



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 243 OF 2014

NJOROGE NJUGUNA

CLAIMANT

V

TIME TREK SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. In a Memorandum of Claim lodged in Court on 21 February 2014, Njoroge Njuguna (Claimant) alleged that Time Trek Security Services Ltd (Respondent) unfairly terminated his employment on 11 November 2013.
2. The Claimant also alleged breach of contract in regard to payment of house allowance, leave allowance, overtime, earned wages and service pay.
3. In the Statement of Defence, the Respondent denied breach of contract. It also contended that the Claimant was not dismissed from employment, but absconded.
4. The Cause was heard on 5 April 2018 when the Claimant and one of the Respondent's Manager testified.
5. The Claimant filed written submissions on 13 April 2018 while the Respondent filed its submissions on 27 April 2018.
6. The Court has considered the pleadings, evidence and submissions and identified the Questions for determination as, *whether the Respondent breached the contract with the Claimant, whether the Claimant absconded or was unfairly dismissed and appropriate remedies.*

Breach of contract

House allowance

7. In terms of section 31 of the Employment Act, 2007, an employer has an obligation to provide housing and in lieu thereof pay an allowance to cover rent.
8. Although pleading that he was not paid house allowance, the Claimant did not testify at all on this head of claim.
9. The Claimant therefore failed to lay any evidential basis for this head of claim.

Leave allowance

10. The Employment Act, 2007 does not provide for the payment of a leave allowance. What it provides for is leave on full pay after completion of a year's employment or a *pro-rated* period thereof.
11. If there was a contractual agreement to pay leave allowance, none was presented in Court.
12. As to the annual leave, the Respondent filed leave records to demonstrate that the Claimant went on leave.
13. The head of claim was therefore not proved to the required standard.

Overtime

14. The Employment Act, 2007 does not prescribe working hours beyond which an employee is entitled to payment of overtime.
15. The prescription is left to the *Regulation of Wages General Orders* and contractual agreement.
16. The Claimant was a guard.
17. He testified that he reported at 6.00am and left at 6.00pm or vice versa.
18. It is a notorious fact that guards in this country work 12 hour shifts.
19. The *Regulation of Wages (Protective Security Services) Order, 1998* prescribes 52 hours of work spread over 6 days of the week. Any work beyond the 52 hours is treated as overtime.
20. The Respondent's Manager admitted the working hours and went on to testify that the wages paid were all inclusive.
21. The Claimant however failed to disclose the details of how he arrived at the sum of Kshs 423,400/- being normal overtime, Kshs 11,840/- off days and Kshs 23,300/-.
22. These heads of claims are in the nature of special damages, but considering the nature of the employment relationship, no ordinary employee would be in a position to keep attendance records such that were a dispute to arise, they would be able to compute the applicable amounts due.
23. No wonder the employer is required to keep records and produce the same in legal proceedings such as this one.
24. On the basis of the admission by the Respondent's witness, notoriety of working hours for guards and need to keep records, the Court concludes that the Claimant worked overtime for which he is entitled to overtime, but the same is not capable of precise determination by the Court on the material presented.

Termination or desertion

25. The Respondent contended that the Claimant absconded from work around 11 November 2013 and that the desertion was established when a supervisor found the Claimant was not at his assignment.
26. The name of the supervisor was not disclosed. Even the person to whom he reported that the Claimant was not at the designated place of work was not disclosed.
27. Absconding from work or failure to appear at work without permission or lawful cause is a *misconduct* warranting summary dismissal, but after going through the requirements of section 41(1) & (2) of the Employment Act, 2007.
28. There was no suggestion that the Respondent made any attempt to reach out to the Claimant to *show cause* why he should not be dismissed for failing to appear at the workplace.
29. Obviously being a security firm, the Respondent must have had the Claimant's contact details.
30. In the view of the Court, the Claimant did not abscond.
31. On his part, the Claimant testified that when he went to request to be granted pending offs from the Manager, the Manager (Respondent's witness), he told him to leave because his services were no longer required.
32. The Court believes the Claimant's narration of the circumstances surrounding the separation and finds that no notice as required by section 35(1) of the Employment Act, 2007 or hearing as contemplated by section 41 of the Act was conducted.
33. There was unfair termination of employment.

Appropriate remedies

Pay in lieu of notice

34. In terms of sections 35 and 36 of the Employment Act, 2007, the Court finds that the Claimant is entitled to the equivalent of 1 month wages as pay in lieu of notice (pay was Kshs 7,000/- at time of separation).

Service pay

35. On the admission that he was a registered contributor to the NSSF, the Claimant is not entitled to service pay. Any deductions made and not remitted can be recovered using the provisions of the NSSF Act by the Fund.

Compensation

36. The Claimant served the Respondent for about 11 years. Due technicalities of the law, the Court has declined to award overtime pay.

37. The Court is therefore of the opinion that maximum compensation would be appropriate and fair.

Conclusion and Orders

38. The Court finds and holds that the Claimant's contract was unfairly terminated and awards him

(i) Pay in lieu of notice	Kshs 7,000/-
(ii) Compensation	Kshs 84,000/-
TOTAL	Kshs 91,000/-

39. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 11th day of May 2018.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Kuria instructed by Wanjiru Theuri & Co. Advocates

For Respondent Mr. Wamwayi instructed by Wamwayi & Co. Advocates

Court Assistant Lindsey