



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

CAUSE NO.1155 OF 2014

MAURICE WANDERA EGESA CLAIMANT

VERSUS

INTER-SECURITY SERVICE LIMITED ...RESPONDENT

JUDGEMENT

1. The issue in dispute is the refusal by the respondent to pay the claimant his terminal dues upon termination of employment.
2. On 11 July 2014 the claimant filed his claim, such was amended and filed on 21st July 2015. A defence was filed on 26th August 2015, and a response to the amended claim filed on 4th September 2015. Hearing date was allocated in court in the presence of both parties on 11th November 2015. On the appointed date, the 10th February 2015 the respondent was absent. Hearing was scheduled at 11.30am but the respondent remained absent. The claimant was heard at 12.45pm as the respondent remained absent.
3. The claim is that on 16th August 2008 the claimant was employed by the respondent as a security guard and was paid Kshs.6, 400.00 per month. The salary was below the minimum wage which was supposed to be Kshs.6, 743.00 per month. The claimant worked diligently until 1st July 2013 when he gave 3 months' notice of his intention to go on early retirement. On 22nd September 2013 the claimant was terminated from his employment despite giving notice for early retirement.
4. The claimant is seeking his terminal dues being balance of notice period; service gratuity; work for public holidays; overtime of 72 hours; work on rest days; annual leave; house allowance; underpayment since May 2010 to April 2011; underpayments from May 2012 to September 2013; refund for uniform; and a refund from his welfare. All dues are computed at kshs.691, 647.00. The claimant is also seeking compensation for unfair termination.
5. In evidence, the claimant supported his claim and testified that upon giving notice to retire from the respondent employment, he was terminated before the due date without being given any reasons or notice. Despite the abrupt termination, his terminal dues were never paid which included underpayments; he never took annual leave for 5 years; house allowance was not paid noting the underpayments; he was made to work doing public holidays and the due allowances were never paid. The claimant worked for long hours each days going over 12 hours. The claimant also testified that his salary was deducted a uniform fees, welfare and seek a refund of such monies. That due to the abrupt termination that had not been planned for, he suffered due to the ill-treatment from the respondent. The fact that nothing was paid to him caused him and his family hardships. He had a wife who left him and this has caused him a lot of stress. The claimant had never gone on leave and when he asked to take leave he was threatened with termination. He has nothing to show for his time in employment. His wife has since married somebody

else as he could not support her.

Defence

6. In defence, the respondent avers that they had employed the claimant who voluntarily resigned by giving verbal notice. That the respondent did not terminate the claimant's employment as alleged, rather on 21st September 2013 the claimant abandoned his duties prior to his notice period. The defence is also that the claimant was never made to work on public holidays and is not entitled to any dues for annual leave, house allowance or underpayment. All NSSF statutory dues were remitted for the claimant and nothing is arising as service gratuity pay.

7. No evidence was called by the respondent.

Determination.

8. The respondent has admitted that they had employed the claimant. There are however no records attached with regard to the work records of the claimant. Section 74 of the Employment Act sets out the requirements thus;

74. (1) an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

9. Such a work records should include the payable salary and its duration; the statutory deductions made on the salary; hours of work setting out the rest day/s; annual leave taken or due and any records for any leave taken with regard to sickness or as the case may be. Such records are to be kept by the employer and where there is a dispute file before this court by an employee challenging the non-payment of any dues, such a record must be produced by the employer. Section 74(1) (I) also requires that;

- i. *Where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee [must be set out].*

10. Work records are important for an employer to keep as such records facilitate state planning even where these records arise from non-state actors. Section 74 and 79 in this regard is couched in mandatory terms thus;

79. An employer shall keep a register in which the employer shall enter the full name, age, sex, occupation, date of employment, nationality and educational level of each of his employees and a return of employees for each calendar year, ending on 31st December containing such information shall be sent to the Director not later than 31st January of the following year.

11. Therefore, where an employer files a defence and fails to submit such records, fails to attend court to controvert the evidence of the employee such as the claimant herein, the defence filed is left bare. The failure to submit such record must be interpreted to the advantage of the employee. The only record submitted in defence is the statutory deduction to NSSF and the pay slip for the claimant. The payslip does not however give the required details such as is set out under section 74 and 79 of the employment Act.

