



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1867 OF 2014

GEORGE SAMBUMWO KIMENGICH.....CLAIMANT

VERSUS

GALLANT SECURITY GUARDS LIMITED.....RESPONDENT

Mr. Wathome for claimant

Mr Isinta for respondent

JUDGMENT

1. The suit was commenced vide memorandum of claim on 22nd October 2014. The claimant seeks compensation for unlawful and unfair dismissal from employment and payment of specified terminal benefits set out under paragraph 8 (i) to (ix) of the memorandum of claim.
2. Brief facts of the case are that the claimant was employed by the respondent from April 1984 until May 2013 when his employment was summarily terminated upon his request to attend the burial of his mother. The claimant had served the respondent for a continuous period of twenty nine (29) years in the position of security personnel.
3. The claimant testified under oath and told the court that he worked on shifts and was initially paid Kshs.2,400 per month. By the time of termination he earned Kshs.4,000 per month. That he worked from 6 p.m. in the evening to 6 a.m. in the morning or from 6 a.m. in the morning to 6 p.m. in the evening.
4. That he worked for seven (7) days a week and during public holidays. That he was not housed and was not paid house allowance. That he never went on leave.
5. That in October 2012, the claimant wrote a letter requesting to retire and he be paid his terminal dues but the respondent did not respond to the letter.
6. That in May 2013, the claimant's mother died and the claimant requested to go and bury her. Mr. Samuel Muturi, a manager told him to go and never come back. The claimant had asked for a few days off.
7. That the employer started remitting NSSF dues in March 2000 up to 2013. The claimant seeks payment as prayed under paragraph 8 of the memorandum of claim. The calculation in respect of each item is shown in the memorandum of claim.

8. The claimant also seeks compensation for unlawful and unfair termination of employment because the employer did not give him a valid reason for the summary dismissal and the manner of the dismissal was unfair in that it was abrupt, and without notice. No terminal benefits were paid to him. He was not given opportunity to explain why he should not be dismissed.

9. The claimant was denied benefits which were due and owing to him for a long time and has suffered loss and damage.

10. The claimant seeks the suit be allowed in its entirety.

Response

11. The respondent filed a memorandum of response on 22nd September 2014 in which the employment of the claimant is not denied. The respondent however denies that the claimant was summarily dismissed averring that the claimant deserted work.

12. The respondent avers further that the claimant was granted leave from time to time and also upon his request. The respondent attached three leave forms as follows;

i. twenty one (21) days with effect from 23th August 2012;

ii. six (6) days with effect from 12th October 2011; and

iii. six (6) days with effect from 11th April 2012.

13. The leave form indicates that off days were to be paid.

14. The respondent avers further that the claims made under paragraph 8 of the memorandum of claim have no basis since the claimant was paid all his dues in full. No documentation was produced in support of this allegation.

15. The respondent did not appear on the day of the hearing and therefore no evidence was tendered in support of the averments made in the memorandum of reply.

16. The respondent did not file any written submissions.

Determination

17. The suit by the claimant is uncontested. The respondent failed to tender any evidence in support of the bare denial made in the memorandum of reply in respect of all particulars of claim except with respect of the claim in lieu of leave in respect of which three leave forms were annexed to the memorandum of reply. The forms were also not substantiated, the respondent's representative having failed to appear during the hearing of the case.

18. The testimony by the claimant that he served the respondent for a period of twenty nine (29) years is not in dispute. The court believes the testimony by the claimant that he was not paid in respect of all the items set out under paragraph 8 of the memorandum of claim and finds that the entire claim has been proved on a balance of probability.

19. In this respect, the court finds that, the claimant is entitled to;

i. Notice pay

One month salary in lieu of notice at Kshs.10,912 which was the statutory minimum wage applicable to the claimant in 2013 when he left employment.

ii. Unpaid leave

The court finds that the claimant did not take leave for the entire period of twenty nine (29) years he was in employment. However, the court will limit this claim to three (3) years untaken leave taking into account the three years limitation period set under section 90 of the Employment Act, 2007. The court therefore, awards the claimant (10,012 x 3) Kshs.32,736.

iii. Under payment

Similarly, the claim for underpayment has been proved but the court limits the same to three (3) years in arrears. The underpayment per month was 5,796 per month for a period of three (3) years. Total underpayment payable is Kshs.208,656.

The rest of the claims for underpayment are dismissed.

iv. House allowance

The claim for house allowance is also limited to 15% of the basic salary for three (3) years only due to statutory limitation of the claim as follows;

$(10,912 \times \frac{15}{100} \times 12)$ Kshs.58,924.80.

v. Overtime

Similarly, the claim for overtime at the rate of four (4) hours worked per day for three (3) years is awarded as follows;

1.5 (overtime rate)

$(\text{Kshs.}45.47 \text{ per hour} \times 4 \text{ hours} \times 360 \text{ days} \times 3 \text{ years})$ Kshs.196,430.40.

vi. Unpaid public holidays

The claim for eleven (11) unpaid public holidays per year is limited to three (3) years as follows;

$(\frac{11}{30} \times 10,912 \times 3 \times 2)$ being double rate payment totaling Kshs.41,472.

vii. Gratuity

The claim for service gratuity is payable for sixteen (16) years which the claimant has shown was not registered with NSSF and the dues were not remitted. The claim is payable in terms of section 35 (5) & 35 (6) (d) of the Employment Act 2007 in the sum of Kshs.87,296.

viii. Compensation

The claimant was already due for retirement and had asked to be retired provided he was paid his full terminal dues.

20. The court finds that the termination of employment did not amount to a summary dismissal but the same is deemed to have been a retirement as had been requested prior. The claimant had remained in employment because the respondent was unwilling to pay his terminal dues.

21. The court does not award the claimant compensation for termination of employment.

22. The court enters judgment in favour of the claimant;

a) in the sum of Kshs. 636,426.

b) the award be paid with interest at court rates from date of filing suit till payment in full;

c) costs of the suit.

d) certificate of service.

23. The judgment to be satisfied within thirty (30) days from date of this judgment.

Dated and delivered at Nairobi this 20th day of January 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE