



**REPUBLIC OF KENYA**

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

**CAUSE NO.367 OF 2014**

**KENNEDY AKUMU OBAGA.....CLAIMANT**

**VERSUS**

**ROZZIKA GARDEN CENTRE LIMITED..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent company, situated in Naivasha town. He was appointed as Guard on 1<sup>st</sup> December, 2009 at a wage of Ksh.5,400.00 per month.

The claim is that the claimant worked for the respondent until 30<sup>th</sup> April, 2013 when he was unfairly terminated in his employment on account of redundancy. He was not given notice or a hearing before termination of employment. The respondent failed to follow due process and thus infringed the claimant's rights.

The claimant is seeking the following;

- a) Notice pay;
- b) Overtime pay and work during public holidays;
- c) Leave earned and not take;
- d) Underpayments for 3 years;
- e) Gratuity/severance pay for 3 years;
- f) Compensations; and
- g) Costs.

The claimant testified that he was employed as a guard by the respondent and was guarding flowers when the respondent started moving its property to another location not disclosed to the claimant. There was no notice or a hearing before termination of employment. No terminal dues were paid. As there was no information as to the whereabouts of the respondent, the claimant decided to go home and filed his claim.

In defence, the respondent deny the allegations made by the claimant and avers that the claimant abscond duty after getting his June, 2012 salary and after he had been issued with several warning letters for being found asleep at work and which amounted to negligence. It was not possible too accord the claimant due process after absconding duty or issue him with notice terminating employment. The claims made are without merit and should be dismissed.

In evidence the respondent called Evans Manager Mokaya the Assistant Manager and who testified that the respondent is a company undertaking planting of vegetables and fruits for export. The claimant was an employee of the respondent from the year 2009 as a Night Guard and would alternate for day of night. The claimant would be found asleep when on night duty and was issued with several warning letters.

Mr Mokaya also testified that in June, 2012 the claimant left his employment after being paid his salary. After such date the claimant is not on the pay roll as he was not on duty after desertion.

Mr Mokaya also testified that The respondent shifted business to a new farm after its lease when the claimant was guarding expired. A new

farm was found 10 kilometres away and all staff moved with the shift in August, 2012.

The respondent closed its farm and moved to a new site. By this time the claimant had since left and had he been patient, he would have been made aware of the shift.

At the close of the hearing both parties filed written submissions.

The claimant has listed two issues as being in dispute. That of unfair termination of employment and that of unprocedural redundancy.

The claimant could however not recall when his last wage was paid. The respondent confirmed that the claimant was last paid in June, 2012 through his bank account at Co-operative bank, Naivasha Branch. With such evidence, the work record with the employer, the court notes that his was the last pay to the claimant.

In defence, the respondent called the Assistant Manager Mr Mokaya and who testified that in August, 2012 the business moved to a new site, ten (10) kilometres away after the lease to the site where the claimant was guarding was not renewed. That the employees present were moved with the shift of business. The claimant had absconded duty at the time and it was not possible for inform him or allow for due process.

An employee who absents himself from work commits gross misconduct as this is contrary to the provisions of section 44 of the Employment Act 2007. The employer has duty to issue such an employee with notice however short to answer as to why his employment should not be terminated.

Where the employer is the custodian of work records, the details required to be kept as required in section 10 of the Employment Act, 2007 should be applied to issue notice to the employee and where there is not such attendance or tracing of an employee who is absent from duty and has been summoned without attendance, a notice issued to the labour officer should suffice.

In this case, the claimant testified that he noted the respondent moved business without any information to him. the equipment's in the farm were also moved.

This evidence is confirmed by Mr Mokaya for the respondent who testified that from August, 2012 the business shift to a new location after the lease at the then site was not renewed.

Where the shift was from August, 2012 I take it there was a hectic time in the months proceedings to the shift and around the time the claimant was last paid his wage in June, 2012. With the business moving and after the lease was not renewed, the duty vested upon the respondent as t4he employer to inform the employees in a general notice of individual notice to employees likely to be affected by the shift of business. Where the claimant is noted to be a night guard or would alternate in day and night shift, reasons demanded that any shift in business be procedurally brought to his attention.

There is a legal duty placed on the employer to communicate any change to the work environment. Section 10(5) of the Employment Act, 2007 requires that;

***(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.***

Matters stipulated under section 10(1) and (2) relates to;

*(a) the name, age, permanent address and sex of the employee;*

*(b) the name of the employer;*

*(c) the job description of the employment;*

*(d) the date of commencement of the employment;*

*(e) the form and duration of the contract;*

*(f) the place of work;*

*(g) the hours of work;*

*(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*

*(i) the intervals at which remuneration is paid; and*

*(j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and*

(k) any other prescribed matter.

Where there is a change of *place of work* the duty is upon the employer to communicate such change to the employee. Leaving the claimant at large and state that he absconded duty, that he could not be traced for the purpose of ensuring due process and thus no notice was issued is an admission by the respondent that there was no compliance with the provisions of section 10 in keeping a work record with the requisite details for the claimant and based on which a notice ought to have issued to him based on his last known address.

The evidence of the claimant is therefore found to be honest and reasonable, his employment terminated contrary to the law, he was not issued with notice, he was not given any reasons and such was unfair.

Notice pay is due at the last paid gross wage of Ksh.6,850.00.

On the finding that termination of employment was unfair and taking into account the work record of the claimant where he had several warning letters issued to him and the court guided under section 45(5) to take such into account, compensation is hereby assessed at three months gross wage all at Ksh.20,550.00.

The claimant confirmed he had taken leave for the last year and the claim for due leave days for 4 months is not outlined as covering what period. Such claim is declined.

On the claim for overtime, the claimant had a contract with a standing overtime pay of Ksh.1,350.00 per month. Putting this into account, such pay is not contradistinguished with the claims now made for due overtime pay. To claim outside the contract sum must be explained.

The claim for underpayment is without details.

The claim for gratuity and severance pay is on the basis the claimant was employed for 3 years and should be paid 15 days for each year. Severance pay is regulated in law and this claim did not stand out as a redundancy claim. Also gratuity should be premised in the contract of employment, collective agreement or other private treaty justifying the payment of the same. This is not the case for the claimant.

**Accordingly, the claims succeed only with regard to the award for notice pay at Ksh.6,850.00 and compensation at Ksh.20,550.00 together with costs of the suit. The claimant shall be issued his Certificate of service in accordance with section 51 of the Employment Act, 2007.**

**Dated and delivered at Nakuru this 6<sup>th</sup> day of December, 2018.**

**M. MBARU JUDGE**

In the presence of:.....