



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2198 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILLIAM ONYANGO RUBIA.....CLAIMANT

VERSUS

HATARI SECURITY GUARD LIMITED.....RESPONDENT

JUDGMENT

The claim herein is filed by the claimant William Onyango Rubia vide Memorandum of Claim dated 11th December 2014. He alleges that the respondent Hatari Security Guards Limited terminated his employment without complying with the Employment Act. He prays for the following remedies:-

- a. Principal sum amount of Kshs.242,788.00/=.
- b. Court to declare termination unlawful
- c. Court to order issue of certificate
- d. Cost of the suit
- e. Interest in (a) above
- f. Any other relief as court may deem just to grant.

The respondent filed a Memorandum of Appearance on 19th January 2015 and a Memorandum of Defence on 16th March 2015 through Githinji Mwangi and Associates Advocates. The respondent denies all the averments in the Memorandum of Claim and prays that the claim be dismissed with costs.

The case was first fixed for hearing on 20th June 2017 when it could not be reached and was rescheduled to 23rd November 2017. The date was taken in court in the presence of the parties.

On 23rd November 2017 when the file was called out for time allocation the claimant was present in person while the respondent was represented by Mr. Kakambo holding brief for Mr. Githinji. Mr. Kakambo informed the court that he had instructions to adjourn the case as the parties were negotiating. The claimant however denied that there had been any negotiations and the file was placed aside to enable parties confirm the position.

When the file was called out later, there was no representation for the respondent. The case therefore proceeded to hearing in the absence of the respondent.

Claimant's case

The claimant testified that he was employed by the respondent on

7th November 2013 as a security guard/dog handler. On 7th December 2013, he was asked by the respondent to go to the police station for

confirmation of his KCPE certificate. He went to the police station and was issued with an abstract at the police station. On 10th December 2013, he was transferred to an assignment at Railways Dog section where he worked until 14th November 2014.

The claimant testified that on 14th November 2014 at around 9.50 p.m. 2 supervisors **Patrick Makina** and **Vincent Owino** arrived at his workstation, stood outside the gate and called him. They informed him that the Controller wished to speak to him on phone. Patrick gave him his cell phone to talk to the Controller. The Controller asked the claimant why he had not gone to the office as instructed. The claimant responded that he did not get any report to see the Controller.

The claimant testified that the Controller told him he was guilty of insubordination. He was instructed to report to the office the following day in the morning.

The claimant testified that on 26th November 2014 he reported to the office as instructed. The Controller informed the claimant that he had called him to the office to terminate his employment. The claimant asked why but the Controller responded that he did not want any questions and the claimant should leave. He directed the claimant to write a letter of resignation but the claimant refused. The Controller then tore a paper from his book and gave it to the claimant to go and write his resignation but the claimant responded that he could not resign without being told why.

The claimant testified that the Controller threatened to call police officers who escort cash on transit to arrest the claimant if he refused to write the letter.

The claimant testified that he agreed to write the letter but when he handed it to the Controller, he crossed it, returned it to the claimant and told him to leave and should never be seen in the offices of the respondent again. The Controller informed him that his terminal dues would be paid into his bank account at the end of the month.

At the end of the month, only half his salary, Kshs.6,400 was deposited into his bank account. The claimant then decided to sue the respondent.

In the response to the memorandum of claim, the respondent denies ever employing the claimant or terminating his employment. At the hearing, the claimant testified that he was sent to CID Headquarters by the respondent to obtain a certificate of good conduct, which he appended to the memorandum of claim as appendix 4. He further appended his work identification card as Appendix 5 and opened a Bank account as directed by the respondent, which he appended as appendix 7 to the memorandum of claim. The claimant further produced a letter written to NSSF by the respondent for registration, which is appended as Appendix 6 to the memorandum of claim. He further produced in court his uniforms which he informed the court he refused to hand over to the respondent as the respondent failed to refund his uniform deposit which was deducted from his salary at Kshs.1,000 for the first 3 months and thereafter at the rate of Kshs.100/= per month. He testified that the money was supposed to be refunded upon termination of employment in exchange for the uniform.

Determination

I have considered the averments in the memorandum of claim and the documents filed therewith. I have also considered the response to the memorandum of claim and the *viva voce* testimony of the claimant.

The issues arising for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the remedies sought.

The response to the memorandum of claim consists of mere denials which the respondent failed to back up with any evidence. This leaves the averments in the memorandum of claim and the testimony of the claimant unchallenged.

According to the unchallenged testimony of the claimant, he was dismissed verbally by the Controller in violation of provisions of Section 41 of the Employment Act which requires that an employee be informed of the grounds of termination in writing and be given an opportunity to defend himself.

The termination was also in violation of Section 43 of the Act, which requires the employer to prove the reasons for termination of employment.

In the absence of a hearing and proof of grounds for termination, the termination of the claimant's employment was unfair in terms of Section 45 (2) of the Employment Act and I find and declare accordingly.

Remedies

The claimant prayed for the following:-

- (i) One month salary in lieu of notice = **Kshs.9,000.00.**
- (ii) Severance pay of 18 days per one completed year = **Kshs.6,220.00.**
- (iii) Annual leave for one year @ 26 days thus 26 days x 346 per day = **Kshs.8,996.00.**

(iv) Housing allowance of 15% of the basic pay. Thus Kshs.9,000/100 x 15% x 12 = **16,200.00**.

(v) Underpayment of the basic pay. Thus paid Kshs.9,000 as opposed to Kshs.97,888 for 12 months. Thus Kshs.788 x 12 = **9,456.00**.

(vi) Official public holidays. Thus 13 days x 346 per day x 2 at double rate = **Kshs.8,996.00**.

(vii) Saturdays' overtime.

Thus worked from 6 pm – 6 am

Thus 6 hours x 12 x Kshs.28 per hr = **Kshs.8,064.00**.

(viii) Sundays overtime thus worked from 6 pm to 6 am

Thus 12 hrs x 4 x 12 x 28 x 2 at double rate

Transport of Kshs.100 per day from and to work

For 317 days for a year excluding off duties provided

Thus 317 days x 100 = **Kshs.3,170.00**.

(ix) Uniform deducted at Ksh.1,000 for 3 months

November, December and January and Ksh.100 deducted for 9 months.

Thus Ksh.1,000 x 3 + 100 x 9 = **Kshs.3,900.00**.

(x) Compensation of 12 months for unlawful termination at the basic pay = **3,900.00**.

(xi) Thus 12 months x Ksh.9,000 = **108,000.00**.

(xii) **Total Kshs.242,788**.

He is entitled to one month's salary in lieu of notice, which I award him. The claimant is also entitled to annual leave for the period he worked which is 26 working days as provided in the Regulation of Wages (Protection Security Services) Order. He is further entitled to underpayments, public holidays, Saturday and Sunday overtime and refund of the uniform deductions made from his salary.

On the prayer for housing allowance, I will use the consolidated salary being statutory minimum wage including 15% house allowance to reckon the underpayments, which would therefore be inclusive of house allowance.

On compensation, I award the claimant 4 months' salary taking into account his length of service and the conduct of the respondent in terminating the claimant's employment. The claim for severance pay is rejected as the claimant was not declared redundant.

Conclusion

In conclusion, I enter judgment for the claimant against the respondent as set out below, using consolidated wage of for night watchman for 2013 at Kshs.12,548.50/=.

(a) Notice Kshs.12,548.50/=.

(b) Annual leave Kshs.10,875.40/=.

(c) Underpayments at Kshs.3,585.50 for 12 months = Kshs.42,582/=

(d) Public holidays, overtime at Kshs.507.75 x 2 x 2 = Kshs.2,031/=

(e) Sunday overtime Kshs.52,806/=.

(f) Uniform refund Kshs.3,900.00

(g) Compensation equivalent to 4 months Kshs.50,194/=.

Total Kshs.174,936.90/=.

All the payments to the claimant under items (a) to (f) will attract interest at court rates from date of filing suit while item (g) and costs will attract interest from date of judgment.

The respondent will issue certificate of service to the claimant.

The respondent will pay the claimant **Kshs.10,000/=** as costs which in my opinion is reasonable to cover his costs and reimbursements to include court fees and fees for service of documents, including swearing of affidavits.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 2ND DAY OF MARCH 2018

MAUREEN ONYANGO

JUDGE