



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2276 OF 2015

ADAN ABDOW HASSAN.....CLAIMANT

-VERSUS-

HANS KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein filed a Statement of Claim on 18th December 2015 alleging that his employment was unfairly terminated by the respondent and his terminal dues withheld. He therefore sought the following reliefs:

- a. An order that the Respondent be ordered to issue certificate of employment to the Claimant.
- b. An order that the Respondent be ordered to pay the Claimant a sum of Kshs.972,063.80.
- c. Costs of action.
- d. Interest at court's rate.
- e. Any other relief the court may deem fit to grant.

2. The Respondent filed her Amended Response to the Memorandum of Claim on 22nd March 2019 admitting that she employed the claimant as a security guard but denied that she unfairly terminated the employment contract. She averred that she decided to outsource her security services and therefore laid off some of her guards including the Claimant. She further averred that after the separation she computed the claimant's dues and drew a cheque in his favour but he refused to collect the same.

3. The main issues for determination arising from the pleadings are whether claimant's contract of service was unfairly terminated and whether the reliefs sought should be granted. To answer the said questions, both parties tendered evidence and thereafter filed written submissions.

Claimant's case

4. The Claimant testified as Cw1 and basically adopted his witness statement filed on 2nd March 2018. He stated that he was employed by the Respondent on 27th June 2012 as a day watchman at a daily rate of Kshs. 365 which was paid weekly. He further stated that his services were terminated on 22nd July 2015.

5. He contended that he was issued with 7 days termination notice and that he was underpaid during the period of his employment. He further contends that he worked from Monday to Saturday from 6 am to 6.00pm and during public holidays. He therefore seeks overtime for the hours worked.

6. In cross-examination, he testified that the Respondent's attendance register was for both night and day watchmen and that he would fill the register during the day. It was his testimony that there was clocking in by thumb at 6 am and 6pm. He admitted that he was being paid on a weekly basis. He further admitted that the company closed down during public holidays, however, as a watchman he was on duty throughout but he was still paid at the normal rate. Finally, he testified that the Respondent had both internal and outsourced guards of which the internal guards like were guarding the inside gate.

7. In re-examination he testified he was a day watchman and that the attendance sheets produced in court from the Respondent and not from him. He maintained that he worked during public holidays and 7 days a week.

Respondent's case

8. George Muchoki Njue is the respondent's Chief Accountant. He testified as Rw1 and basically adopted his Witness Statement filed on 22nd March 2019 as his evidence in chief. He stated that the Claimant was employed in 2012 and was paid a daily wage of Kshs.365 which was reviewed in 2013 in accordance with the Wage Order. He further stated that the Claimant worked for 6 days and rested on Sunday when the Respondent outsourced a guard. It was his testimony that the Claimant could not have worked on Sundays and public holidays since the premises were closed. He confirmed that the Claimant was a day guard watching inside the premises while the outer gate was guarded by outsourced guards.

9. Rw1 testified that he used to pay the claimant through Equity Bank Limited. He stated that the Claimant was not issued with notice but was paid salary in lieu of notice equivalent to 6 days' pay, the 4 days he worked and service pay for the years worked totalling to Kshs.25,520 but he refused to collect the cheque. Finally, he contended that the Claimant was reporting to work at 8.30 am and leaving at 5pm.

10. In cross-examination, he testified that the Letter of Appointment indicates that the Claimant was a day guard earning Kshs. 365 per day. He admitted that the Claimant was to report to work at 6 am and leave at 6pm which is the equivalent of 12 hours. He testified that the daily wage was increased in 2013 but he could not recall the exact date. He however, contended that as at 29th November 2013 the Claimant was receiving Kshs. 3760. He contended that he used to confirm the number of days the Claimant clocked in before paying him.

11. He denied ever suspending the Claimant and maintained that the respondent terminated the Claimant's employment in order to outsource guards. He further denied knowing that the labour officer had by his letter dated 30th September 2015 advised that the respondent that the termination was on account of redundancy. He further testified that the labour officer recommended that the respondent should pay the claimant Kshs.35,507 as terminal dues but she drew a cheque of Kshs.25,520 and the claimant refused to collect it. He however clarified that the respondent had drawn the said cheque before receiving the labour officer's opinion.

12. In re-examination he testified that Kshs.365 was only paid in 2012 but thereafter the salary was increased annually. He clarified that the clock in and clock out was automatically generated.

Claimant's submissions

13. The Claimant submitted that by virtue of working continuously as a casual for a period of 3 years his employment was converted to permanent basis. In support of this he relied on the decision in *Charles Onchoke v Kisii University [2018] eKLR*.

14. He further submitted that since the termination of his employment was caused by the outsourcing of guards, the termination was due to redundancy and the provisions of section 40 of the Employment Act applied to it. In support of this he relied on the decision in *Gerrishom Mukhusti Obayo DSV Air and Sea Limited [2018] eKLR*.

15. He further submitted that the termination did not comply with the procedure under section 40 of the Employment Act and prayed for the maximum compensation for unfair termination being 12 months' salary. He further prayed for one month's salary, the balance of 6 leave days at Kshs.3,162.60 plus severance pay at Kshs.28,463.40.

16. He urged the Court to award him overtime as he worked 12 hours a day as provided under clause 3 of his contract of service dated 27th June 2016. He further urged the court to allow the prayer for public holidays as the Respondent's letter dated 27th June 2017 indicated that he was not entitled to a rest day and that he worked for 7 continuous days save for his annual leave.

Respondent's submissions

17. The Respondent submitted that the Claimant was being paid Kshs.365 as opposed to Kshs.412.80. She maintained that the Claimant was not underpaid during his employment as alleged. The Respondent relied on sections 106,107,108 and 109 of the Evidence Act and submitted that the Claimant did not furnish the court with any evidence by way of payslip or payment voucher to enable the Court compare what he was earning with what he should have been the correct pay according to him. To fortify this submission he relied on *Stephen Wasike & Another v Security Express Ltd [2006] eKLR* where the Court held that a party seeking justice must place before the court all material evidence and facts to enable the court arrive at a decision whether the relief sought is available.

18. The Respondent further argued that under section 35 (b) of the Employment Act the employer had a right to terminate the contract of employment without notice, for just cause, and that as soon as the Claimant was terminated the Respondent drew a cheque of Kshs.25,520 which the Claimant rejected. She submitted that the Claimant went on leave before being dismissed on 22nd July 2015 and prayed that the claim for accrued leave to be dismissed. She further denied the claim for severance pay and contended that the Claimant was not declared redundant.

19. She denied the claim for over time and submitted that the muster rolls of all employees of Respondent produced by the claimant were forgeries. She maintained that the Claimant never worked beyond the normal company hours from 8am to 5pm. She further maintained that the Claimant was working for only 6 days a week and submitted that he did not adduce any proof that he was working Sundays and public days. In conclusion, she urged the court to dismiss the claim with costs.

Analysis and determination

20. The undisputed facts are that the Claimant was employed by the Respondent as a day guard until his termination on 22nd July 2015 vide the letter of termination dated 16th July 2015.

21. As observed herein above, the main issues for determination arising from the pleadings, evidence and submissions are:

- a. Whether the Claimant was unfairly terminated
- b. Whether the Claimant is entitled to the reliefs sought.

(a) Whether the Claimant was unfairly terminated.

22. According to the letter of termination, and the evidence by Rw1, the Respondent terminated the Claimant's employment because she had decided to outsource guards. The letter stated as follows:

“RE: TERMINATION OF YOUR CONTRACT OF SERVICE.

This is to inform you that from the date of this letter you are working on a one week notice. Your last working date will be on 22nd July 2015.

This is because of change of guards.

...”

23. Under paragraph 6 of the Statement of Defence filed on 5.2.2016, the respondent pleaded as follows:

“6. The Respondent avers that the claimant's employment was terminated on account of redundancy and denies that the claimant is entitled to any compensation at all.”

24. On 22.3.2019, she amended the above paragraph to read as follows:

“6. The Respondent avers that the Company decided to outsource its security services and was forced to lay off some of its guards including the claimant herein and denies that the claimant is entitled to any compensation at all.”

25. When the dispute was presented to the Labour Officer for conciliation, he made a finding vide the letter dated 30th September 2015, that the termination of the Claimant's employment was on account of redundancy. I agree with the said opinion because the decision by the respondent to outsource guards meant that the position of internal guards held by the claimant was abolished. Redundancy is defined under Section 2 of the Employment Act as follows:

“The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;”

26. For reasons best known to the respondent, the defence was amended to state that the claimant was laid off as opposed to redundancy. I however wish to state that redundancy and lay off mean the same thing. Lay off is defined by the **Black's Law Dictionary, 10th Edition** as follows:

“The termination of employment at the employer's instigation, usu. through no fault of the employee; esp., the termination- either temporary or permanent- of many employees in short time for financial reasons. – Also termed reduction in force.”

Reason for the termination

27. Having established that the claimant's employment was terminated on account of redundancy, I now proceed to answer the question whether the termination passed the legal test of fair termination as set out under section 45 of the Employment Act. The said Section provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) related to the employees conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed.

