



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2129 OF 2012

ALFRED ONGOSI OMBEO.....CLAIMANT

v

RADAR SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. Alfred Ongosi Ombeo (Claimant) instituted legal proceedings against Radar Security Ltd (Respondent) on 19 October 2012 and he stated the Issue in Dispute as *Wrongful and unfair termination of the Claimant's services and failure by the Respondent to pay terminal benefits to the Claimant.*
2. The Respondent was served with and acknowledged Summons on 29 October 2012, but it did not file a Response within the prescribed time of 14 days.
3. On 13 March 2014, the Court directed the Respondent to file and serve a Response within 14 days. The Respondent was also ordered to pay the Claimant's costs of Kshs 3,000/-.The directive and order were not complied with.
4. At the same appearance, the Court scheduled the Cause for hearing on 3 June 2014, but the hearing did not take off.
5. On 20 May 2015, the Court ordered that the Cause proceed as an undefended Cause and a hearing scheduled for 11 October 2017 was postponed on the application of the Respondent.
6. When the Cause came up for hearing on 16 January 2018, the Court declined to grant an adjournment requested by the Respondent. It is noteworthy that the Respondent was seeking an adjournment when it had not filed a Response over 4 years after service of Summons.
7. The Claimant gave sworn testimony and filed submissions on 23 January 2018.
8. The Court has given due consideration to the evidence and submissions and identified the Issues for determination as, *whether there was unfair termination of employment and appropriate remedies including entitlements accruing from the employment contract.*

Whether there was unfair termination of employment

Procedural fairness

9. The Claimant testified that he was not issued with notice of termination and that no hearing was conducted before the summary dismissal on 28 November 2011.

10. The Claimant's testimony remaining unchallenged and uncontroverted, and considering that it is incumbent upon the employer to demonstrate that it complied with the procedural fairness essentials of section 41 of the Employment Act, 2007, the Court finds that the summary dismissal was procedurally unfair.

Substantive fairness

11. In terms of sections 43 and 45 of the Employment Act, 2007, an employer shoulders the burden of proving the reasons for dismissing an employee, and that the reasons were valid and fair.

12. The Respondent having failed to file a Response to outline the facts material to the dismissal, and further having failed to discharge the burden, the Court can conclude that the reasons for dismissing the Claimant were not proved and were equally not valid or fair.

13. The dismissal was substantively unfair.

Appropriate remedies

1 month pay in lieu of notice

14. With the conclusion reached and in terms of section 35 of the Employment Act, 2007, the Claimant is entitled to the equivalent of 1 month pay in lieu of notice.

Leave pay

15. The Claimant's testimony that he did not go on leave during the period of employment was not controverted by production of employment records in terms of sections 10(3) and 74 of the Employment Act, 2007 and the Court returns a verdict in favour of the Claimant as claimed and computed.

Overtime

16. Under the head of overtime, the Claimant stated that he used to work from 6.00am to 6.00pm, a total of 12 hours per day.

17. Regulation 6 of the Regulation of Wages (Protective Security Services) Order, 1988 provide for 52 hours of work spread over 6 days of the week, thus averaging about 8 hours per day.

18. It is notorious fact that security guards in this country generally work two shifts of 12 hours each day and the Court would find in favour of the Claimant as claimed.

Gratuity

19. The Claimant sought Kshs 17,500/- on account of gratuity.

20. Regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1988 provides for payment of gratuity.

21. The head of claim therefore has statutory foundation and is allowed.

Compensation

22. Compensation in terms of section 49 of the Employment Act, 2007 is discretionary. The Claimant did not explicitly seek compensation, but general damages for loss of opportunity. Compensation is declined.

Conclusion and Orders

23. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of Notice Kshs 10,000/-

(b) Leave pay Kshs 24,500/-

(c) Overtime Kshs 9,333/-

(d) Gratuity Kshs 17,500/-

TOTAL Kshs 61,333/-

24. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 26th day of January 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maina instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Churchill Midwa & Co. Advocates

Court Assistant Lindsey