



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.215 OF 2016

CHRISTOPHER KOMEN CHEBETCLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITEDRESPONDENT

JUDGEMENT

In February, 2014 the claimant was employed by the respondent as a night guard.

The claim is that there was underpayment where the claimant was only paid his basic pay without a house allowance. Work hours were 6pm to 6am each day and for the overtime hours he was not compensated. The claimant was not allowed a rest day, annual leave or public holiday or paid in lieu thereof.

The claim is also that on 11th December, 2015 the claimant was called by the manager, Mr Tom and told not to report to work the next day. After 3 days he called to ask why he had been stopped from attending duty and was advised that his employment had been terminated. There was no notice, hearing or reasons given.

The claims are for;

- a) Notice pay at ksh.13,029.60;
- b) Underpayments ksh.86,490.10;
- c) Overtime ksh.134,915.30;
- d) Off duties Ksh.119,924.65;
- e) Public holidays ksh.23,457.00;
- f) Salary for 11 days for February, 2016 Ksh.6,011.00;
- g) Uniform deductions Ksh.2,400.00; and
- h) Compensation.

The claimant testified in support of his claims. upon employment on 3rd March, 2014 he signed a contract and paid Ksh.7,000 per month which was an underpayment. On 11th February, 2016 the branch manager called him and directed him to report to Section 58 from the Safaricom booster but he did not know where the new station was located, the distance was long and no transport was offered. after 4 days the manager called him with instructions to report to work and told him to go home. He was then called and issued with letter of summary dismissal.

The claimant reiterated his claims.

The defence is that the claimant was employed on 8th march, 2014 and left work on 19th February, 2016 while earning Ksh.11,000.00 per month. He willingly signed the employment contract and agreed to the payments made. The claimant had a day off each week.

The defence is also that save for the 11 days worked in February, 2016 which were not paid for, the claimant was fully remunerated as agreed and nothing is owing. The uniform refund of Ksh.2,400 would have been paid back if the claimant had returned to clear with the respondent by returning all his work tools issued to him by the respondent.

The defence is also that on 14th February, 2016 while the claimant was working as a guard at safaricom shop, Nakuru he was instructed by his supervisor to report to Anytime Garage which is one of the respondent's assignments to cover for shortage but he blatantly refused to attend. Even when the branch manager intervened, the claimant refused to obey lawful instructions leading to summary dismissal for insubordination and failing to attend work as directed.

The defence is also that the claimant was not entitled to a house allowance as the wage paid was clearly stated in the contract of employment and this was accepted. The suit should be dismissed with costs.

Moses Mauka testified that he is the branch manager, Nakuru and on 11th February, 2016 the claimant was called by Richard Bett to report to Anytime Garage at Section 58 following a shortage after another guard was unable to attend work but he declined. The supervisor informed the manager, Tom Ochanga but the claimant was adamant and refused to attend at the new location.

The respondent has the practice of replacing staff shortages by removing some guards from locations with sufficient guards as an interim measure to address a gap and then upon replacement to return the guards to their usual stations. At safaricom there were 6 guards, on the material day the claimant had not reported for the handover and was therefore directed to attend at another station but he declined and defied the directions from his supervisor. At the time, only saraficom station required transportation of the guards and for other stations the guards had to source own transport. The claimant refused to be moved even where transport was offered.

Mr Mauka also testified that the claimant had signed a contract with an all-inclusive wage and cannot claim house allowance.

Each guard had 4 days off each month unless there was a shortage. At the safaricom site the client had requested for the guards to take a day off each week. This arrangement was followed by the respondent.

On the claim for leave, the claimant had 11 months prorated and 11 days worked in February, 2016 is admitted as due. other claims should be dismissed.

At the close of the hearing both parties filed written submissions.

The claimant's case is that on 11th February, 2016 he was called by his supervisor and sent to Section 58 at Anytime Garage which was in the night, it was far, and he did not have transport and did not know the place and therefore could not report at this new site. The claimant testified as follows;

... on 11th February, 2016 I was sent to work at Section 58 and did not know where it was located. I was resident at Kiamunyi and my station was safaricom booster and due to distance and as no transport was offered I did not report. I signed into my usual station.

After 4 days the manager called me and told me not to report to work. Thereafter there was no call and I decided to call the manager who told me to stay at home...

From his evidence, the claimant admitted that he was sent to a new location by the employer and did not report. His reasons were that he did not know where section 58 was, he had no transport and due to the long distance he decided not to report.

By his statement, where the claimant knew the distance to be covered from the safaricom booster to section 58 or from his home in Kiamunyi to section 58, it is apparent he was conversant with the location of section 58. Even where he was a stranger to section 58, for 4 days upon the direction by the employer to report to section 58 he did not seek guidance, seek from the employer for directions, he simply sat back and insisted on attending at the site, safaricom booster.

