



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1466 OF 2012

MR. JEVASE KARIUKI NYINGICLAIMANT

VERSUS

M/S EAGLE WATCH COMPANY LTD1ST RESPONDENT

MR. JOHN M. KARANJA [MD]2ND RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of employment by the respondent on 30/7/2012. In total the claim is for ksh.529,698.50 of which the sum of kshs.103822 has since been paid by the respondent. Despite service with court summons, the respondent has not filed any defence. Therefore the suit was heard exparte on 3/4/2017 and thereafter the claimant filed written submissions.

CLAIMANT'S CASE

2. The claimant stated in his testimony that he was employed by the respondent as a night guard from 2012 earning ksh.5177 per month. He used to work from 6pm to 6am every day. In 2009, he was arrested and charged with the offence of theft at his place of work in Criminal case No. 1108 of 2009. He did not meet the terms of his bond and as such he was remanded throughout his trial which ended with an acquittal in July 2010.

3. After the acquittal CW1 resumed work but his demand for his salary for the period he was in remand bore no fruit. Instead on 30/7/2012, his supervisor terminated his employment and repossessed his uniform. CW1 contended that the termination was unfair because the reason for the same was because he was demanding for his salary that fell in arrears during the period he was remanded. He also faulted the termination because he was not served with a prior notice.

4. He therefore prayed for 12 months pay as compensation for the unfair termination, one month salary in lieu of notice, severance pay, salary during remand period, and overtime worked. He admitted that after filing this suit the respondent paid him ksh103822 which settled the claim for leave, salary underpayment for 2010-2012, rest days and public holidays.

ANALYSIS AND DETERMINATION

5. After careful consideration of all the material presented to the court, it is clear that the claimant was employed by the respondent as a Night Guard from 2002 till 2009 when he was arrested and charged with theft. He failed to meet the bond terms and remained in custody until his acquittal in July 2010. It is further clear that after his acquittal, he resumed work but the employer refused to pay the salary for the period when the claimant was out of work. Finally there is no dispute that when the claimant intensified the demand for the salary for the period he was in remand, the respondent terminated his services. The issues for determination are:

- (a) Whether the termination was unfair.
- (b) Whether the reliefs sought should be granted.

Unfair termination

6. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair if he fails to prove that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent never filed any defence and the claimant's evidence that he was terminated for no valid reason but for demanding salary arrears was not rebutted. The termination was also without any prior notice as required under Section 35 and 36 of the Employment Act. On a balance of probability therefore, I find and hold that the termination of the claimant's services was unfair under Section 45 of the Act.

Reliefs

7. Under Section 49(1) of the Act, I award the claimant one month salary in lieu of notice and six months salary as compensation for unfair termination. In awarding the said compensation, I have considered the long period served by claimant and also the fact that no misconduct was proved against the claimant, which contributed to the termination. He will therefore get ksh.67001.55 based on the monthly salary of ksh.9571.65.

8. The claimant did not prove in evidence that he was terminated on account of redundancy. Consequently, the claim for severance pay is dismissed. Likewise, the claim for salary for the period he was in remand custody is dismissed for lack of evidence. The claimant never adduced any evidence to prove that before resuming work after the acquittal, he was entitled to any salary for the said period he was out of work. He also did not adduce any evidence to prove that he was reinstated to the original contract of employment as opposed to reemployment.

9. The claim for overtime is also dismissed. There is no doubt that the claimant worked for 12 hours every day which meant that for 6 days he worked for 72 hours instead of 53 hours as provided by Regulations 6 of Regulation of Wages (Protective Security Services) Order. The result was 48 hours of overtime work per month. However the claimant has not pleaded any particulars for the overtime pay for each year. It is obvious that the hourly wage as gazette under the Labour Institutions Act was not constant from 2002 to 2012 when the claimant was dismissed. I will therefore not assume that the claimant should be awarded overtime at the flat rate of ksh.36.40 per hour pleaded in the claim.

DISPOSITION

10. For the reasons that the termination of the claimant's contract of service was unfair, I enter judgment for the claimant in the sum of ksh.67001.55 plus costs and interest.

Dated and signed at Mombasa this 20th June 2017

O.N. Makau

Judge

Delivered at Nairobi this 30th day of June 2017

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Judge