



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 102 OF 2017

MOSES OSORE..... CLAIMANT

VERSUS

COBRA SECURITY COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent his former employer seeking to recover for his injuries while at the facility he had been assigned to guard by the Respondent. The Claimant averred that on the night of 20th December 2014 in the course of his duty he was attacked by thugs and suffered serious injuries. He was admitted to Nyeri County Referral Hospital and he averred that the Respondent was negligent in not issuing him with the necessary equipment to undertake his duties as a night guard. He averred that the Respondent failed to make provision to have 2 night guards in the place as the area was remote. The Claimant averred that the Respondent did not pay his medical bills and the assessment of the county occupational safety and health officer was not paid. The Claimant sought salary underpayments for 13 months, annual leave for 21 days, overtime payment, house allowance for 13 months, remittances to NHIF and NSSF, the WIBA assessment of Kshs. 46,135/-, a certificate of service, and costs of the suit. The Claimant attached various documents in support of his claim.

2. The Respondent filed a defence on 16th November 2017 and in it averred that the WIBA claim was being handled by insurers. The Respondent averred that the Claimant breached the contract of employment by deserting duty without notice on 1st June 2015 and after the desertion the Respondent notified the County Labour Officer Nyeri who called for conciliation and a settlement of the dispute was reached on 2nd September 2015. The Respondent further averred that the dispute having been settled the suit filed herein was an afterthought meant to embarrass the Respondent. The Respondent averred that it complied with the law in its engagement with the Claimant and paid him all his dues. The Respondent averred that the Claimant's claim has no basis and raises no triable issues against it and as such should be dismissed with costs. The Respondent attached various documents relating to the matter in support of its defence.

3. The Claimant testified on 8th February 2018 that he was employed by the Respondent on 17th July 2014 and while guarding the site he had been assigned he was attacked by thugs. He was taken to the hospital and the Respondent responded the next day despite being notified at midnight. He earned Kshs. 6,000/- or 5,000/- a month as it was not fixed. He worked at the TAWASCO water treatment plant. He worked nights and would report at 6.00pm and guard the site alone. He stated that he had no rain coat, boots. He was attacked and was hospitalised for 4 days and the Respondent paid his hospital bill and took his P3 form. He testified that they were called at 12.30am and they responded at 1.00pm the next day. He stated that had he been thrown in the water he would have died and all they would have got was his uniform. He stated that after hospital the Respondent's personnel took him close to his residence and told him after he was fully healed he should get back to them. He was not paid and went to his rural home and after 3 months came back. He was told he would be employed afresh and deployed. He was told to go to Nairobi and he asked that they write a formal letter. He was not paid his WIBA dues despite assessment. He testified that he was paid Kshs. 14,750/- and the NHIF and NSSF were unpaid. He stated that he did not refuse to work and was given forms to fill at the Ministry of Labour when the matter was reported. He stated that the Respondent never wrote to him accusing him of refusing to resume work. He decided to seek redress for his pay in court. He sought sums due for underpayment, the NHIF and NSSF dues, a certificate of service as well as house allowance. He produced the letter showing the Respondent had been contracted to guard the property by TAWASCO and the report made to the Police by TAWASC. He stated that the Respondent had not paid the WIBA claim despite demand and a reminder made by his lawyer. He thus sought the remedies per his claim.

4. In cross-examination by the Respondent's counsel he stated that he was not returned to work and that the meeting at the Labour office was on 2nd September 2015. He denied refusing to work and that the letter that was sending him to Kawangware in Nairobi was not on letter head or stamped. He denied that he absconded from work and that if he did not work as expected he would have failed to try to stop the robbers. He stated that the sum for housing was too little and that it was included as part of his pay – Kshs. 900/-. He did not receive a certificate of service and confirmed that he was not contacted for his WIBA claim from Kenya Orient the insurer. He stated that the alarm did not work as there was no power and there was no equipment. He did not have a button and had to go to the main switch. He testified that the Respondent had patrol cars but they never went to check on him even once.

5. In re-examination he testified that he was never told that he had declined to work. He also had not been called to collect a certificate of

service. He stated that the Respondent was to follow up with insurance. That marked the end of oral testimony for the Claimant. The Respondent was not ready and sought an adjournment which was granted.

6. The Respondent's witness Peter Macharia Kamau gave evidence on 6th April 2018 and stated that he was an employee of the Respondent as a branch manager Nyeri. He testified that he knew the Claimant as former employee of the Respondent and that the Claimant was not dismissed by the Respondent. He stated the intent of the thugs was to steal the transformer where the Claimant was guarding and as he interfered with them they attacked him. He testified that they attended to him and took him to hospital and upon discharge he did not come back to work. He stated that the Claimant was taken to the residence by the company. He did not clear with the company and the company only heard of the suit as he had not had any other communication with the company. He testified that the Claimant's uniform was taken from his residence and he was paid some dues. He stated that the Claimant did not earn overtime and that the Claimant failed to cooperate and the office could not help him.

7. In cross exam he testified that the Claimant was at his place of work and that the transformer was not within the plant. He stated that the transformer provides power to the water treatment works and other surrounding parts. He stated that the Respondent reported the work injury claim and filled the forms. He stated that the figure given was the correct one as calculations were made and the breakdown had been provided to the Respondent's lawyer. He testified that the Claimant had agreed to receive less than the minimum wage. He stated that the contract to guard the premises was end in October and the Claimant was even paid after the contract expired. He testified that the Claimant reported at 6.00pm and worked till 6.00am and each week he had one day off. He stated that the one day off was to compensate for the one hour from 5-6. He stated that the WIBA claim is being processed by the insurer and that the Claimant had failed to cooperate as he was the one to do the follow-up. He stated that the Claimant had deserted employment as he had just gone home after discharge. He testified that when the Claimant returned to work he communicated with the relevant office and advised that the Claimant be reinstated. He maintained that the Respondent did not dismiss the Claimant. He confirmed that the Claimant was not issued with a sword or a raincoat. He stated that it was the Police who took the Claimant to hospital and was working alone when he was attacked. He testified that the Claimant was not issued with a certificate of service. He stated that he tried his best to attend to the Claimant but he was not cooperative and he could not assist him.

8. In re-exam, he stated that the Respondent had no problem issuing the Claimant with a certificate of service. He testified that the Claimant was to sign another contract and he refused. On WIBA the Claimant was to follow up and he was directed and if he follows up he will be paid by the insurance. He testified that the 4 days off in a month were to compensate the Claimant for extra hours worked each day. That marked the end of the oral testimony adduced by the Respondent.

9. The parties were to file submissions and the Claimant filed submissions on 19th April 2018 while the Respondent filed submissions on 16th May 2018. The Claimant submitted that where an employee is terminated without being accorded a chance to be heard or without reasons being given was unfair. The Claimant relied on the case of **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** where the Court of Appeal held as much, the case of **Tirus Kariuki Mungai v Postal Corporation of Kenya [2016] eKLR** where the court held that the efforts to contact the Claimant alleged to have deserted were not demonstrated. The Claimant's submitted that the court should be persuaded by this authority. The Claimant relied on the case of **Kennedy Mutinda Nzoka v Basco Product (Kenya) Limited [2013] eKLR** where the Claimant hand was cut in the course of his employment and the trial court found the employer culpable in negligence. The Claimant submitted that he was entitled to unpaid dues and the WIBA claim. The Claimant further submitted that the Respondent had failed to produce employment records and as held in the case of **Daniel Kiplagat Kipleibut v SMEP Deposit Taking Micro Finance Limited [2016] eKLR** this court should find the dismissal unfair as the Respondent had failed to discharge its burden.

10. The Respondent submitted that the Claimant had absconded from work and relied on the case of **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** where the court citing a South Africa labour court decision held that desertion and absence from work without justifiable reason amounts to repudiation of contract of employment. The Respondent cited the provisions of Section 47(5) of the Employment Act and stated that the Claimant had a burden to prove the dismissal was unfair and having failed to do so was not entitled to compensation for the unfair termination. The Respondent submitted that the suit by the Claimant should be dismissed.

11. The Claimant was employed to guard premises of TAWASCO and while guarding the premises his employer had been assigned, was attacked and seriously injured leading to hospitalisation for 4 days. He did not resume work after the hospital visit. He asserts that the Respondent wanted to re-employ him while the Respondent asserts he absconded duty and was to be re-engaged upon his resumption but he was uncooperative. It is clear that after his injury the Claimant was not returned to work. He was also not paid his dues under the WIBA which is a payment the insurer of the Respondent is required to pay after the required processes are undertaken. Though the insurer is not a part to this suit, the payment usually made to an employee under WIBA is through the employer. It is therefore mischievous for the Respondent to say the Claimant was to follow up with the insurer. He is not the insured but the Respondent and he is merely the beneficiary of the policy. The Respondent is to ensure the dues are paid to the Claimant within 14 days of the judgment failing which the Claimant will be entitled to recover the sum summarily as against the Respondent with interest at commercial rates from date of filing suit till payment in full. The Claimant claimed underpayment. Under the relevant Regulation of Wages (General)(Amendment) Order 2015, a night watchman in Nyeri was 11,330/-. He was paid 6,000/- per the Respondent's witness who was his manager. Notwithstanding his contract, the Claimant was entitled at the least to earn the statutory minimum which is 11,330/- a month for a night watchman. This sum is inclusive of house allowance unless the regulation of wages order specifies it is not. The Claimant would therefore be entitled to the balance unpaid of the sums due under the statutory minimum. He produced his NSSF statement which showed he was not up to date. Registration under NSSF is not sufficient to exclude the employer from liability should the employee sue for retirement benefits if the employer has not been remitting dues. For the Claimant there are months excluded and for that reason he will be entitled to recover service pay for one year of service. He was working on a 6 day week and worked for an extra 4 hours in a day. This was said to be compensated by the 4 days he got off in a month. An employee is entitled to rest days and the rest days cannot be compensation for overtime worked. The Claimant is therefore entitled to the payment of overtime worked at the rate of 4 hours in a day multiplied by the hourly rate for a night watchman in Nyeri which is a former municipality. The Claimant is also entitled to a certificate of service, compensation which I will cap at 8 months and the costs of this suit.

12. In the final analysis, judgment for the Claimant for

- i. Payment of WIBA claim per the assessment made. In default of payment of the sum due within 14 days of today the same to attract commercial rates of interest from date of filing suit till payment in full.

ii. The difference in pay between the 6,000/- earned and amount in the Regulation of Wages (General)(Amendment) Order 2014 and the difference between the 6,000/- earned and Kshs. 11,300/- for the months between May 2014 and his last month of service which was October 2015.

iii. Compensation Kshs. 90,400/- being 8 months pay

iv. overtime worked at the rate of 4 hours in a day multiplied by the hourly rate for a night watchman in Nyeri

v. Costs of the suit

vi. Interest on the sums in ii, iii), iv) and v) above at court rates from today till payment in full

vii. Certificate of service

It is so ordered.

Dated and delivered at Nyeri this 11th day of July 2018

Nzioki wa Makau

JUDGE