



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 546 OF 2016

BETWEEN

DANIEL ODENY MBOYACLAIMANT

VERSUS

PERFECT SCAN LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Oloo & Chatur Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 15th July 2016. He states he was employed by the Respondent as a Security Guard on 13th February 2012. He was underpaid and demanded he is paid wages in consonance with the applicable Wage Order in October 2013. He was arrested on 19th September 2015 for alleged theft at the apartments he guarded. He reported at work on 26th September 2015, intending to consult the Director, but was denied access. He considered his contract unfairly terminated. He prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice;
- b) Underpayment of Wages;
- c) Wages for 19 days worked in September 2015.
- d) Compensation for unfair termination;
- e) Certificate of Service; and,
- f) Costs and interest.

2. The Respondent filed its Statement of Response on 28th July 2016. Its position is that the Claimant was employed by the Respondent as a Security Guard on 12th February 2012. He was issued a written contract, granting him an all-inclusive monthly salary of Kshs. 5,800. The contract allowed the Respondent to summarily dismiss the Claimant for theft, refusal to work or negligence. The Claimant was assigned guard duties at the time this dispute arose. Theft occurred at the premises the Claimant was guarding. A tenant complained 2 laptops, money and other valuables were stolen. The tenants reported the matter to the Police. The Claimant was arrested and locked in. The Respondent was not aware what happened after the Claimant was locked in and considered him to have deserted. On 15th January 2016, the Claimant served the Respondent with a letter of resignation. He states he opted to resign effective from 31st January 2016, because he had not been assigned duty since October 2015. The Respondent states it had already summarily dismissed the Claimant for desertion and resignation was superfluous. He is not entitled to notice pay and compensation having deserted. He consented to the rate of pay given to him and is bound by his contract. The Respondent concedes the prayers for Certificate of Service and Wages for 19 days worked. Otherwise the Respondent prays that the Claim is dismissed with costs to the Respondent.

3. The Claimant testified, and closed his case on 8th February 2017. The Respondent was unable to secure attendance of its Witness, and applied on the same date, and was with the Consent of the Claimant, allowed to rely entirely on the record, as filed by the Respondent.

4. The Claimant told the Court he was paid Kshs. 5,800. His purchasing power was eroded. He complained to the Respondent to bring his rate to the minimum prescribed under the relevant Wage Orders.

5. There was a break-in at the premises where the Claimant had been assigned guard duties. The Claimant explained he was assigned duty to guard the gate to the apartments. Break-in was at an apartment. Every tenant had own key to respective apartment. The Claimant was arrested.

6. The Respondent insisted the Claimant should admit liability for the crime. The Claimant declined and was locked in for 4 days. When he reported to work after release by the Police without charge, the Manager told him to go away, he would be recalled. He was not recalled.

7. In January 2016, he saw the Manager who advised the Claimant to write a letter of resignation. The Claimant wrote the letter, and later, reported the dispute to the Labour Office. He was referred to an Advocate, who made demand before instituting this Cause. He was never issued with a letter of termination. He agreed to write the letter of resignation because he had not received salary for months.

8. He testified on cross-examination he was assigned duty at residential premises. Tenants reported to the Police and the Claimant was arrested. He was not given a letter of termination. He had asked the Respondent to pay him his terminal dues, if there was no more work. He concluded his contract had been terminated when he was advised to write the letter of resignation. He complained verbally, about underpayment of wages. The Claimant reiterated upon redirection that he was confined to guarding the gate, not individual apartments. Tenants had their own keys to individual apartments.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Security Guard on 13th February 2012. He was paid a monthly salary of Kshs. of Kshs. 5,800.

10. There occurred a theft incident at the Romapavers Apartments, which the Claimant guarded, on 19th September 2015. He was arrested and kept in Police custody for 4 days.

11. At paragraph 9 of the Response, the Respondent states it considered the Claimant to have deserted, and summarily dismissed him. The Respondent wrote to the Labour Office on 12th October 2015, informing the Labour Office that the Claimant had deserted and therefore been summarily dismissed.

12. The letter of resignation written later on by the Claimant at the instigation of Respondent's Manager was of no effect. The Claimant did not terminate the contract through voluntary resignation; he was summarily dismissed by the Respondent on alleged desertion.

13. The issue arising from Respondent's decision is whether it was justifiable and carried out fairly, as required under Sections 41, 43 and 45 of the Employment Act 2007.

14. The Respondent does not give theft as the ground for summary dismissal. The ground is stated to be desertion.

15. There is no evidence that the Respondent brought the charges against the Claimant for desertion. The Respondent had personal details of the Claimant. There was no letter written, calling on the Claimant to explain his absence, or report to the Respondent for disciplinary proceedings.

16. It is not probable that the Respondent did not know what transpired after the Claimant was reported to the Police by tenants for theft. The Respondent would know from the tenants and the Police what had become of the Claimant's theft case.

17. There was no voluntary resignation. What there was, from the evidence on record, was a summary dismissal based on an unproven ground of desertion. Termination was unfair, having failed to meet the test of substantive justification and procedural fairness under the Employment Act 2007. ***The Claimant is granted the equivalent of 12 months' salary in compensation for unfair termination. The prayer for 1 month salary in lieu of notice is granted.***

18. The prayer for underpayments is disputed by the Respondent only on the ground that the Claimant and the Respondent agreed on the rate of Kshs. 5,800 monthly. Parties are bound by the contracts they enter into.

19. Contracts affording Employees benefits below the minimum statutory standards cannot be upheld by the Court. The Court has an obligation in law to bring such benefits in tandem with the minimum standards. Sanctions of a criminal nature could be imposed on an Employer who pays his Employee below minimum statutory standards under the guise of freedom and privity of contract. The stand taken by the Respondent on underpayments is not tenable. The Claimant has shown through the attached Wage Orders made under the Labour Institutions Act Number 12 of 2007, that he was denied minimum monthly wages for the period in question. ***He is granted the prayer for underpayment of wages as prayed.***

20. ***The prayer for salary for 19 days worked is not opposed and is granted at Kshs 7,978.***

21. ***Certificate of Service shall be released to the Claimant under Section 51 of the Employment Act 2007.***

22. ***Costs to the Claimant.***

23. ***Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 151,164; 1 month salary in lieu of notice at Kshs. 12,597; underpayment of wages for the years 2013-2015 at Kshs. 128,844; wages for 19 days worked in September 2014 at Kshs. 7,978- total Kshs. 300,583.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest granted at the rate of 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 19th day of June 2017

James Rika

Judge