



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2320 OF 2012

MOSES OJANI KHASAYA CLAIMANT

VERSUS

WASSO SECURITY COMPANY LIMITED RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent as a night watchman in October, 2007 at a monthly wage of Kshs.5,000.00 and would report to work from 6pm to 6am. The wage was increased to Kshs.6,000.00 in 2008; Kshs.7,000.00 in 2009 and Kshs.8,000.00 from February, 2012. The claimant was thus being underpaid based on the general wages orders for 2007 to 2012.

2. On 5th April, 2012 the claimant was terminated from his employment by the respondent without any reason or payment of his terminal dues.

3. The claim is for;

- a) *One month salary in lieu of notice at Kshs.9,571.65;*
- b) *Unpaid salary for March, 2012 at Kshs. 9,571.65;*
- c) *Unpaid salary for 4 days in April, 2012 at Kshs.1,837.20;*
- d) *Unpaid house allowance for 2 years kshs.34,457.94;*
- e) *Accrued leave for 63 days Kshs.30,150.00;*
- f) *Service pay for 3 years Kshs.20,668.50;*
- g) *Refund of Kshs.60.00 per month x 12 Kshs.720.00;*
- h) *Uniform refund Kshs.200 x 3 years Kshs.8,200.00;*
- i) *Underpayments Kshs.94,299.00;*
- j) *Maximum compensation Kshs.11,859.00.*

4. The claimant is also seeking reinstatement back to his position without loss of benefits and salaries and payment of all costs herein.

5. The claimant testified in support of his claim that he was employed by the respondent on 28th November, 2007 as a Guard on night shift running from 6pm to 6am. His wages were paid through the back less the NSSF and NHIF deduction uniform and insurance pay at Kshs.500.00 and Kshs.60.00 respectively.

6. The claimant also testified that on 5th April, 2012 he was issued with a letter terminating his employment. He had worked until morning following his night duties and did his handing over. He had a patient at Kenyatta National Hospital and went to attend to the patient. He resumed work at 5.05pm so as to take over but at 8.30pm the manager came and claimed that the claimant had been demanding Kshs.500.00 from bus drivers to park their vehicles at the yard he was guarding but he had not been aware of such payments. The claimant was directed to remove the uniform and leave the premises. On 6th April, 2012 the claimant went to the respondent offices and his employment was terminated.

7. On 13th April, 2012 the claimant was cleared and then he demanded for his terminal dues which have not been paid to date.

Defence

8. The respondent admit to having employed the claimant, he was deployed to work as a Guard as Crown Energy at a site for one of the respondent's clients. After the manager questioned the claimant about his conduct, the claimant became rude, got upset and unilaterally left his employment. The claimant was never terminated from his employment by the respondent and the allegations made in this regard are false.

9. The defence is also that the claimant is not entitled to the reliefs set out in the claim by virtue of the fact that he absconded duty. A certificate of service was not issued as there was no termination of employment.

10. In evidence the respondent witness was Hussein Abbas the director of the respondent. He testified that he employed the claimant when the company opened in 2008 for business and not in 2007. The claimant was among his first employees.

The claimant deserted duty when he had a problem with the manager.

11. On 5th April, 2012 while the claimant was at work, while the manager was going round checking on the guards he got a complaint that the claimant had been collecting money from drivers for parking at the yard. A driver parked there for the night and when leaving he was asked for his receipt but he said he had paid the claimant in cash. The yard was owned by Crown Energy who paid the respondent for parking service and all drivers had to pay and get a receipt. When the claimant was asked about the payment he became rude to the manager. Other complaints had also been made about the claimant collecting money from drivers for parking at the site he was guarding.

12. After two days the witness called the claimant to the office. He refused to attend and demanded that unless he was paid he would file suit.

13. When the claimant eventually returned, he claimed to have been attending to a sick patient in the hospital. No such information had been left with the respondent before the claimant failed to attend work. The complaint made against the claimant was sensitive and required to be addressed. When the claimant absconded duty he was not paid his dues wages as he had deserted.

14. The claimant was not paid a house allowance as his pay was all inclusive. The claimant took off days and his leave and all due salaries. The claimant applied for leave and all days at work were recorded on the master roll. All statutory deduction and payment were effected.

15. Both parties filed written submissions.

Determination

16. The claim is based on conflicting facts where on the one hand the claimant asserts that on 5th April, 2012 he was falsely accused of receiving Kshs.500.00 from a driver over parking at the yard he was guarding at Crown Energy along Mlolongo area. That when he report back to work he was directed to do a hand over and then he was terminated from his employment unfairly and without payment of his terminal dues.

17. The respondent on the other hand asserts that there were complains against the claimant receiving monies form drivers parking at their client's site, Crown Energy and when the manager asked the claimant about these complaints he became rude and upset and then left employment only to attend demanding his terminal dues. That the claimant deserted work and was never issued with a termination letter.

18. The respondent has admitted that the claimant was never issued with a letter of employment and that his work attendance was recorded in the master roll. Failure to issue an employment contract, letter or document on employment is a major mistake done by the respondent as the employer. Failure to issue such a document only works to the disadvantage of the employer. The terms and conditions of employment are not clear, they remain ambiguous and when there is a conflict, the word of the employee must be believed. The rationale is to be found under section 8, 9 and 10 of the Employment Act, 2007

19. Where an employee is employed through an oral contract, such must be reduced into writing at least within 2 months of such employment. This is to ensure that both parties to the employment relationship are aware of the terms and conditions thereto. Where no written contract is issued and there is a dispute such as this one, the duty is upon the employer to produce all records to support its case in terms of section 10(6) and (7) of the Employment Act, 2007.

20. In this case what is apparent is that on 5th April, 2012 there was an exchange between the claimant and his manager, such related to allegations of the claimant receiving money form drivers parking at the site he was guarding at Crown Energy. The claimant added to these details by testifying that he had a sick relative in Kenyatta National Hospital and thus left work early at 5.45am instead of his scheduled hour of 6am so as to be at the hospital at 6am.

21. The claimant also testified that after attending to his sick relative, it was Good Friday and Easter followed. He then reported back to work when the office was open. This was on 13th April, 2012. There is therefore a time period of over 8 days unaccounted for by the claimant who was ordinarily the night guard for the respondent.

22. Where the claimant failed to attend work for over a week without prior approval or authorisation by the respondent, such amounted to gross misconduct. Such is a matter subject to summary dismissal in accordance with section 44(4) of the Employment Act, 2007. But the respondent did not apply the same. They just let the claimant be.

23. Even where the employee has grossly misconducted himself, the mandatory provisions of section 41(2) requires that there should be notice issued to the employee and a hearing. Where it is not possible to give the employee a hearing either because the employee is absent or has refused to attend upon being invited for such hearing, the employer must demonstrate to the court such matters. To leave the employee at large and then allege there was absconding of duty, such only foments a claim for unfair termination of employment. Such is equally not a fair labour practice. To fail to take a decision whichever way, a termination or recall back to work only encouraged the claimant to make the claims made herein as he had no certainty as to his employment with the respondent.

24. I therefore find by the respondent failing to take firm action on the claimant, asking him to hand over his duties, such amounted to termination of his employment without adherence to the rules of fair procedure. Even where the claimant had failed to attend work, the duty was on the respondent as the employer to take appropriate action and sanction. Such amounted to unfair termination of employment.

Remedies

25. The respondent has admitted to owing salary arrears at kshs.11,408.85 comprising unpaid salary for March, 2012 at Kshs.9,571.65 and 4 days worked in April, 2012 a kshs.1,837.20.

26. With this admission and computation of the terminal dues, the due wage for the claimant at the time of termination is thus Kshs.9,571.65. The question of underpayments thus put into account and noting the General orders applicable for the duration of 2008 to 2012, the computation by the claimant is correct as submitted and amounting to Kshs.75,014.60. There was no specific challenge to this claim save for the year 2007. The respondent witness confirmed to have engaged the claimant as a causal but no contact of employment was submitted. Underpayments due are thus Kshs.75,014.60.

27. On the finding that there was a lapse on the part of the respondent in terms of due procedure in terminating the employment of the claimant, notice pay is due and is hereby awarded at kshs.9,571.65.

28. Leave is due to every employee in terms of section 28 of the Employment Act, 2007. I have gone through the master roll of the respondent and confirm that indeed on various occasions the claimant was marked as being absent from work. The claim for off days and or leave is thus covered and shall not be awarded as claimed

29. The respondent confirmed that all NSSF and NHIF dues have been remitted. The claimant also testified that at the time he was giving evidence, only 3 months had no record. As such and by application of section 35 of the Employment Act, 2007 service pay is not due. Even where some deductions were not effected for the 3. months, such monies are not due to the claimant.

30. The rationale for the deduction of the uniform fee/charge in the absence of a written contract setting out the terms and conditions of employment is lost. Section 15 read together with sections 16 and 5 of the Employment Act, 2007 requires an employer to explain to an employee his rights at work and to ensure all rules and regulations are displayed prominently at the place of work. Where the claimant was therefore required to wear a uniform in the performance of his duties, such requirement being for the benefit of the respondent, the expense thereof should be borne by the respondent. The deductions made are not contested and I award the claimant Kshs.26,500.00.

31. On the compensation due, based on the evidence of both parties, the court is required to put into account the provisions of section 45(5) of the Employment Act, 2007 with regard to the conduct and capability of the employee up to the date of termination. The claimant is not without blame. Absconding duty is a matter serious and ought to be punished. With the payment of notice pay and the remedies for compensation being discretionary, to award more would be to reward misconduct.

Accordingly, judgement is hereby entered for the claimant with an award for admitted amounts of Kshs.11,408.85; notice pay at Kshs.9,571.65; underpayments Kshs.75,014.60; uniform refund at Kshs.26,500.00; and each party shall bear own costs.

Delivered in open court at Nairobi this 26th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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