



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 102 OF 2015

(Before Hon. Justice Mathews N. Nduma)

CHARLES ETYANG ENGALAU.....CLAIMANT

VERSUS

J.R.S GROUP SECURITY LIMITED.....RESPONDENT

J U D G E M E N T

1. The suit commenced vide a statement of claim on 2nd April, 2015 seeking compensation for wrongful and unfair termination and payment of terminal benefits set out in the statement of claim as follows:-

a. Three months in lieu of notice Kshs.29,342.85.

b. Overtime Kshs.14,466.65

c. 10 months in lieu of leave Kshs.97,809.50

d. N.S.S.F refund Kshs.4,400

e. Certificate of Service

f. Interest and Costs.

g. The Claimant relied on witness statement filed on 2nd April, 2015 and annexures to the statement of claim including a demand notice by advocate for the Claimant to the Respondent.

h. The Claimant testified under oath in support of the particulars of Claim.

i. The Claim is opposed vide a Memorandum of defence filed on 24th April, 2015 and the Respondent called RW1, John Odhiambo who testified for the Respondent.

j. The issues for determination are:-

i. Whether the termination of the Claimant was for a valid reason and in terms of a fair procedure and

ii. Whether the Claimant is entitled to the reliefs sought.

Issue I

Claimant's Case

6. The Claimant testified that he was employed by the Respondent as a security guard on 13th October 2003, at a monthly salary of Kshs.7,000.

7. That he was summoned by the Respondent to their Kisumu Offices on 24th April 2014 and his employment was unlawfully and unfairly

terminated without notice, hearing or valid reason.

8. The Claimant states that he was wrongfully accused of being a boda boda rider hence the termination. That he had a clean record before termination. That he was not given leave for the entire period he worked for the Respondent. That he worked from 6pm to 6am, a period of 12 hours and was not given off days and therefore worked from Monday to Friday every week, but was not paid overtime. That although he was a member of NSSF, the Respondent did not remit the deducted contributions for some of the months. That he was given a CID Bond, which he produced as evidence for having worked for the Respondent. He also produced a warning order from the Respondent as evidence of his service.

9. The Claimant prays to be awarded as prayed in the Claim since he was not paid any terminal benefits upon termination and was not given certificate of service to enable him get alternative employment.

Respondent's Case

10. The Respondent denied in paragraph 3 of the Memorandum of Defence having employed the Claimant at all. The Respondent further denied all the prayers set out in the Memorandum of Claim.

11. In the same breath under paragraph 5, the Respondent states that the Claimant deserted work after receiving several warnings for his habit of absenting himself from work.

12. Mr. John Ojiambo (RW1) in his testimony under oath told the court that the Claimant was a good employee but he slept a lot at work. The Claimant was called to a meeting by the Director of the Respondent Mr. Rafiki Dhanji and was asked in the presence of RW1, whether he preferred to work during the day or during the night. He was told that the Clients had complained that the Claimant slept at work at night. The Claimant chose to work during the night but was asked by Mr. Rafiki to work during the day since he was riding boda boda during the day hence sleeping at night, while on duty.

13. The Claimant deserted work from that day. RW1 stated that the Claimant was not dismissed from work.

14. RW1 was closely cross-examined by counsel for the Claimant and persisted in his version of events.

Determination

15. The issues for determination are:-

- i. Whether the Claimant was dismissed from employment or he deserted work.
- ii. Whether the Claimant is entitled to the reliefs sought.

Issue i

16. Upon a careful analysis of the evidence adduced before court, the court is satisfied that the Claimant deserted work when he was given the option of either working during the day or during the night. The Respondent had justification to introduce this charge following complaints from a client that the claimant was sleeping on duty. The Respondent had reliable information that the Claimant operated a boda boda during the day and therefore regularly slept at his duty station at night.

17. The court finds that the claimant has failed to discharge the onus placed on him in terms of section 47(5) of the Employment Act which reads:-

47(5) for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

18. On the contrary, the Respondent has sufficiently rebutted the evidence by the claimant and the court finds that the Claimant deserted work and was not dismissed at all.

Issue ii

19. Following the finding by the court that the Claimant deserted work, the claim for payment in lieu of Notice has no merit and is dismissed.

Overtime

20. The Claimant has satisfied the court that he worked for twelve (12) hours daily and was not paid overtime in the sum of Kshs.14,466.65. The court awards the claimant accordingly.

Leave Allowance

21. The claim for leave allowance was not sufficiently proved by the Claimant. It is not clear whether the claim was for payment in lieu of

leave days not taken or if it was a claim for grant of leave allowance upon taking leave. The onus is on the Claimant to prove his claim on a balance of probabilities and has failed to discharge the onus. The claim is accordingly dismissed.

NSSF Refund

22. The Claimant demonstrated that Kshs.4,400 was contributed but was not remitted on his behalf by the Claimant to the NSSF Fund. The court awards the Claimant accordingly.

Damages

23. Upon finding that the Claimant deserted work and was not dismissed, the claim for damages is dismissed.

Certificate of Service

24. The Respondent did not provide the Respondent with a certificate of service and is directed to provide the same.

25. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

- i. Kshs.14,466.65 being unpaid overtime to be paid with interest at court rates from date of filing suit.
- ii. Respondent to provide a Certificate of Service to the Claimant within 30 days of this judgment.
- iii. The rest of the prayers are dismissed.
- iv. Respondent to pay half the costs of the suit.

Dated and Signed in Kisumu this 15th day of March, 2018

Mathews N. Nduma

Judge

Appearances

Ojienda for claimant

M. M. Omondi for Respondent

Chrispo – Court Clerk