Section 44(4) of the Employment Act, 2007 allow an employer to summarily dismiss an employee who fails to abide lawful instructions and directions on short notice and upon allowing the employee to give their defence and the same is found unsatisfactory as held in **Standard Group Limited versus Jenny Luesby [2018] eKLR;**

Section 44 of the Employment Act which was invoked covers 'Summary Dismissal' and in subsection (3) thereof allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service. Subsection (4) then sets out various acts that may amount to gross misconduct so as to justify summary dismissal. Section 44 (4) (d), which was specifically invoked by the appellant as a 'justifiable or lawful ground' to dismiss the respondent states: ...

Therefore, where the claimant was required by the employer to attend work at a given location and he failed to attend and where he was unable to attend failed to inform the employer by insisting that he had to work at a given location, he frustrated his own employment. Failure to attend work as required by the employer and insisting the distance is long even without making an effort to attend at such a distance or

causing the employer to know of the challenge in reporting at the required location is tantamount to disregard to lawful instructions and directions of the employer. Such amounts to gross misconduct.

By failing to attend work as required and forcing the supervisor to call the manager to urge the claimant to attend, the issue at hand was not only insubordination in its general sense of refusal to obey lawful instruction but the offence committed by the claimant had to do more with insolence. disobeying a lawful instruction that is reasonable is justifiable ground for summary dismissal.

This is aptly captured in the case of **Palluci Home Depot (Pty) Ltd versus Herskowitz & Ors [2014] ZALAC 81** that;

A failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious. ... The sanction of dismissal should be reserved for instances of gross insolence and gross insubordination as respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her

The summary dismissal of the claimant by the respondent is hereby found justified.

Notice pay and compensation are not due.

The respondent has admitted to owing the claimant pay for 11 days worked in February, 2016 and for prorated leave days for 11 months.

On the claims made, the General Wage Orders applicable to the employment of a night guard regulate the wage payable. Such cannot be negotiated downwards as there is a minimum wage. An employer cannot lawfully enter into a contract with an employee with an underpayment. Such contract is void ab initio for being unlawful and cannot be enforced in law for lack of adherence to the Wage orders.

Under the employment contract dated 8th March, 2014 the claimant as paid ksh.11,000.00 per month. Under the applicable Regulation of Wages (General) (Amendment) Order, 2013 and shall be deemed to have come into operation on 1st May, 2013 the due basic wage was Ksh.9,024.15 and 15% house allowance being Ksh.1,353.60 gross at Ksh.10,377.60 and for the period of March and April, 2014 there was no underpayment.

From May, 2014 to April, 2015 the due gross wage under the Wage Orders was the same as there were no new Wage orders issued with a review and where the claimant was paid ksh.11,000.00 he was within the minimum wage due.

From May, 2015 to January, 2016 the Wage due was gross Ksh.11,633.55 per month and for the 9 months there was an underpayment of ksh.633.55 x 9 all at ksh.5,701.95 which is due.

On this basis, the due wage for 11 days worked in February, 2016 is ksh.4,265.40.

The leave due prorated to 11 months as admitted and based on the basic pay at Ksh.10,107.00 pursuant to section 28 of the Employment Act, 2007 is 1.75 x 11 months all at ksh.6,485.32 due in annual leave pay.

On the claim for overtime pay, the respondent has not attached the work records save the defence that the claimant enjoyed a day off each week was not challenged. That while the claimant worked at the safaricom booster, the client insisted that of the 6 guards, each had to take a day off.

Under the Wage orders, security guards are allowed work for 10 hours spread over 6 days a week all at 60 hours. Where the claimant worked for 12 hours each day and without compensation, the 2 extra hours not compensated this is due at 1.5 basic wage due. in total the claimant claims for 1008 hours spread over 7 days each week. With the off day addressed, each day having 2 hours overtime worked, this reduces to 672 hours. On the last basic wage of ksh.10,107 the due overtime pay is ksh.42,449.40 due in overtime worked.

On the claim for public holidays worked the due dates/days and are not addressed, these claims are made generally and not addressed as to whether these fell on days when the claimant on enjoying his off days and such general claims are declined.

The claim for uniform deduction is due subject to the claimant undertaking clearance with the respondent. this is a reasonable requirement.

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

- (a) Underpayment awarded at ksh.5,701.95;**
- (b) 11 days worked in February, 2016 Ksh.4,265.40;**
- (c) Leave pay ksh.6,485.32;**
- (d) Overtime Pay Ksh.42,449.40;**

(e) The claimant shall be paid ksh.2,400.00 uniform refund upon a successful clearance approved by the respondent.

(f) Each party shall bear own costs.

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

M. MBARU

JUDGE

In the presence of: