



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 327 OF 2015

BETWEEN

ALI MUSA MWAMNGAROCLAIMANT

VERSUS

1. DARAD HOTEL LIMITED

2. DARAD SHOPPING CENTRERESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Marende Necheza & Company Advocates for the Claimant

P.A. Osino & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 15th May 2015, and an Amended Statement of Claim, on 11th February 2016. He states he was employed by the Respondent as a Guard, in July 2013. He earned a salary of Kshs. 8,000 monthly. He resigned in December 2014. He did so because he was frustrated by the Respondent. He was not paid terminal dues, prompting him to file this Claim. He prays for Judgment against the Respondent for:-

- a. Annual leave pay for 2 years at Kshs. 16,000.
- b. House allowance for 2 years at Kshs. 4,000 per month for 18 months, at Kshs. 72,000.
- c. Shoe allowance at Kshs 500 per month for 18 months at Kshs. 9,000.
- d. N.S.S.F arrears at Kshs. 7,200.
- e. N.H.I.F arrears at Kshs. 2,660.
- f. Public holiday pay [17 days] at Kshs. 9,671.
- g. Salary for days worked in December 2014 at Kshs. 8,000.
- h. Salary underpayment at Kshs. 2,911 per month for 18 months at Kshs. 52,410.
- i. Overtime pay at Kshs. 153,600.
- j. Service charge.
- k. Costs.

1. Any other relief the Court may deem fit to grant.

2. The Respondents filed their Statement of Response and Counterclaim, on 14th July 2015. They state that the Claimant absconded on 23rd December 2014. He took his annual leave for the month of February and March 2014. There was a fire at Respondent's workplace on 20th December 2014. The Claimant was handed 40 pieces of kikoi [African embroidery clothing pieces] worth Kshs. 60,000, for safe-keeping. He disappeared with the items. The Respondents counterclaim this amount from the Claimant. They pray the Court to dismiss the Claim with costs.

3. The Claimant testified, and rested his Claim, on 21st July 2017. Security Guard-in- Charge, Nyae Rai Dani, testified for the Respondent on 12th February 2018. The Parties admitted a Witness Statement filed by one Luciano Manyesi, as part of the Respondent's evidence, bringing proceedings to a close on 12th February 2018. The matter was last mentioned on 24th July 2018 when Parties confirmed filing of their Submissions.

4. The Claimant told the Court he resigned in December 2014 because of poor conditions and terms of employment. Salary was poor, there were excessive hours of work, and there was no provision of food. There was a fire at the workplace, before the Claimant left. The scene was chaotic. Many people were involved in trying to put out the fire. There were members of the public. It is not true that the Claimant pilfered kikois entrusted to him. He testified on cross-examination that the 2 Respondents are registered companies. He did not have their registration documents. He was paid a net salary of about Kshs. 7,600. He did not issue notice of resignation to the Respondents. He did not run away after the fire incident. He was among persons who were involved in rescue of Respondents' merchandise from the fire. He returned after the fire. It is not true that he disappeared after the fire with the vikois. He should have been paid a monthly salary of about Kshs. 10,000. He did not agree that he received a salary commensurate with the basic wage for a Guard. There were about 8 Guards per shift. There was one gate. The Claimant patrolled inside. He did not have documents supporting the claim for service charge. He had off duty every week. There would be a reliever whenever the Claimant took annual leave. He did not take annual leave in February/March 2014. He had been asked to stay away from work because there was diminished work. He told the Court on redirection that he notified the Supervisor Security Guard on resignation. He returned to work after the fire.

5. Nyae Rai Dani testified that the Claimant worked on and off. He was paid after every 2 weeks. He disappeared for 2 months from the workplace. He returned and the Respondents continued to employ him and pay his salary. He was given boots. Salary paid to him was consolidated. He did not work overtime. There was no agreement on service charge. He was on duty when the fire broke out and vikois lost. Cross-examined, Dani agreed the Claimant was an Employee of the Respondent. The Claimant deserted. The Respondents did not call upon him to show cause, why he should not be disciplined. Dani did not know if Police arrested the Claimant over allegation of theft of vikois. The Guards worked 12 hours. They worked over Public Holidays.

6. The Witness Statement of Luciano Manyesi, who was said to be old and suffering from dengue fever and unable to attend Court, repeats almost verbatim, what is contained in the Statement of Claim. It does not add value to the proceedings.

The Court Finds:-

7. The Claimant was employed by the Respondents as a Security Guard in July 2013. He earned a salary of Kshs. 8,000 monthly. He resigned in December 2014, about 1½ years after employment.

8. During that period, the Claimant admitted there was a time he stayed at home in March/ April 2014. He was told there was diminished work. The Court does not think his prayer for annual leave pay is merited. He took a break during the period of service. He did not even complete 2 years in employment, to justify his prayer for annual leave pay, which he calls annual leave allowance. He did not work in March and April 2014. He had not completed 12 continuous months in employment to qualify for annual leave at the time.

9. The monthly rate the Claimant states he ought to have been paid of Kshs. 10,911, applied only to workplaces at Nairobi, Mombasa and Kisumu. Diani where the Claimant was based would fall within a rate of Kshs. 7,507 inclusive of house allowance as submitted by the Respondent. The prayers for underpayment of salary and house allowance are rejected.

10. No wage instrument is exhibited by the Claimant, entitling him to shoe allowance of Kshs. 500 per month. No contract, CBA or wage order is cited anywhere in Claimant's Pleadings, Evidence or Submission, supporting the prayer for shoe allowance. This applies also, to the item characterized as service charge. Where is it to be found and at what rate is it to be paid?

11. N.S.S.F and N.H.I.F contributions are statutory obligations. They ought, if not remitted to be followed up by the Claimant, with the respective statutory bodies. The Court does not see any reason to order that a statutory payment reverts to the Claimant. He ought to pursue the Respondents through the statutory enforcement mechanisms given under the respective Acts of Parliament. The Claimant has an avenue in law, to ensure statutory contributions reach their intended custodians for his benefit.

12. Nyae Rai Dani testified that the Claimant worked for 12 hours a day. He worked on Public Holidays. There is no evidence from the Respondents showing that the Claimant was paid for work done during Public Holidays, and in excess of normal working hours on other days. The mode of computation of overtime pay and holiday pay adopted by the Claimant appears not to be contested by the Respondents. It does not significantly depart from the methodology given under the General Wages Order. The figures pleaded in Public Holiday Pay and Overtime Pay [not allowances as stated by the Claimant], are reasonably grounded in fact and law. ***They are allowed at Kshs. 9,671 and Kshs. 153,600 respectively.***

13. There is no evidence that the Claimant was responsible for the loss of Respondents' vikois. The loss if any, occurred in a chaotic situation, where the Respondents, their Employees and the General Public, were involved in fighting out the fire, and trying to salvage what could be salvaged. There was no evidence that anyone entrusted the Claimant any merchandise, in the course of fighting the inferno. There was no evidence that items were lost in the hands of the Claimant. The value of those items, if lost through the Claimant, was not established.

The Respondents did not refer the Claimant to the Police for arrest and criminal prosecution for theft of merchandise. There is no evidence to sustain the counterclaim.

14. No order on the costs.

15. Interest allowed at 14 % from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a. The Respondent shall pay to the Claimant Public Holidays worked at Kshs. 9,671 and Overtime worked at Kshs. 153,600- total Kshs. 163,271.

b. The Counterclaim is declined.

c. No order on the costs.

d. Interest allowed at 14% per annum from the date of Judgment, till payment is made in full,

Dated and delivered at Mombasa this 25th day of October 2018

James Rika

Judge