



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 182 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**WYCLIFFE OLUMASAYI.....CLAIMANT**

**VERSUS**

**MODERN SECURITY HOLDING LIMITED.....RESPONDENT**

**J U D G E M E N T**

By a plaint dated 28th July, 2014 WYCLIFFE OKANG'A OLUMASAYI the Claimant sues MODERN SECURITY HOLDINGS LIMITED the Respondent seeking the payment of terminal benefits. The Claimant states in the Memorandum of Claim that he was employed by the Respondent as a Senior Guard cum Lance Corporal in the operations department from 13th April, 1999 to 30th September, 2013 when he resigned due to persistent delay of payment of his salary. He states that at the time of writing the letter of resignation on 1st September, 2013 his salary for March to August 2013 had not been paid causing him and his family financial embarrassment. He seeks payment of gratuity, pending leave, allowances, underpayments and overtime.

At the hearing of his claim on 2nd December, 2015 the Claimant testified that he filed a complaint on non-payment of his salary to the Labour Office following which he was paid the arrears of salary in two instalments on 16th September, 2013 and 30th October 2013. At the time the arrears were made up of Shs.800 for April, Shs.4,300 each for May, June, July and August, 2013 amounting to a total of Shs.18,000. The two payments he received was Shs.9,000 each. He stated that he was not paid the salary for September of Shs.4,300.

The Claimant further testified that he was underpaid by the Respondent.

The Claimant further seeks payment in lieu of annual leave. He stated that he applied for leave but the leave was never approved. He attached the leave application forms for 2008, 2009, 2010, 2011, and 2013 as annexure to the plaint.

**Respondent's Case**

The Respondent filed a Statement of Defence on 28th August, 2014 through Odhiambo Ouma and Company Advocates. The Respondent states it is a stranger to all the allegations in the plaint, that the suit against the Respondent is bad in law, an abuse of court process and without legal basis. The Respondent prayed that the suit dismissed.

At the hearing the Respondent called one witness MR. SIMON ONYANGO OJUOK, RW 1 who testified on 7th March, 2016 that he was an employee of the Respondent from 1993 to 2005 when he left

employment. He rejoined the Respondent in 2012 as Transport and Alarms Manager. From 2013 he became a director and co-owner of the company, with 3 other directors. He testified that he knew the claimant when he was summoned to the Labour Office, Kakamega following a complaint by the claimant. He stated the Labour Complaint was for Shs.18,000. He did not know what the money related to. He stated that he did not know if there was any month when the claimant was not paid. He further testified he was not aware if the claimant resigned. He stated that the Respondent paid all the salary arrears.

He further testified that he was not aware that the claimant did not go on leave, that the procedure for leave is that an employee fills the leave form. If the leave is approved the clerk fills the form and sends to one of the directors or operation manager to sign.

RW1 testified that he took over in 2013 and paid off all employees who had not taken leave.

RW1 testified that he had no idea about house allowance and that their salaries are consolidated. He further stated that he was not aware about gratuity. RW1 stated that the Claimant was only owed one months salary of Shs.4,600 for September, 2013. He stated he did not know how the claimant left employment.

### **Determination**

Neither the Claimant who was acting in person, nor the Respondent filed written submissions or made oral submissions.

I have considered the pleadings and evidence and there is no dispute that the claimant was an employee of the Respondent based in Kakamega. There is also no dispute that the claimant's salary was not paid between May and August 2013 and salary for April 2013 was not paid in full leaving a balance of Shs.800. This prompted the claimant to file a complaint at Kakamega County Labour Office following which he was paid the salary arrears in two instalments of Shs.9,000 each.

RW1 who testified on behalf of the Respondent did not have personal knowledge of the issues arising in the claim as his participation was limited to the payment of the arrears of claimant's salary at the Labour Office. He was not even aware what the arrears related to and kept referring to what he was told by a Mr. Muchibi who was never called as a witness.

RW1 confirmed that the claimant was entitled to one months' salary. This he was told by Mr. Muchibi. He however could not tell whether that was salary for September, 2013 or payment in lieu of notice. RW1 further stated salaries paid by the Respondent were inclusive of house allowance. He was not aware whether or not the claimant had taken leave, only stating that he had paid off those in employment when he took over as a director in 2013.

RW1 however confirmed that employees applied for annual leave through leave forms and only proceeded on leave if there was approval.

From the evidence on record it is my finding that the Respondent has not controverted the claimant's claim for September, 2013 salary and annual leave for 2008 to 2013. Having stated that the Respondent pays consolidated salaries, the claim for house allowances would be covered under salary underpayments.

The evidence on record shows that the claimant's salary was increased on 1st July, 2002 from shs.2,000 to 2,200, and from Shs.4,100 to shs.4,600 from April 2013.

From the foregoing it is my finding that the claimant is entitled to the following:-

#### **1. September 2013 salary**

RW1 testified that the information he had was that the Claimant is entitled to one months' salary.

According to the statutory minimum rates of pay applicable for September 2013 for Kakamega where the claimant was based, the claimant is entitled to shs.11,633.60 being consolidated wage for other municipalities under the Wages Order. I award him shs.11,633.60.

## 2. Unpaid Leave

The Claimant submitted unapproved leave forms for 2008 to 2013. The Respondent did not controvert his evidence that he applied for leave which was not approved. At 26 days entitlement per year (Under the Regulation of Wages (Protective security Services) Order) the claimant is entitled to 156 days leave. Based on a salary of shs.11,633.60 per month, the claimant is entitled to (11,633.60/30x156) Shs.60,494.70 which I award him.

## 3. Gratuity

Under the Regulation of Wages (Protective security Services) Order, the Claimant is entitled to gratuity at 18 days salary per year worked as he had worked for more than the qualifying period of 5 years and did not leave employment on disciplinary grounds. Having worked from April 1999 to September 2013, he is entitled to gratuity for 14 years. At a consolidated salary of Shs.11,633.60, the gratuity for 14 years is Shs.97,722.20. I award the Claimant the same.

## 4. Underpayments

The Claimant seeks underpayments for 173 months. From the evidence adduced, there are no figures from the claimant's rate of pay for all the 173 months. The only figures the court can go by are those in documents filed by the claimant. His salary was increased from shs.4,100 to shs.4,600 in April 2013.

Based on shs.4,100 and going back for 12 months on the consolidated basic minimum wage for 2012, the claimant was underpaid by (10,204.90-4,100) Shs.6,104.90 per month. For 12 months he was underpaid by Shs.73,258.50 which I award him as underpayments from May 2012 to April 2013. For May to August 2013 the Claimant was underpaid by (11,633.60-4,300) Shs.7,333.60 per month. For 4 months he was underpaid by Shs.29,334.40.

I therefore award the Claimant underpayment in the total sum of Shs.102,592.90.

## Conclusion

In summary therefore, judgment is entered for the Claimant against the Respondent as follows -

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|------------------|----------------|
| 1. Notice        | Shs. 11,633.60 |
| 2. Unpaid Leave  | Shs. 48,861.10 |
| 3. Gratuity      | Shs. 97,722.20 |
| 4. Underpayments | Shs.102,592.90 |

**TOTAL                      Shs.260,809.80**

The decretal sum shall attract interest at court rates if not paid within 30 days from date of judgement.

**DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**