



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 208 OF 2017

JACQUELINE KADOGO IMBALI.....CLAIMANT

VERSUS

BOBBY GUARD LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her alleged unlawful dismissal from her service and the failure to pay her terminal dues. She averred that she was employed by the Respondent as a security guard in 15th January 2015 earning a salary of Kshs. 7,000/-. She averred that she was however she was not issued with a contract of employment. The Claimant averred that she worked well with the Respondent without any incidence or accusation of indiscipline until her unlawful, wrongful and unfair termination. She averred that on 30th December 2015 her supervisor, Mr. Alex informed her that there was slump in orders for security services by the Respondent's clients and that the Respondent could not retain her services as there was no work for her. The Claimant averred that the supervisor directed her to leave and informed her that she would be recalled but she has not been recalled to date. The Claimant averred that the Respondent failed to comply with the law while terminating her and did not issue her with notice of termination, the labour officer was not informed of the termination, and the criterion employed in selecting her for termination was not explained to her. She averred that the termination was therefore unlawful, wrongful and unfair for failure to adhere to the law. The Claimant averred that she was not paid any money upon termination even though she had already worked for the entire month of December 2015. She averred that during the subsistence of her employment she was only paid salary for three months as the Respondent kept on promising that it would pay in vain. The Claimant further averred that she was never allowed to go on leave, to rest on public holidays nor was he paid in lieu thereof. She was also was not paid house allowance nor did she agree with the Respondent that her salary would be consolidated. The Claimant averred that she was underpaid contrary to express provisions of law. She averred that she was not issued with a certificate of service. The Claimant thus prays for judgment against the Respondent for a declaration that her termination is unlawful, wrongful and unfair; outstanding salary and underpayments of Kshs. 108,637.60; salary in lieu of notice Kshs. 10,954.70; in lieu of leave Kshs. 8,848.03; in lieu of rest days Kshs. 21,066.73; in lieu of public holidays Kshs. 3,791.70; house allowance Kshs. 18,896.90; severance pay Kshs. 6,319.95; 12 months' compensation Kshs. 131,456.40, certificate of service, costs and interests of the suit. The claim was undefended as the Respondent never entered appearance or filed any response.

2. The Claimant in her testimony reiterated all the above stated sentiments and produced her ID and the bank statement as her exhibits. She also adopted her statement as evidence. In her submissions the Claimant raised three issues for determination as follows:-

- a. whether the Claimant was an employee of the Respondent
- b. whether the Claimant's termination was lawful and unfair
- c. whether the Claimant is entitled to the prayers sought.

3. On the issue as to whether the Claimant was employed by the Respondent, the Claimant submitted that Section 8 of the Employment Act provides that the Act shall apply to both oral and written contracts and that Section 74(1) of the Employment Act mandatorily requires an employer to keep a written record of all employees employed by him with whom he has entered into a contract under the Act specifying the particulars set there under. It was submitted that the Respondent failed to comply with the mandatory provisions of the law in as far as issuing a contract of employment is concerned. She submitted that it was the Respondent's responsibility to issue a formal agreement stipulating the terms and conditions of employment. The Claimant relied on the case of **Josephine M. Akinyi O v Farhiyo Mohamed [2016] eKLR** where the Court held "*Section 10 (7) of the Employment Act provides that where an employer fails to produce a written contract in legal proceedings then the employer must prove or disprove an alleged term of the Employment Relationship. In the instant case the respondent did not cause a written contract to be drawn up and therefore where there are contradictory statements as to the terms of the contract, the employee's statement must be given more weight*". The Claimant submitted that she had proved that she was employed by the Respondent as shown in her bank statements as she was paid by the Respondent for the three months and the court should hold as such. As to whether her termination was lawful and fair, the Claimant submitted that she was verbally terminated with no notice. She submitted that the labour officer in the area the Respondent was operating was not informed of the termination. The criteria of selection was

not explained to her and the sum total of the Respondent's actions amounted to unfair, unlawful and wrongful termination. She submitted that since she was terminated on account of reduction of work as informed by her supervisor, the termination was on the basis of redundancy but the Respondent failed to follow the procedure as laid down in Section 40 of the Employment Act. The Claimant submitted that the Respondent also breached the provisions of Section 45(2) of the Employment Act as it did not prove the reasons for termination as provided by law. The Claimant submitted that there is no material on record to show that the redundancy effected by the Respondent was warranted and/or that the termination was predicated on the Respondent's operational requirements or related to the employee's conduct. The Claimant submitted that the provisions of Sections 40 and 41 of the Employment Act were not complied with in that the redundancy procedure was not followed and if by any chance the termination was based on the Claimant's conduct, she was not afforded an opportunity to be heard. The claimant relied on the case of **Kevin Ziro Pole v Elsek & Elsek Limited [2015] eKLR** and urged the Court to find that the termination was unlawful and unfair. On the issue as to whether the Claimant is entitled to the reliefs sought, she submitted that she was not paid for a period of 9.5 months, she is therefore entitled to the payment of salary for the outstanding months. The Claimant submitted that she was grossly underpaid as the salary of Kshs. 7,000/- paid to her fell below the statutory minimum wage provided for under the Regulation of Wages (General) (Amendment) Order, 2013 and 2015, respectively. She submitted that pursuant to the two Wage Orders the minimum wage exclusive of house allowance payable to a day security guard is a sum of Kshs. 9,780.95 and Kshs. 10,954.70 respectively. The Claimant submitted that the entire minimum wage for the year would therefore be a sum of Kshs. 126,761.40. The Claimant submitted that she was however only paid a sum of Kshs. 23,700/- for the entire year. The Claimant urged the court to find that she is entitled to the claim for non-payment and/or underpayment of wages. The Claimant submitted that she was never issued with notice. She submitted that she never went on leave and was not given any rest day and that she worked on public holidays and was never paid house allowance and severance pay. The Claimant submitted that the evidence on record and the reliefs sought have not been challenged by the Respondent and urged the court to find that she has proved her case on a balance of probabilities and therefore her case should be allowed as prayed.

4. The Claimant in the matter before me proved her case on a balance of probabilities. Her bank statements prove the Respondent made payment for some months and the salary that was paid was well below the statutory minimum showing the Respondent underpaid her. She served the claim upon the Respondent who refused to defend the suit. In the premises she is entitled to the reliefs sought to wit:-

- a. A declaration that her termination was unlawful and unfair
- b. Kshs. 108,637.60 as salary underpayment;
- c. Kshs. 10,954.70 salary in lieu of notice;
- d. Kshs. 8,848.03 in lieu of leave;
- e. Kshs. 21,066.73 in lieu of rest days;
- f. Kshs. 3,791.70 in lieu of public holidays;
- g. Kshs. 18,896.90 house allowance;
- h. Kshs. 6,319.95 severance pay;
- i. 12 months' compensation Kshs. 131,456.40;
- j. certificate of service,
- k. costs of the suit
- l. interest on the sums in b, c, d, e, f, g, h and i above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 5th day of November 2019

Nzioki wa Makau

JUDGE