28. In this case, the reason cited for the termination was redundancy due to the decision to outsource security services. The said reason in my view was valid and fair because it was founded on a managerial prerogative in relation to her operational requirements and not maliciously to target the claimant alone. Consequently, I find that the termination of the claimant's services was justified because the Respondent has the prerogative to decide on how best to conduct her business. In this instance, the Respondent did so by choosing to outsource its guards as opposed to continuing to employ its own internal guards.

The procedure followed

29. However, the procedure followed by the respondent before terminating the claimant's services on account of redundancy was not fair because the Respondent failed to comply with the mandatory procedure set out under section 40 of the Employment Act. The respondent never served the claimant and the area labour officer with at least one month notice of the intended redundancy as required by section 40 (a) and (b) of the Act. She also never paid the claimant severance pay, one month salary in lieu of notice and accrued leave as provided by the said section. Even if the claimant was receiving salary on weekly basis, his prolonged service had converted his status from casual to that of an employee employed for a monthly salary by dint of section 37 of the Act.

30. Having found that the respondent failed to comply with the mandatory procedure set out under section 40 of the Act, I return that the termination of the claimant's employment by the respondent on account of redundancy was unfair within the meaning of section 45 of the Act.

(b) Whether the Claimant is entitled to the reliefs sought

31. In view of the foregoing finding, the claimant is entitled to damages under section 49(1) of the Employment Act namely one month's salary in lieu of Notice, and 6 months' salary compensation for unfair termination. In granting the said compensation I have considered that the claimant never contributed to the termination through misconduct and that he had served for a short period.

32. Based on the Legal Notice No.117 publishing the General Wage Order for 2015, the minimum daily wage for day a Watchman was Kshs.527.10 equalling to Kshs.15,813 per month. The total award under the said section equals to Kshs.110,691.

33. The contract of service dated 27th June 2012 provided that the Claimant was entitled to Kshs.365.00 per day. Legal Notice No. 71 of 2012 the Regulation of Wages (General) (Amendment) Order 2012 provided that a day watchman was to earn a daily rate of Kshs.412.80 that represents underpayment of kshs.47.80 per day. I therefore grant the sum prayed underpayment in June 2012 to April 2013 being 10 months x 30 days x Kshs.47.80 equalling to Kshs.14,340.

34. As regards the rest of the period from May 2013 to 2015, the Court notes from the payrolls forwarded to the Equity bank, that the Claimant was paid different amounts as weekly wages. He cannot, therefore, allege that in each of these months he was underpaid as he did not produce any documents to ascertain his exact pay as at that date. Consequently, the Claim for underpayment for the said period fails.

35. Rw1 testified that the Claimant was to be paid 6 days pay and 4 days worked but he only stated that the 6 days were notice pay. The issue of notice is compensated above under section 49(1) of the Act. The claimant has not prayed for any unpaid salary. He has however prayed for 6 days leave which has not been disproved by the Respondent by leave records. Consequently, I grant the claim for leave being 6 days x 527.10 equalling to Kshs. 3,162.60.

36. The claimant sought severance pay for 3 years. However, although the he was terminated on account of redundancy, the termination has been declared unfair and the claimant adequately compensated under section 49 of the Employment Act. It will therefore be unfairly benefiting the claimant twice by awarding him further compensation under section 40 of the Act. Consequently, I dismiss the claim for severance pay.

37. The Claimant prayed for overtime pay and testified that he worked overtime being from 6 am to 6pm. The contract of service produced by the Respondent indicated that the Claimant was to work from 6 am to 6 pm. However, both the Claimant and Rw1 confirmed that the employees were expected to clock in and clock out. Further, the Claimant testified that he was also signing an attendance register. The clock in and clock out document provided by the Respondent indicated that during his employment the Claimant got to work at 8.30 am and left at 5.30 or minutes before or after 5.30 pm. Consequently, the claim for overtime exaggerated and it fails.

38. On the other hand, I find that the Claimant never proved that he was present at work throughout the week. Going by his written witness statement, he confirmed that he used to work from Monday to Saturday. He therefore had one rest day per week.

39. Finally, the claimant is entitled to a certificate of service under section 51 of the Act and as such I grant the prayer for the same.

40. In conclusion I enter judgment for the claimant against the respondent in the following terms:

Notice	Kshs. 15,813.00
Compensation	Kshs. 94,878.00
Underpayment	Kshs. 14,340.00
Leave	<u>Kshs. 3,162.60</u>
Total	Kshs. 128,193.60

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The award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 1st day of November , 2019

ONESMUS N. MAKAU

JUDGE