



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO. 151 OF 2017

(ORIGINALLY NAKURU CAUSE NO. 270 OF 2016)

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

V

RILEY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Kenya National Private Security Workers Union (Union) commenced legal proceedings against Riley Services Ltd (Respondent) in Nakuru on 19 July 2016, and the issue in dispute was stated as *refusal to pay Mr. Julius Abok (Grievant) his terminal dues*.
2. However, the Union also alleged breach of contract in respect of underpayment of wages, accrued leave and leave travelling allowance and overtime.
3. When the Cause first came for hearing in Nakuru on 22 February 2017, Mr. Githiru for the Respondent informed the Court that Notice of Summons and the pleadings had not been served and the Court directed that service be effected afresh as the affidavit of service on record was not satisfactory.
4. The service was effected and the Respondent filed a Response on 15 March 2017.
5. On 4 May 2017 the Court issued a notice to the parties with an intention to transfer the Cause to Eldoret, where a sub-registry of the Court had been opened.
6. On 22 June 2017 the Court made an order that the Cause be transferred to Eldoret and when the file was mentioned on 25 September 2017, the Court, at the request of the Union fixed hearing for 31 October 2017.
7. The Court also directed the Union to serve a hearing notice.
8. According to an affidavit of service sworn by Kenneth O. Oduor and filed in Court on 24 October 2017, a hearing notice was served upon and acknowledged by the firm of Otieno Ragot & Co. Advocates on 26 September 2017.
9. Despite acknowledging service of the hearing notice, the Respondent and its advocate on record did not attend the Court for hearing.
10. The Court, being satisfied that a hearing notice was served allowed the hearing to proceed.

11. Mr. Odima who represented the Union opted not to lead any oral evidence (witness) and indicated that he would make oral submissions.

Whether there was unfair termination of employment

12. Despite submitting that the Grievant's contract was terminated unfairly through a letter dated 25 July 2014, the Court is unable to agree that there was unfair termination of employment.

13. The Grievant's employment contract filed together with the Memorandum of Claim indicated that he was on a fixed term contract of 12 months.

14. The letter from the Respondent to the Grievant dated 25 July 2014 is also clear that the Grievant's contract had come to an end and was not going to be renewed.

Underpayment of wages

15. According to the Memorandum of Claim, the Union contended that the Grievant was underpaid from 2013 to 2014.

16. The Grievant's pay slip for June 2013 filed in Court indicated that the monthly wage was Kshs 8,477/-. The pay slip for July 2013 indicated a monthly wage of Kshs 8,876/-.

17. According to the letter of appointment, the Grievant was a guard and in terms of Legal Notice No. 197 of 2013, the prescribed minimum wage for a guard was Kshs 9,024/-, exclusive of house allowance, within municipalities.

18. The Court can therefore conclude that the Grievant was underpaid for the months of June and July 2013 (pay slips for other months were not filed in Court).

Annual leave

19. Pleadings remain just that and the allegations therein ought to be supported by evidence, which the Union opted not to lead.

20. The Court will therefore find that this head of claim was not proved as the Union did not provide an evidential basis for it.

Overtime (normal/public holidays)

21. No evidence as to the prescribed working hours was presented.

22. Although the Claimant's contract of employment prescribed 12 hours of work per day, there was a caveat that the reporting and handing over hours may be varied.

23. Without evidence as to the actual hours worked (including details of public holidays), the Court cannot determine whether the Grievant worked overtime without pay.

Leave travelling allowance

24. The Court was not informed whether leave travelling allowance was a contractual or statutory entitlement and therefore it would decline to make any award under this head.

Uniform deduction

25. The employment contract at clause 3.2 required the Grievant to make a uniform deposit of Kshs 5,500/- to be refunded at the end of the contract.

26. At the end of contract, the Respondent requested the Grievant to return all the Respondent's property in his possession before accessing his terminal benefits.

27. Without evidence that he cleared with the Respondent, the Court cannot order payment of the uniform deposit.

28. Before concluding, the Court wishes to reiterate a caution it has given before, especially in cases where Unions appear on behalf of their members.

29. It is a risky endeavour to opt to prosecute a Cause through the records and submissions route where there are not only disputed facts, but where an evidential basis needs to be laid, even if the Cause is undefended.

30. There can be no legal presumption that because the Cause is not defended or the Respondent will not lead evidence, there will be findings in favour of the Grievant, when appropriate evidential foundation is not laid.

31. The caution is even more pertinent where no explanation is offered as to the whereabouts of the Grievant or his failure to attend Court as in the present Cause.

Conclusion and Orders

32. The end of contract letter informed the Grievant to clear with the Respondent before accessing his terminal dues. Such dues may include pay in lieu of leave, uniform refund among others.

33. The Grievant ought to clear with the Respondent in order to access those dues.

34. Such dues should include underpayments for June and July 2013.

35. From the foregoing, the Court finds no merit in the Cause herein save for what is stated in paragraphs 32,33 and 34 hereinabove and orders that it be dismissed with no order as to costs.

Delivered, dated and signed in Eldoret on this 24th day of November 2017.

Radido Stephen

Judge

Appearances

For Union/Grievant Mr. Odima, Secretary General

For Respondent Otieno Ragot & Co. Advocates

Court Assistant Nixon/Martin