



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

**NAKURU**

**CAUSE NO.390 OF 2017**

**PHILLEMOM OSENI KIDAVI.....CLAIMANT**

**VERSUS**

**BRINKS SECURITY LTD.....RESPONDENT**

**JUDGEMENT**

The claimant, an adult male was employed by the respondent company as a Night Watchman on 10<sup>th</sup> October, 2013.

The claim is that upon the claimant's employment by the respondent he was underpaid contrary to the minimum Wage Orders and was not paid the due house allowance as required under section 31 of the Employment Act, 2007. The claimant was made to work from 6pm and 6am each day against the required 9 hours and for the 3 hours overtime he was not paid. The claimant would be at work during public holidays without the requisite pay.

The claim is also that there was a deduction of Kshs.2, 400.00 for 12 months all being kshs.2, 400.00 as uniform fees and this was never refunded. The salary due for March, 2017 was not paid and despite going on leave, the claimant was not paid his leave travel allowance. Upon taking leave the claimant got a deduction from his pay for 5 days.

The claimant was a member to Brinks Sacco owned by the respondent wherein he had shares worth Kshs.32,200.00 and from where he took a loan of Kshs.18,000.00 and had repaid Kshs.7,200.00 and had a deduction from his salary and the balance due is Kshs.10,800.00 and is thus entitled to be paid Kshs.21,400.00.

The claim is also that the claimant's employment was verbally terminated by the Nakuru Branch manager following the contract as Safaricom, CDN Assumption centre being terminated. There was no explanation or payment of terminal dues or the due gratuity and severance pay.

The claimant is seeking for the payment of the following;

- a) *Notice pay*
- b) *Gross underpayments*
- c) *Normal overtime pay*

- d) *Payment for work during public holidays*
- e) *Salary for March 2017*
- f) *Leave pay*
- g) *Leave travelling allowance*
- h) *Amounts deducted for taking leave*
- i) *Uniform deductions*
- j) *Brinks Sacco refund*
- k) *Gratuity pay*
- l) *Compensation*
- m) *Costs.*

The claimant testified in support of his claims. upon employment the claimant was paid Kshs.11, 380.00 per month without a housing allowance. Such employment was terminated on 1<sup>st</sup> April, 2017 without payment of the terminal dues. The respondent issued the claimant with a cheque for kshs.632.25 which was not sufficient to cover what was owing.

The claimant also testified that on 27<sup>th</sup> March, 2017 the respondent's officer Mr Mauka called him to the office and notified him that his employment would terminate as where he had been placed the contract had been terminated and there was no work.

The claimant is now working at CASA but this was not sourced for him by the respondent. When he was issued with a cheque, there was no breakdown on how the amounts paid had been arrived at.

Upon cross-examination, the claimant testified that he was not issued with a letter terminating his employment. On 1<sup>st</sup> April, 2017 he did not report to work as he had a new job at CASA, at Assumption centre and was issued with a new uniform by the new security company. He applied for such job immediately upon the respondent informed him that his employment would terminate.

## **Defence**

In response, the respondent's case is that they had employed the claimant as pleaded but deny the claims made. Upon the end of employment, the claimant was paid all his dues and allowances and the claims made are without basis and should be dismissed.

In evidence, the respondent called Mr Moses Wekhanya Mauka the Branch Manager for the respondent at Nakuru and who testified that before the claimant was employed by the respondent he was informed of the applicable terms and conditions of employment to which he gave consent. In March, 2017 the respondent was informed by its client Safaricom that the allocated assignment was to be terminated with effect from 31<sup>st</sup> March, 2017 and he notified all the guards on site. While handing over to the incoming company, CASA security the operations manager of the company requested respondents' guards if they could be retained and they agreed and were thus employed. On 10<sup>th</sup> March, 2017 the claimant had been issued with new uniforms by the new incoming company and indication he was aware of the changes.

Mr Mauka also testified that all guards employed by the respondent were paid the applicable wage less statutory deductions and paid a uniform fee of kshs.200.00 which was later refunded upon clearance. Work hours were 12 with reliever after a month and 4 days off each month as off duty. Each employee

had 25 leave days together with 5 days of unpaid leave to pay for the reliever. All public holidays were part of working days. The claimant not dismissed due to misconduct, rather there was no work to be allocated after the client terminated work contract.

The defence that employment of the claimant terminated following no work is not challenged in any material way. Mr Mauka for the respondent also testified in March, 2017 he informed employees of the respondent that their client Safaricom had terminated the service contract and thus invited them to apply for work with the new provider, CASA. The claimant testified that indeed by end of March, 2017 he handed over the entire respondent's property and by 1<sup>st</sup> April, 2017 he was with the new employer, CASA security.

The Court of Appeal in the case of **Heritage Insurance Company Limited versus Christopher Onyango & 23 others [2018] eKLR** held that where termination of employment is due to operational requirements, such is a redundancy. A verbal notice to the employee issued in terms of section 40 of the Employment Act, 2007 is sufficient as the termination of employment had been brought to the attention and notice of the employee a month prior.

*Was the termination of the respondents wrongful? Under the terms of employment, termination was by notice of one month or payment in lieu of notice. There is nothing in the evidence tendered to prove that the redundancy was fake. The respondents were paid in lieu of notice. The termination, being in accordance with the terms of employment could not be said to be wrongful, and therefore the question of damages did not arise.*

As the claimant was made aware of the reasons leading to termination of employment and such arose following operations requirements, the respondent complied with section 43 of the Employment Act, 2007 read together with section 40 of the Act.

- (2) *A termination of employment by an employer is unfair if the employer fails to prove—*
  - (a) *that the reason for the termination is valid;*
  - (b) *that the reason for the termination is a fair reason—*
    - (i) *related to the employee's conduct, capacity or compatibility; or*
    - (ii) *based on the operational requirements of the employer; and*

In this case, there was no case of misconduct, rather, due to operational requirements; this resulted in termination of employment. Notice having issued, no pay is due thereof.

On the claim for gross underpayments, the claimant has attached his pay statements with a gross pay of Kshs.10, 110.00 per month. Such gross pay is also stated to be the basic pay.

The respondent as the employer opted not to submit any work records with regard to the claimant's employment contrary to section 10(7) of the Employment Act, 2007.

*7. If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. [*

The only records made available to the court are those filed by the claimant. Such records are relevant for the assessment of terminal dues owing to the claimant despite the fact of termination of employment due to operational requirements.

The minimum wages for a Night Watchman is regulated under the Wages (General) Orders and for the period the claimant was in the employment of the respondent, the monthly wage as 11,330.00 inclusive of

the housing allowance. Where the claimant was paid a basic wage of Kshs.10, 110.00 a balance of Kshs.1, 220.00 is due each month. For the 41 months, the claimant is entitled to Kshs.50, 020.00 in underpayments.

On the claim for overtime pay, I find no material challenge to the claims that the claimant had 3 hours overtime work each day. However, the computation is based on a full month whereas the claimant admitted to having taken 4 off days each week, and also too annual leave. Without any records filed by the respondent in this regard, a reasonable computation of the same would to remove a month pay in each year based on the last gross wage earned by the claimant. From the total claim of Kshs.89, 644.65 less Kshs.30, 330.00 this amounts to Kshs.59, 314.00 in overtime pay due to the claimant.

The claims for work during public holidays are chronologised at 16 days each year for 2013/2015 and for the period ending March, 2017. I have made great effort to go through the list of public holidays gazetted for the period of October, 2013 to March, 2017 but the computation of 16 days in each band does not add up. I take into account the claimant enjoyed off days each month and enjoyed his right to annual leave. The claims made have not factored all these aspects and how the claimant arrived at the numbers of public holidays to arrive at his computations. These claims are declined.

Salary for March, 2017 is lawfully due to the claimant where not paid. The claimant testified that he was issued with a cheque for the sum of Kshs. 632.25 which had no breakdown as to how the same was arrived at. These payments shall be put into account in making final dues payable to the claimant. The claimant is awarded the salary due at Kshs.11, 330.00.

On the claim for leave pay due, where the claimant has been compensated for underpayments, the gross salary due for each month, such takes into account payments for salary while on leave. To claim for leave pay and leave travel allowance over and above the salary payable each month would be an unjust enrichment. Leave travel allowance can only arise where there is agreement to this effect or a term of contract. Such is not due.

On the claim for amounts deducted from leave wages, this is not justified. Noting the above findings, while an employee takes leave, and even where the employer must find a reliever, such leave is lawful and should be paid for. the claimant is awarded all monies deducted for taking leave at kshs.5, 465.00.

Uniform deductions are due at kshs.2, 400.00.

Claim for gratuity for 2 years is not due as this is not a term of contract and by application of section 35 of the Employment Act, 200 where the respondent paid statutory dues, such a claim cannot stand.

On the claims for Brinks Sacco refunds, the claimant testified that he was a member of the Sacco and had taken a loan therefrom. He repaid part of it and the balance is due. section 19 of the Employment Act, 2007 allows an employer to effect deductions from the wages of an employee for good cause. Where an employee has taken a loan and secured the same through his employment, at the end of such employment, the owing liabilities must be offset from the total terminal dues. However, I take cognisance that each Sacco formulated by employees has its own rules and regulations and to take the evidence that the claimant had taken a loan of Kshs.32, 200.00 and repaid Kshs7, 200.00 and thus should be paid the due balance is simplistic. Sacco regulations on the time the loan was due, any interest's payable and terms and conditions should be addressed. Such Sacco's are also regulated by different persons other than the employer. Such persons/parties are not parties herein. the parties herein should address noting section 19 of the Act.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the following;**

**(a) underpayments amounting to Kshs.50,020.00;**

**(b) overtime pay Kshs.59,314.00;**

**(c) March, 2017 salary Kshs.11,330.00;**

**(d) Leave days deductions Kshs.5,465.00;**

**(e) Uniform deductions Kshs.2,400.00;**

**(f) From the above amounts the respondent to take into account the terminal dues paid to the claimant at Kshs.632.25;**

**(g) From the above payments the respondent to take into accounts the owing dues from Brinks Sacco unpaid by the claimant.**

**Each party to bear own costs.**

Dated and delivered at Nakuru this 3<sup>rd</sup> day of October, 2018.

**M. MBARU JUDGE**

In the presence of: