



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 701 OF 2015

BETWEEN

NICHOLAS JUMA OJUOK.....CLAIMANT

VERSUS

PENTAGON ELITE SECURITY SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Salma Ramadhan & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 9th September 2015. He states he was employed by the Respondent as a Security Guard, in February 2008. In January 2014, he was diagnosed with cardiac disease. He resigned on medical grounds. He was paid Kshs. 30,000 by the Respondent on 22nd January 2015. He was not told what the amount represented. During employment, he was not paid salary in accordance with the statutory minimum rates of remuneration. He prays for Judgment against the Respondent for:-

a) Underpayment of salary from 1st May 2013 to 30th December 2014 [20 months], including house allowance, at Kshs. 104,961.

b) Annual leave of 32 days at Kshs. 20,996.

c) Overtime of 14 hours per week for 3 years at Kshs. 123,240.

Total...Kshs. 249,198.

c) Certificate of Service to issue.

e) Costs and interest be provided for.

2. The Respondent filed its Statement of Response on 8th December 2015. The salary paid to the Claimant was freely negotiated and agreed between the Parties. The Wages Orders relied on by the Claimant came into force years after the Parties contracted. The sum of Kshs. 30,000 paid to the Claimant was similarly negotiated and agreed upon. The Respondent urges the Court to reject the Claim with costs to the Respondent.

3. The Claim was initially heard, and proceedings closed, in the absence of the Respondent, on 29th September 2016. The Respondent was granted leave to respond to the Claim on 23rd November 2016, and hearing reopened, to proceed on 23rd March 2017.

4. On 23rd March 2017, it was indicated to the Court by Parties, that Parties were ready to compromise on certain issues. No agreement was recorded. The Claimant was recalled, gave evidence, and once again rested his case. Hearing of the Respondent's case was rescheduled for 14th July 2017. It did not take off. The Court was told Respondent's Counsel was attending a job interview in Nairobi. Hearing was fixed for

23rd October 2017. The Respondent and its Advocate did not attend Court on this date. Claimant's Advocate applied to have orders, and orders were granted, marking the Respondent's case and the proceedings as closed. The Claimant was directed to file his Closing Submission within 14 days, which he confirmed to have filed when the matter was last mentioned on 13th December 2017.

5. The Claimant restated the contents of his Pleadings, with regard to his employment history with the Respondent, and his terms and conditions of service. He was paid a salary of Kshs. 6,000 monthly throughout, while he ought to have been paid Kshs. 11, 248 under the minimum wage law. He retired on medical ground. He was paid Kshs. 30,000 by the Respondent to enable him transfer his household goods to his rural home in Nyanza Region. The money was not enough to transfer his household goods and family.

6. Cross-examined, the Claimant confirmed he left employment on medical grounds. His Employer had offered to reassign him duty at a Filling Station, after the Claimant was diagnosed with cardiac disease. He did not want to die in Mombasa, and opted to resign. The amount of Kshs. 11,248 claimed as salary was obtained from the Wages Order. He never went on annual leave. In his letter of demand before action, issued by his Advocates on 22nd June 2015, the Claimant states he went on leave for 2012/2013. He worked for 7 years. He asks for overtime over a period of 3 years. He worked for 12 hours from 7.00 a.m. to 6.00 p.m. each day. He confirmed on redirection that he took annual leave of 2 months in 2012/2013.

The Court Finds:-

7. The Respondent was granted an opportunity to file its Response out of time. It was allowed to state its case, after the proceedings had closed. The Claimant presented his case *ex parte*, and was on the verge of obtaining Judgment, when the Respondent approached the Court asking to be allowed to reopen proceedings. This prayer was granted; the Respondent granted a second chance; but the Respondent still failed to present any evidence.

8. There is no evidence to counter the position given by the Claimant.

9. The Statement of Response filed by the Respondent, which is not supported by any evidence, is mainly based on the idea of freedom of contract. The Claimant was paid Kshs. 6,000 as monthly salary. This was freely negotiated by, and agreed to between, the Parties. Other acts done in the name of freedom of contract include payment of terminal dues at Kshs. 30,000.

10. The Court's view is that Parties cannot agree to pay and receive monthly salaries, below the minimum wage set by the law. They cannot agree on terms and conditions of service, below the minimum standards set in law. Terms and conditions of service which fall below the minimum statutory standards are, illegal and unenforceable. Section 27 of the Employment Act, and regulations made under other written laws, such as Wage Regulations made under Section 63 of the Labour Institutions Act 2007, constitute minimum statutory standards. Parties cannot contract below these standards. Section 48 [2] of the Labour Institutions Act states where a contract of employment provides for less remuneration than the statutory minimum remuneration, remuneration and conditions of employment established by the Wages Order shall be inserted in the contract, in substitution of those terms. An Employer cannot offer, and an Employee cannot legally accept, and be bound by an offer, of terms and conditions of service, below the statutory minimum standards.

11. The argument advanced by the Respondent, that the Wage Orders relied upon by the Claimant, on the prayer for underpayment, came into effect after Parties had contracted, is flawed.

12. The Respondent does not deny that the Claimant was paid Kshs. 6,000 as monthly salary. The Wage Orders attached to the Claim have not been contested. It has not been shown that the Respondent paid a monthly salary which included housing element. ***The prayer for underpayments under legal notice 197 of 2013 is granted at Kshs. 104,961 as pleaded.***

13. The prayer for annual leave pay is inconsistent and its validity full of doubt. In his Statement of Claim, the Claimant prays for 32 days of annual leave. At paragraph 17, the Claimant states rather incoherently, that he is entitled to annual leave, "*at the tune of not less than one and three-quarters days with full pay...*" He did not explain in his evidence, how this ties up with 32 days claimed. In his demand letter of 22nd June 2015, he states he took leave for 2012/2013. He was on leave for 2 months. In another demand letter issued on his behalf by Kituo Cha Sheria, he alleged he was owed annual leave over a period of 7 years. The evidence by the Claimant on annual leave is an assemblage of inconsistencies. This evidence does not allow the Court to grant the prayer for annual leave pay.

14. The prayer for overtime is similarly unclear. The Claimant seeks overtime over a period of 3 years. He worked for 7 years. He did not specify during which years, out of 7 years worked, he worked excess hours without overtime pay. His evidence was simply that he worked 12 hours, from 7.00 a.m. to 6.00 p.m. daily, without overtime pay. Why would the Respondent select 3 out of 7 years, to overwork the Claimant, while complying with the law on overtime, over the other 4 years? In his Submissions, the Claimant says nothing about 3 years overworked. He ought to have specified during which years he worked overtime. It is insufficient to point out what the law on overtime is, without giving evidence to which that law can be applied, to result in an order for overtime pay. The prayer lacks in specificity and is declined.

15. ***Certificate of Service shall be availed to the Claimant by the Respondent forthwith, under Section 51 of the Employment Act.***

16. ***Costs to the Claimant.***

17. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED: -

a) The Respondent shall pay to the Claimant Kshs. 104,961 in underpayment of salary.

b) Certificate of Service to issue forthwith.

c) Costs to the Claimant.

d) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 9th day of March 2018.

James Rika

Judge