



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 896 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

SIMON GITAU MURAVI.....CLAIMANT

-VERSUS-

KIJABE LIMITED.....RESPONDENT

JUDGMENT

By memorandum of claim dated 28th May 2012, the claimant avers that he was employed by the respondent as a night security guard at a salary of Kshs.4,165 per month from 1st April 2005 to 2nd October 2009 when the respondent orally terminated his employment. He avers the reason for termination is that he inquired about deduction of Kshs.200 from his salary. The claimant further avers that he was underpaid by the respondent. He avers that he reported the matter to the Labour Officer who instituted a suit against the respondent and its Directors but the suit was later withdrawn under unclear circumstances after the respondent paid Kshs.4,180 to the claimant.

The claimant prays for payment of Kshs.203,390 on account of underpayments as tabulated in paragraph 7 of the memorandum of claim, refund of Kshs.200 deducted from his salary and described as “donation”, pay in lieu of notice and compensation for unfair termination of employment. He further seek costs and interests.

The memorandum of claim was amended with leave of the court on 5th December 2017 to include a prayer for service pay.

At the hearing of the case on 10th July 2107, the claimant testified that he started working for the respondent on 1st April 2005 and was dismissed on 2nd November 2009. He was paid Kshs.3,000. At the time of leaving employment his salary was Kshs.5,216. He produced a payslip for September 2009 as proof of the salary.

The claimant testified that he was registered with NSSF. He produced a copy of NSSF statement.

He testified that on 2nd November 2009 he asked for refund of Kshs.200 which had been deducted from his salary but he was sacked. He produced the letter of termination. He testified that there was no notice or hearing. He reported to the Labour office and the employer was called to the Labour Office. He produced the recommendation of the Labour office in which a recommendation was made that the respondent pays the claimant the following –

1. One month’s salary in lieu of notice----- Kshs.3,514.00
2. Arrears of wages under paid from May 2009
to September 2009----- Kshs.2,745.00
3. The equivalent of 6 months’ salary----- Kshs.21,084.00
4. Annual bonus ----- Kshs.4,000.00
5. Wrongful deduction ----- Kshs.200.00

Total **Kshs.31,543**

The claimant prayed for underpayments from 2005 to 2009.

After giving his evidence, counsel prayed to amend the claim orally in court but was directed to file a formal application to amend. The witness was stood down.

The amended claim was filed on 5th December 20017. It is dated 30th November 2017.

On 6th December 2017 the claimant was recalled to give evidence and further testified that he had amended his claim and was praying for service pay of Kshs.16,475.

There is evidence on the record that the respondent was represented in court on 18th July 2013 by Mr. Opini holding brief for Mr. Njoroge when the respondent was directed to file and serve response to the claim within 14 days and the case fixed for hearing on 18th October 2012. The respondent did not file a defence and was not present or represented in court appearances after that date although on 27th July 2015 when the case came up for hearing Ms. Cheroni who was holding brief for Mr. Karanja for the claimant informed the court that Mr. Karanja was ready to proceed but was indulging Mr. Njuguna for the respondent who was indisposed.

The claimant filed submissions on 2nd February 2018 in which it is submitted that the termination of the claimant's employment was unfair as he was not given an opportunity to be heard. He relied on the case of **GEORGE ONYANGO AKUTI -VS- G4S SECURITY SERVICES KENYA LTD [2013] eKLR**.

The claimant submits that he is entitled to compensation and relied on the case of **ABISALOM AJUSA MAGOMERE -VS- KENYA NUT COMPANY LIMITED -VS- KENYA NUT COMPANY LIMITED [2014] eKLR**. It is further submitted that the claimant is entitled to costs. The claimant relies on the case of **NANCY CHERENO KOROS & 2 OTHERS -VS- PRESBYTERIAN FOUNDATION & 2 OTHERS [2014] eKLR**.

Determination

This case is undefended and the claimant's averments in both the memorandum of claim and in his oral testimony uncontroverted. The evidence on record is that the claimant was dismissed on 2nd October 2009 when he went to ask for Kshs.200 wrongfully deducted from his salary as reflected in his payslip for November 2009. The letter of dismissal is produced here below –

“2nd October 2009

Simon Gitau Muravi

ID. No. 4269291

REF: SUMMARY DISMISSAL

On 1st October 2009 you were off duty and you came to the office claiming that you have been deducted one day as absent in the month of September 2009. You were explained how and when you were absent but you were not satisfied. You came again being drunkard and you caused disturbance by abusing everyone in the office and threatened to firth the Office Manager. This is gross misconduct hence summary dismissal.

In the past you have been warned verbally on several occasions for coming to work drunkard.

You are hereby required to return all company items and contact accounts office for your final dues.

Yours faithfully

For: KIJABE LTD

SIGNED

DAVID MUIKIA

cc. Labour Officer

Naivasha”

From the letter it is evident that the claimant went to the office on 1st October 2009 while drunk to demand the money he alleges was deducted from his salary. He was dismissed the following day being the date of the letter on 2nd October 2009. It is evident that he was not given a hearing.

The termination was therefore unfair in terms of Section 45 (2) which provides that failure of the employer to comply with both requirements

of a hearing in terms of Section 41 and proof of valid reason for termination as provided in Section 43 of the Employment Act constituted unfair termination.

Remedies

The claimant prays for under payments as follows –

1. Underpayment year 2005

Statutory requirement: Kshs.5,517/=

Actual salary paid: Kshs.4,165/=

Total Underpaid (Kshs.1,534 x 12 months) = 16,219/=

2. Underpayment year 2006 – 2009 April

Statutory requirement: Kshs.6,179/=

Actual salary paid: Kshs.4,165/=

Total Underpaid (Kshs.2,014 x 40 months) = 80,558/=

3. Underpayment year 2009 April – September

Statutory requirement: Kshs.7,291/=

Actual salary paid: Kshs.4,165/=

Total Underpaid (Kshs.3,126 x 5 months) = 15,630/=

The statutory minimum was for night watchman as at 2005 was shs.3,306 + 15% house allowance being 3,802.

At 2006 the statutory minimum wage for night watchman under municipalities was Kshs.5,373/= with house allowance of 15% at Kshs.805.95. His consolidated wage was therefore Kshs.6,178.95

This means that the claimant's were as follows –

2005 May to 2006 April = (6,178.95 – 4,165) x 12 = Kshs.24,167.40

2006 May to 2009 April = Kshs.24,167.40

2009 May to 20069 October = (7,291 – 4,165) x 12 = Kshs 35,512

Total underpayments = Kshs.85,846.80/=

The claimant is not entitled to service pay under Section (5) as read with Section 35 (6) of the Employment Act as he was a member of NSSF as confirmed by his payslip and NSSF Statement produced.

Having been terminated unfairly, he is entitled to compensation. Taking into account all the circumstances of his case including the grounds for dismissal and length of service, it is my opinion that 4 months' salary is reasonable compensation and I award him Kshs29,164/= based on his consolidated salary and overtime.

I also award the claimant the Kshs.200 deducted from his salary.

In summary I award the claimant the following

1. Underpayments----- Kshs.85,846.80

2. Compensation----- Kshs.29,164.00

3. Refund-----Kshs.200.00

Total **Kshs.115,210.80**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE