



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 354 OF 2015**

***(Before Hon. Lady Justice Maureen Onyango)***

**JACKSON LOKOI ESOKON.....CLAIMANT**

**VERSUS**

**TOTAL SECURITY SURVEILLANCE....RESPONDENT**

**JUDGMENT**

Vide memorandum of claim dated 17<sup>th</sup> August 2015 and filed on 24<sup>th</sup> September 2015 the claimant avers that the respondent terminated his employment unlawfully. He prays for the following orders –

a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.

b) Payment of the sums of money as claimed below –

1) One month's pay in lieu notice

Basic + house allowance

10,116+ 1517.4                      Kshs.11,633.4

2) Gratuity

18 days x years worked x basic/30 days

18 x 3 years x 10,116/30              Kshs.18,208.8

3) Unpaid leave dues

26 days x years worked x basic + house allowance

26 days

26 days x 3 years x 11,633.4/26              Kshs.34,900.2

4) Pending wages of 17 days of March 2014

17 days x 11,633.4/30                      Kshs.6,592.26

5) Underpayment wages

(i.) Legal notice number 98 of 1<sup>st</sup> May 2010

Basic + house allowance - current pay

$6,974 + 1,046 - 6,500 =$

$1,520.1 \times 6 \text{ months} \quad \text{Kshs.9,120.6}$

(ii.) Legal notice No. 64 of 1<sup>st</sup> May 2011

Basic + house allowance - current pay

$7,846 + 1,176.9 - 6,500 =$

$2,522.9 \times 12 \text{ months} \quad \text{Kshs.30,274.8}$

(iii.) Legal notice no. 71 of 1<sup>st</sup> May 2012

Basic + house allowance - current pay

$8,873.80 + 1,331.07 - 6500 =$

$3,704.87 \times 12 \text{ months} \quad \text{Kshs.44,458.44}$

(iv.) Legal notice no. 197 of 1st May 2013 to March 2014

Basic + house allowance – current pay

$10,116 + 1,517.4 - 6,500 =$

$5,133.4 \times 9 \text{ months} \quad \text{Kshs.46,200.6}$

6) Compensation for unfair termination

Gross pay x 12 months

$11,633.4 \times 12 \text{ months} \quad \text{Kshs.139,600.8}$

**TOTAL CLAIM** **Kshs.340,989.9/=**

c) Costs and Interests.

d) Any other relief the court may deem fit to grant.

The respondent filed a response to the claim on 15<sup>th</sup> January 2016 denying the averments in the claim.

At the hearing of the case the claimant testified on his behalf while the respondent called PATRICIA NJERI KINYANJUI, its Human Resource Manager.

### **Claimant's Case**

The claimant's case is that he was employed by the respondent a security company as a guard from 2<sup>nd</sup> January 2010. He reported to work at 6 pm and worked until 6 am while on night shift and from 6 am to 6 pm while on day shift. His duties entailed patrolling and assigning duties to other guards. His salary was shs.6,500 per month which he earned for the entire period that he was in the respondent's employment.

He was not provided with housing or paid house allowance or any other allowance. He did not take annual leave during the entire period that he worked but was given one off day every week except when there was no reliever. He worked on public holidays without compensation.

The claimant testified that while he was at work he was attacked by thugs and injured. He reported to the office together with other guards who were attacked with him. They asked for money for treatment but were told to use their money and seek refund as the office did not keep money for medical treatment. He went and looked for money and went for treatment. When he handed the treatment records to the office nobody took any action. He was told to go and rest until he is called back.

He went back to the office at the end of the month around the time of payment of salary but there was no pay for him as he did not work for the month. He was again told to wait at home until he was called. He was never called back. Instead someone was sent to tell him to return his uniforms. That is when he concluded that his employment had been terminated. He went to the office after that and was told he had been

terminated. He went to report to a union which tabulated his terminal dues then he went to instruct a lawyer. The lawyer sent a demand letter to the respondent and thereafter filed suit.

The claimant testified that he was not guilty of any misconduct. He prayed for payment of salary not paid, work done for five years and costs.

### **Respondent's Case**

PATRICIA NJERI KINYANJUI RW1 testified that she knew the claimant who was employed by the respondent on 27<sup>th</sup> July 2012. She referred to an application for employment at document 1 of the respondent's bundle together with personal history form and insurance forms at respondent's document 2 and 3. The claimant signed another contract on 1<sup>st</sup> September 2013 for one year.

RW1 testified that the claimant was on duty at KPLC Rivatex in the month of February 2014. He was given some off days on 17<sup>th</sup> February 2014 to go and rest but did not report back for work when he was expected back on 21<sup>st</sup> February 2014.

RW1 testified that on 12<sup>th</sup> February 2014 there was no report of an attack of security guards while on duty. She testified that when the claimant did not report back to work on 21<sup>st</sup> February 2018 the Supervisor tried to reach him on phone unsuccessfully. She testified that the claimant's employment was never terminated.

She testified that it is not true that the claimant never took annual leave. She referred to document 9 in the respondent's bundle of documents which is a leave application form for the claimant. She further testified that the respondent remitted the claimant's NSSF and NHIF contributions for 2014.

She denied that the claimant was employed in 2010. She stated that the claimant's employment no. was 12525 and not 12255. She denied that the payslip attached to claimant's bundle of documents is from the respondent. She admitted that the claimant reported for work at 6 am to 6 pm and was paid a consolidated salary of Kshs.6,500 per month.

### **Determination**

I have considered the pleadings and evidence. I have further considered the submissions of the parties. The issues for determination are the following –

1. When the claimant was employed by the respondent.
2. Whether the claimant's employment was terminated or he deserted duty.
3. Whether the claimant is entitled to the prayers sought.

### **Date of Employment**

The claimant produced a certificate of training by the respondent dated 27<sup>th</sup> November 2010. The training took place at Nzoia Sugar Company. The claimant further produced an employment identity card issued on 22<sup>nd</sup> February 2010. However in his testimony he did not mention working at Nzoia Sugar in 2010.

The respondent on the other hand produced an application for employment, personal history details form, an insurance form and an employment agreement all dated 27<sup>th</sup> July 2012.

The evidence on record thus points to the claimant having been employed by the respondent on 27<sup>th</sup> July 2012 and I find and hold accordingly.

### **Whether claimant's termination was unfair**

The second issue is whether the claimant's employment was terminated by the respondent. The respondent produced a copy of attendance register that show the claimant was at work until 16<sup>th</sup> February 2014. He was marked off duty from 17<sup>th</sup> to 20<sup>th</sup> and absent from 21<sup>st</sup> February 2014. There is however no evidence that the claimant was issued with a letter to show cause why he should not be dismissed for deserting duty.

The claimant testified that he was injured while on duty and was given four days to recover and when he reported back he was not allowed to resume duty. He produced the treatment records at page 16 of claim.

Under Section 10(6) as read with Section 10(7) of the Employment Act, the employer is supposed to keep all employment records including the date when employment starts and when it ceases. Desertion of duty is a ground for summary dismissal and the respondent should have taken some action to bring the relationship to a close.

RW1 who testified is an officer based in Nairobi. No evidence was produced from the Eldoret Branch Office where the claimant was based to controvert the claimant's assertions that he was not allowed to report back to duty after the off days that he was given or his treatment

records which reflect he was injured at work.

For these reason I find that the claimant's employment was terminated by the respondent unfairly by being locked out by not being allowed to report back to work.

### Remedies

The claimant is entitled to one month's salary in lieu of notice, 20 days worked in February 2014 as he was off duty for four days and was expected back on 21<sup>st</sup> February 2014. He is further entitled to underpayments as the salary he was paid was below minimum wage. The claimant further worked four hours overtime per day without compensation.

I however find that the claimant took leave 26 days as reflected in the leave of absence request form annexed to respondent's bundle.

The Protective Security order provides for 26 working days leave every year. The claimant having worked for one year and seven months, is entitled to seven months annual leave at 15.2 days. Having not completed five years, he did not qualify for gratuity under Protective Security Order which provides for a qualifying period of a minimum of five years' service. He is further entitled to costs of the suit.

The salary for a night guard in Eldoret in 2014 in the General order was Kshs.10,116.15 excluding 15% house allowance of Kshs.1,517.50. He gross salary was therefore Kshs.11,633.60.

I therefore enter judgment in favour of the claimant against the respondent as follows –

- i. One month's salary in lieu of notice                      Kshs.11,633.60.
- ii. Salary for 20 days worked in February 2014    Kshs.7,755.70
- iii. Overtime at 1.5 times per day for 4 hours  
for 12 months based on basic pay                      Kshs.84,166.40

This is based on hourly rate of pay of 6 days a week for 52 weeks in a year as provided under Rule 6(2) of the General Wages and Conditions of Employment (General) Order.

iv. Underpayments

Legal Notice No. 71 of 1<sup>st</sup> May 2012

From August 2012 to April 2013 (9 months)

$8,873.80 + 1,331.07 - 6,500 =$

$3,704.87 \times 9 \text{ months} =$                       Kshs.33,343.83

Legal Notice No. 197 of 1<sup>st</sup> May 2013 to January 2014

$10,116 + 1,517.4 - 6,500 =$

$5,133.4 \times 11 \text{ months} =$                       Kshs.56,467.40

v. Annual leave for 15.2 days

Kshs.15,226.60

**TOTAL    KSHS. 208,593.53**

The respondent shall issue certificate of service to the claimant and pay claimant's costs of this suit.

The decretal sum shall attract interest at court rates from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JULY 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 30<sup>TH</sup> DAY OF JULY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**