



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 241 OF 2013

SAMUEL MAROKO OGANA

CLAIMANT

v

INTER SECURITY SERVICES LIMITED

RESPONDENT

JUDGMENT

1. Samuel Maroko Ogana (Claimant) was employed by Inter Security Services Ltd (Respondent) as a security guard on 31 January 2010. On 25 July 2013, he commenced legal proceedings alleging unfair termination of employment and seeking a quantified award of Kshs 212,843/20 being *underpayments on salary, uniform refund, overtime, accrued leave, pay in lieu of notice and compensation*.

2. The Respondent filed its Response on 17 September 2013, which prompted the Claimant to file a Reply on 10 October 2013. The Claimant's case was heard on 18 June 2015.

3. When the turn came for the Respondent to present its case on 26 October 2015, it sought an adjournment which was rejected, and it therefore closed its case without calling any witnesses.

4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair, whether the Claimant was underpaid, whether Claimant worked overtime and appropriate remedies/orders including entitlement to contractual/statutory rights*.

Whether dismissal was unfair

5. The Claimant's case is that on 31 September 2011, he reported to work as usual but in the evening, a supervisor alerted him to the disappearance of a computer from the property he was guarding (Kenya Power & Lighting Co. Ltd).

6. The supervisor wanted to know about the theft. According to the Claimant, he asked the supervisor to seek explanations from the night guards (supervisor) as they were responsible for guarding the offices from which the theft occurred.

7. After about a month, the Claimant was asked to meet a supervisor from the Respondent's Nairobi office (Mr. Otibi). The supervisor wanted him and others to produce the computer and also record statements, after which he was suspended for 3 days.

8. According to the Claimant, he called the Respondent's offices and talked to a Esther Wanja to inquire

about his wages which had not been remitted but she told him he would not be paid because of the theft of the computer.

9. The Claimant did not report back to work thereafter.

10. Because the Respondent was not forthcoming, the Claimant reported to the Ministry of Labour. The Respondent did not cooperate with the Labour Officer, and on 8 November 2011, the Labour Officer demanded the payment of Kshs 20,839/90 to the Claimant. No payment was made.

11. The Claimant was led by his advocate but he did not lead any testimony at all as to why the dismissal was unfair.

12. Under section 45(7) of the Employment Act, 2007, an employee has a low threshold burden to show that an unfair termination of employment occurred before the employer is called upon to prove the reasons and that the reasons were valid and fair.

13. In the present case, the Claimant failed to discharge the burden. His evidence was simply that he was suspended for 3 days and after making an inquiry on phone, he never reported back to work.

14. With the material placed before Court by the Claimant, the Court is unable to determine whether an unfair termination of employment occurred.

Underpayments

15. The Claimant testified that on employment he was earning Kshs 4,400/- per month which was paid through his bank account (bank statements were produced).

16. The pleaded monthly wage was Kshs 5,600/-. The produced bank statements had varying sums of Kshs 4,367/-, Kshs 5,279/- and Kshs 6,092/- among other figures.

17. In the pleadings, the Claimant listed the Legal Notices prescribing the minimum wages.

18. The Claimant stated that the wage would increase or reduce. He did not disclose when the increments or reductions were implemented or effected.

19. The Court, with the scant details offered cannot make a conclusion as to the particular months when the underpayments occurred.

Overtime

20. The Claimant's testimony that he was reporting to work at 6.00am and leaving at 6.00pm was not challenged or controverted. He also stated that he used to clock in and out. The Respondent, as custodian of employment records did not produce the records to rebutt the Claimant's testimony.

21. It is also a notorious fact of which judicial notice can and is taken that security guards in this country work 12 hour shifts.

22. The Court therefore finds that the Claimant has laid a foundation to claim overtime as pleaded.

Appropriate remedies/orders including contractual and statutory entitlements

Uniform refund

23. No evidence was led in respect of this head of claim.

16 public holidays

24. The Claimant did not disclose the holidays he worked. The Response admitted to Kshs 2,624/- on account of holidays.

Wages in lieu of notice

25. The Respondent admitted that the Claimant was entitled to 1 month pay in lieu of notice of Kshs 6,204/-.

Accrued leave

26. An entitlement to Kshs 13,227/- was made in the pleadings. In testimony, the Claimant stated that he was seeking Kshs 13,390/50.

27. The law, as minimum grants to each employee 21 days annual leave with full pay.

28. But the Respondent admitted in the Response to an entitlement to Kshs 5,227/- under this head.

29. The calculations by the Respondent cannot be correct because the Claimant was in employment for just slightly under 2 years and would be entitled to about 2 months wages in commuted leave.

30. The Court finds his calculations more probable.

Holiday pay

31. Similarly, an admission was made to Kshs 2,624/-.

Overtime

32. The Respondent admitted that 80 hours of overtime worth Kshs 2,186/- was due.

33. The Claimant sought Kshs 4,181/30 on account of overtime. His calculations were not challenged. The Court finds in his favour as pleaded.

House allowance

34. No evidential basis was laid and this relief is declined.

Compensation

35. With the finding that the Claimant did not discharge the statutory burden, this relief is declined.

Conclusion and Orders

36. The Court finds and holds that the Claimant failed to discharge the burden placed on him by section 45(7) of the Employment Act, 2007 and dismisses the complaint for unfair termination of employment.

37. However, the Court finds and holds that the Claimant is entitled to and awards him the dues admitted by the Respondent as follows

- | | |
|-----------------------------------|---------------|
| (a) 1 month pay in lieu of notice | Kshs 6,204/- |
| (b) Accrued leave | Kshs 13,227/- |
| (c) Holiday pay | Kshs 2,624/- |
| (d) Overtime | Kshs 4,181/30 |

TOTAL

Kshs 26,236/30

38. Claimant to have costs of Kshs 15,000/-.

Delivered, dated and signed in Nakuru on this 5th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Mburu instructed by Getanda, Rabera & Associates
For Respondent	Mr. Mboga instructed by Mboga G.G. Advocates
Court Assistant	Nixon