12. From the memorandum of claim and in the evidence of the claimant, he gave notice on 14th July 2013 seeking to retire with effect from 1st October 2013. Though this notice is not acknowledged by the respondent, the evidence challenging it is that the notice was issued but it was verbal. The details of the verbal notice to retire as alleged by the respondent are not set out. As such, I take it that the respondent was therefore aware that the claimant had tendered his notice to exit their employment. The allegation that the claimant absconded duty from 21st September 2013 is not supported by any evidence. There is no record of work attendance, there is no notice recalling the claimant back to work or notice of his

misconduct for absconding duty. It is therefore not clear why the respondent terminated the claimant's employment despite his notice to retire.

13. Noting the knowledge by the respondent that from July 2013 they were aware of the claimant's impending exit, to terminate his employment before so as to frustrate him and then fail to pay his terminal dues is an act I find to be inhuman, degrading, and contrary to fair labour practices. An employee who goes out of his way to issue notice for retirement should be paid his terminal dues so as to retire in dignity and settle back in his retirement life in peace. To terminate such an employee before the due date, fail to pay the terminal dues and benefits, I find to be unfair termination as such has no justification under any law or policy. Such an employee should be appreciated and made to take their retirement with appreciation.

14. Noting that the notice period for retirement as issued by the claimant was to expire on 1st October 2013, he was terminated before such notice could mature, there were reasons given for the termination, notice pay is due. The claimant is seeking underpayments on the basis that his salary was kshs.6, 400.00 per month. The respondent has attached a pay slip indicating that the claimant's salary was Kshs.9, 942.00 per month. In the initial claim filed by the claimant on 11th July 2014, he had set out his salary at Kshs.9, 295.00. In the amended claim such details have changed to Kshs.6, 400.00. The work record by the respondent clarifies the salary paid to the claimant at kshs.9, 295.00 per month and such will be the applicable salary for purposes of computation of dues owing herein. The sum of kshs.9, 295.00 was a basic pay only as set out in the pay slip submitted. In this regard therefore, notice pay is awarded at kshs.9, 295.00.

15. There are several claims I find that have not been challenged by the respondent in any material way. Such relate to service gratuity for 18 days; work on public holidays; overtime covering 72 hours; work on rest days; annual leave; house allowance; refund for uniform and welfare fund. Save for the claim for work during public holidays that is claimed at 10 days for 5 years and noting that such public holidays change every year and the 10 days due are not set out, such will not be awarded as claimed. The other claims are confirmed at;

16. Service gratuity is awarded based on 15 days for each year all at kshs.23, 237.00;

17. Overtime covering 72 hours instead of 52 hours per week means that the claimant had 20 hours overtime per week. The overtime is kshs.278, 400.00.

18. Work during rest days for 4 days a month based on salary due is awarded at kshs.18, 580.00.

19. Annual leave is due at 21 working days pursuant to section 28 of the Employment Act. Without a record that the claimant took his annual leave such is awarded herein at Kshs.32, 532.50.

20. House allowance is due where the claimant was only paid a basic pay and the housing is not set out as how it was earned. The claimant is awarded Kshs.83, 655.00 as house allowance.

21. The claim for underpayment as set out and noting the payslip attached does not arise. Such is declined.

22. The claimant should have been provided with his tools of work by the respondent. The uniform deduction shall be refunded at kshs.1, 300.00 together with the welfare refunds at Kshs.4, 960.00.

23. For the unfair termination of employment, the claimant is awarded compensation based at 3 months' salary all being kshs.27, 885.00.

Judgement is hereby entered for the claimant against the respondent in the following terms;

- a. **Compensation awarded at Kshs.27,885.00;**
- b. **Notice pay Kshs.9,295.00;**

- c. **Service gratuity Kshs.23,237.00;**
- d. **Rest days Kshs.18,580.00;**
- e. **Annual leave Kshs.32,532.00;**
- f. **House allowance Kshs.85,655.00;**
- g. **Uniform refund Kshs.1,300.00; and**
- h. **Welfare refund Kshs.4,960.00.**

Each party shall bear their own costs.

Orders accordingly.

Delivered in open court at Nairobi and signed this 16th day of February 2016.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga