



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1363 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 21<sup>st</sup> September 2017)**

**MALISE DUBA BUKU.....CLAIMANT**

**VERSUS**

**SAGAR BUILDERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 15.8.2014 in person alleging unfair termination of his employment as a day Watchman on 1<sup>st</sup> March 2014. He also alleged that the Respondent failed to pay him termination benefits as per the Regulations of Wages (Building & Construction Industry) Order 2004 and Employment Act 2007 Legal Notice No. 71 of 1<sup>st</sup> May 2012 and Legal Notice No. 197 of 1<sup>st</sup> May 2013.

2. The Claimant's case is that he was employed by the Respondent on 1.2.2013 as a day watchman at a monthly salary of 8,500/= per month against Legal Notice No. 71 of 1<sup>st</sup> May 2012 which is Kshs.8,570/80 per month and Kshs.1,300/= per month to make a total of 10,379/80 per month and so he contends that he was underpaid by Kshs.1,879/80 per month upto 30<sup>th</sup> April 2013 (3 months) which is Kshs.5,639/40.

3. He also avers that from 1<sup>st</sup> May 2013 Legal Notice No. 197 raised his salary to 9,780/95 per month and 15% house allowance which is 1,467/15 to make a total of Kshs.11,248/10 per month. The Respondent was still paying him 8,500/= per month upto 1<sup>st</sup> March 2014 when he was unfairly terminated having underpaid him by kshs.2,748/10 per month for 10 months which is equivalent to another 27,481/=.

4. The Claimant contends that he worked from 6 am to 6 pm which is 12 hours per day for 6 days a week making 72 hours of six days and so he worked for 12 hours per week overtime as contained in the Regulation of Wages Order 2004 in 4 weeks a month. He therefore contends that for the 13 months he serve 624 hours overtime which translates to 44.85 x 936 hours = 41,979/60.

5. The Claimant also avers that he worked during public holidays and served for 10 public holidays and he should be paid for 240 hours at 44/85 per hour = 10,764.

6. The Claimant also avers that his services were unfairly terminated on 1.3.2014 and was not paid his 1 month salary in lieu of notice at Kshs.11,248/10 nor severance pay for 1 year which is 6,019/05.

7. He prays for judgment of Kshs.294,081/15 as follows:

- 1. Underpayment of salaries 33,120.40.**
- 2. 936 hours overtime at 44/85 per hour = 41,976.60/=.**
- 3. 1248 hours weekly rest days at 44/85 per hour = 55,972.80/=.**
- 4. 240 hours public holidays at 44/85 per hour = 10,764/=.**
- 5. One month salary in lieu of notice = 11,248.10/=**
- 6. 16 days severance pay served = 6,019.05/=.**
- 7. 12 months salary compensation as damages at 11,248.10 = 134,977/=.**
- Total 294,081.15/=**

8. The Respondent on their part filed their Memorandum of Appearance on 7.3.2016 through the firm of Mwangi & Partners. They also filed a defence on 1.4.2016 where they denied any familiarity with the Claimant herein and that the Claimant was ever employed by them. They also didn't call any witness to testify on their behalf.

9. The parties also filed their submissions where they reiterated their evidence.

10. I have considered all evidence and submissions placed before me. The issues for determination are as follows:

- 1. Whether the Claimant was an employee of the Respondent.**
- 2. If yes, whether there were valid reasons to terminate the Claimant.**
- 3. Whether the Claimant was accorded due process before termination.**
- 4. If the Claimant is entitled to the remedies sought.**

11. On the 1<sup>st</sup> issue, the Claimant told Court that he was an employee of the Respondent. There is no appointment letter he was issued with. There is also no evidence of a work relationship even a work I/D card.

12. The Respondent denied knowing the Claimant nor employing him. Indeed he who alleges must prove.

13. The burden of proving an employment relationship lies upon the Claimant. It was an aspect upon him even to call a witness to confirm he worked with him. It was also upon the Claimant to call for any records he wishes that may built up his case. There is no evidence that he asked Respondent to produce certain documents for his perusal and use and they refused. It is upon the claimant as an employee to prove his case on a balance of probability that would lay the foundation of his case.

14. It is my finding that the Claimant's case as presented does not prove he was an employee of the Respondent.

15. In the absence of proving the above issue, this Court cannot delve into the other issues and so the entire case must flop.

16. I find the Claimant has not established his case and so dismiss it accordingly with no order as to costs.

Read in open Court this 21<sup>st</sup> day of September, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okemwa for the Claimant – Present

No appearance for Respondent