



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 9 OF 2018

REPUBLIC..... APPLICANT

v

CABINET SECRETARY, LABOUR,

SOCIAL SECURITY AND PROTECTION.....RESPONDENT

and

EX PARTEISAAC G.M.ANDABWA, THE NATIONAL GENERAL

SECRETARY OF THE KENYA NATIONAL PRIVATE SECURITY WORKERS UNION

JUDGMENT

1. On 5 April 2018 the Court granted Isaac G.M. Andabwa, the National General Secretary of the Kenya National Private Security Workers Union (*ex parte* applicant) leave to apply for

2. An order prohibiting the use of the term "day watchman", "night watchman" and assignment of a different salary to the "day watchman" on account of the time of day worked.

2. The motion was filed on 10 April 2018 and the Respondent was served on 11 April 2018.

3. When the application came up for hearing on 15 May 2018, the Court directed the Respondent to file and serve any responses before 30 May 2018 in readiness for hearing on 29 October 2018.

4. When the application was called for hearing on the scheduled date, a State Counsel for the Respondent sought an adjournment on the ground that the Respondent had not given her instructions.

5. The Court declined the application and allocated hearing time of 11.00am.

6. Eventually when the application was called for hearing, the State Counsel on record for the Respondent was not in Court and her absence was not explained.

7. The Court notes that the Respondent had about 6 months to file appropriate responses to the application but did not.

8. The *ex parte* applicant has advanced two propositions in the application under consideration.

9. First, it is asserted that the terms *day watchman* and *night watchman* are demeaning and a violation of the dignity of those persons engaged to provide private security services in light of the enactment of the *Private Security Regulation Act, 2016*.

10. Second, the *ex parte* applicant contends that the prescription of different remuneration to security guards based on hours of work (day and night) is discriminatory.

Submissions on use of terms of watchman

11. Before moving Court, the *ex parte* applicant had written to the Respondent on 7 July 2015 and 16 January 2018 expressing misgivings

about the continued use of the term *watchman* despite the changed statutory framework, but the letters did not elicit any response.

12. In urging the application, the *ex parte applicant* took the position that the *Private Security Regulation Act, 2016* had introduced the terms *private security officer* and *security guard*, and therefore it was demeaning and an attack on the dignity of *private security officers* and *security guards* to be referred to using the archaic term *watchman*.

13. According to the *ex parte applicant*, and consequent to the commencement of the Act, it was illegal for the Respondent to use the terms *day watchman* and *night watchman* in Legal Notice No. 112 of 2017, when prescribing minimum wages.

14. The *ex parte applicant* further contended that even the *Regulation of Wages (Protective Security Services) Order, 1998* had not used the terms *day watchman* and *night watchman*.

Discrimination in remuneration

15. In Legal Notice No. 112 of 2017, the Respondent prescribed different wages depending on the hours of work.

16. The *ex parte applicant* took the position that it was the *norm in the industry* to pay a uniform pay irrespective the hours of work save that those serving at night would be paid an *additional token*.

17. In this regard, the Court was informed all *security guards* work 12 hour shifts, and that as a result of the action of the Respondent, several employers in the private security sector had unilaterally varied terms and conditions of service of their security guards (the Court was informed that there is active litigation(s) on the variations of the terms and conditions of service).

18. It was also asserted that the Respondent did not consult stakeholders before coming up with Legal Notice No. 112 of 2017, and that the notice had led to employers in the private security sector adjusting wages to the detriment of their employees.

19. The *ex parte applicant* further relied on the principles of *proportionality* and *legitimate expectation* to advance his cause.

Evaluation

Watchman or security guard?

20. It is correct, as urged by the *ex parte applicant* that the primary law governing the private security sector has set out definitions of the different players in the sector and that the person famously called *watchman* has been given the description of *security guard*.

21. In the view of the Court, it would therefore be anomalous for the Respondent to prescribe minimum wages under the occupation and description of *watchman* when that terms is not used in the primary statute.

22. Such description may even lead to academic litigation as to whether the *security guards* as contemplated by the *Private Security Regulation Act, 2016* is the same as the *watchman* in the Regulation of Wages Order, Legal Notice No. 112 of 2017.

23. The *Private Security Regulation Act, 2016* is the primary statute governing the private security sector and because it has introduced certain definitions or nomenclature, it is only rational and reasonable that the Respondent uses the terms introduced in the Act while prescribing minimum remuneration and other conditions of service within the sector.

Discrimination in pay

24. The Court was informed that there are ongoing wage disparity disputes involving day and night security officers without a disclosure as to the stage of the said litigations.

25. Although asserting that it was the *norm in the industry* to pay a uniform salary, the *ex parte applicant* did not place before the Court any material at all upon which the Court could make a finding that there was such a *norm*.

26. In the view of the Court, a *norm, custom, tradition or practice* should be proved by appropriate evidence.

27. The Court is aware that the Respondent is under a statutory obligation to consider recommendations of various *Wages Councils* established by virtue of section 43 of the Labour Institutions Act before prescribing minimum wages in different sectors of industry.

28. It was not suggested that the Respondent did not act on the recommendations of such a *Wages Council* when prescribing the differentiated minimum wages.

29. The Court has also looked at the *Private Security Regulation Act, 2016*.

30. It establishes a *Private Security Regulatory Authority* with a wide standard setting mandate. It may have a role to play, before the jurisdiction of Court is invoked in the circumstances obtaining here. There was no suggestion that the *ex parte applicant* had brought to its attention the wage disparity question.

31. In consideration of these circumstances, the Court is of the view that the pending remuneration dispute(s) run their full course.

Appropriate remedies

32. The Court sought to know from the *ex parte* applicant whether an order of prohibition would be the most efficacious and appropriate in the case at hand and he replied in the affirmative.

33. The Court however has its misgivings but considering that the motion was not defended despite the Respondent being afforded an opportunity to present his case, the Court will order that

(i) An order prohibiting the use of the term day watchman and night watchman in any instruments issued by the Respondent do and is hereby issued.

34. Costs to the *ex parte* applicant.

Delivered, dated and signed in Nairobi on this 13th day of December 2018.

Radido Stephen

Judge

Appearances

For *ex parte* applicant Mr. Wati instructed by D.B. Wati & Co. Advocates

For Respondent Ms. Odhiambo, State Counsel, Office of the Attorney General

Court Assistant Lindsey