employment. He submitted that therefore the termination was deemed unfair and unlawful as it was carried out in violation of the due process as provided in the Employment Act. He submitted that the Respondent had tried to raise an issue of a collective bargaining agreement. He admitted that he was a member of the trade union but denied knowledge of the existence of any collective bargaining agreement. He submitted that there was none produced in evidence by the Respondent nor were witnesses called to testify on the same. He

urged the Court to disregard any existence of a collective bargaining agreement which were not furnished in court. he submitted that he was paid below the statutory minimum and sought payment of Kshs. 285,360.30 for the underpayments. He also sought payment of the overtime dues for the 300 hours he worked overtime a month. He submitted that he was entitled to payment of Kshs. 1,127,746/- as overtime for the duration of his service. He sought payment in lieu of rest days for 7 years amounting to Kshs. 151,068/-. He claimed compensation totaling to Kshs. 135,961.20 as well as service pay of Kshs. 45,756.17. The Claimant sought payment of Kshs. 64,058.64 being the amount he claimed as unspent leave days for the 7 years. He sought an addition Kshs. 7,843.84 for the period he had worked making the total claimed for leave as Kshs. 71,902.48. He also sought payment of Kshs. 11,330.10 as payment in lieu of notice, Kshs. 32,219.23 as payment for holidays. He sought a certificate of service and costs of the suit. On the issue of costs he relied on the case of **Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Limited [2014] eKLR**, **Douglas Ouma Oyobo v P. W. Waswa & Another [2013] eKLR** and **Samuel Agwata Ogaro v Lavington Security [2017] eKLR**.

5. The Respondent submitted that the Claimant was a casual as shown by the evidence adduced. The Respondent submitted that the Claimant did not produce the payslips for the period between June 2009 and 2016 and that in the absence of the relevant payslips the court has not been convinced there has been underpayment. The Respondent submitted that the Claimant had not produced evidence for the days he worked and for which overtime was due. The Respondent submitted that he who alleges must prove. On the claims for overtime, unspent leave days it was submitted that the Claimant had not proved them as no evidence was adduced. The Respondent submitted that only one holiday in December 2010 was indicated as not being paid and that the Claimant was entitled to only the one day that was unpaid.

6. This suit morphed from the time of filing, hearing and finally at submissions stage. A party in proceedings before the court is bound by their pleadings. At the hearing there was no adduction of evidence on the claims the Claimant introduced at submissions stage being severance pay and the enhanced figures he sought for the itemized parts of his claim as per paragraph 12 of the claim. The Claimant had a duty to adduce evidence of the underpayments by providing evidence of the sums paid and link it to the CBA or the wages orders in the relevant years. In any event, the claims could only be in respect of the 3 years preceding his dismissal in regard to claims that survive beyond the 12 months provided for under Section 90 of the Employment Act. The Claimant produced only 2 payslips being the payslip for March 2017 and the payslip for December 2010. He did not adduce evidence of any requests for leave that was denied or leave sought and not granted over the years. The claims in regard to his dues are specific and must be strictly proved. The payslips produced do not indicate the Claimant as having a different position other than that of a general labourer. In 2017, the minimum wage for a general labourer was Kshs. 6,896.15 a month which figure applied to all other areas where Mweiga, Nyeri County falls. The Claimant was therefore not underpaid as can be seen from the copy of December 2017 payslip. He was therefore unable to prove any part of his claim and the suit is therefore not fit for grant. The suit is dismissed but each party will bear their own costs.

It is so ordered.

**Dated and delivered at Nyeri this 12<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**