



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO. 1599 OF 2014
PAUL MUTUMA MARIMBA..... CLAIMANT
VERSUS
SECURITY GROUP KENYA LIMITED RESPONDENT

JUDGEMENT

The issue in dispute has not been set out. This is a requirement under Rule 4 of the Court Rules.

The Claimant is an adult male and was employed by the respondent. The Respondent is a registered company offering security services for tracking goods and vehicles as well other related services. Claim

On 8th July 2013 the Claimant was employed by the Respondent as a Technician. The employment contract was issued and dated 19th July 2013. A salary of kshs.40, 000.00 was paid per month. The Claimant worked from 7am to 6 pm on day shift and while on night duty he would be at work from 6 pm to 7 am. On 11th February 2014 the Claimant was suspended from duty on the grounds that he had failed to create and send journeys to control room which led to the client disputing payments. On 5th March 2014 the claimant's employment with the Respondent was terminated following a disciplinary process that he found to have been pre-determined as he had not been issued with a disciplinary rules or informed of any allegations of misconduct. There was no warning letter or any communication with the labour officer and the union as required under Regulation 23 of the Regulations of Wages (Protective Services) Order.

The Claimant was aggrieved with the decision to terminate his employment and on 7th march 2014 he filed an appeal with the respondent. The appeal was never heard and therefore his termination was contrary to section 12 and 40 of the Employment Act.

The claim is for unpaid salary for February 2014; salary for 5 days worked in March 2014; notice pay; 24 days untaken leave; unpaid overtime of 1681 hours; and damages for unfair termination. The Claimant is also seeking for an order directing the investigations of the Respondent in accordance with section 51(3) of the Employment Act; the Claimant be issued with a certificate of service; costs and interest of the judgement amounts.

In evidence the Claimant testified that upon employment by the Respondent on 11th February 2014 he was suspended on the grounds that he had not done his work well. After 3 days he was called for a hearing but was not given any disciplinary rules on how he was to conduct the defence during the hearing. His work was to create journeys – to track cargo and trace vehicles from Mombasa so that the Respondent could know where each vehicle was. At the hearing he was not given a chance to defend himself and after leaving to go home he received a termination letter dated 5th march 2014. He lodged an appeal but was never heard as the Respondent did not reply.

The Claimant also testified that upon termination his February and March salaries were not paid. He worked for long hours each day and was not paid overtime. He had leave days due but was not paid.

In cross-examination, the Claimant testified that his main role with the Respondent was to track journeys for vehicles travelling from Mombasa. Each vehicle had to be entered into the Respondent system and follow it through its journey. Where a vehicle had no tracking the Respondent would not be able to trace it and where losses occurred the client would not pay. That the Claimant was accused of not tracking vehicles as he was away from work but he was sick and therefore did not report to work. He was away for a day but cannot recall which day. He was sick on the day he was absent from work. That upon suspension he was called for a hearing and present were Musyoka his supervisor, the human resource officer, Atundo and the administrator. He was told that a vehicle had been lost from Mombasa to Nairobi as he had not registered it in the system but on this day the Claimant was away sick and Dennis and Eric were on duty.

Defence

In defence the respondent's case is that the Claimant was suspended on 11th February 2014 and later terminated him lawfully and in compliance with the law after following all the termination procedures. That the claimant's employment was not regulated or governed by Regulations of Wages (Protective Security Services) Order. Before termination the Claimant was given a hearing but he opted not to offer any defence. The allegations made are not justified, the Claimant has no cause of action and has refused to collect his dues and prematurely filed the case in court. For failing to abide and collect the terminal dues, the suit should be dismissed with costs.

In evidence, the Respondent called two witnesses, Gregory Musyoka and Joan Birech.

Gregory Musyoka testified that he is the Racking System Supervisor for the Respondent and worked with the claimant. His department is for tracking vehicles electronically and by use of electronic seals. A track from Mombasa to Malaba is allocated seals mapping its route from origin to destination. These details are in the system for a 24 hours tracking and the client is issued with similar details to monitor their cargo. The claimant's duty would start by creation of journey and would follow the truck/cargo until end of trip once the truck was confirmed as untagged.

The Claimant was allocated the duty was to send daily tagging reports to various clients and to the internal team with;

- details of vehicles tagged,
- seal and identification used,
- tracking identification for each trip,
- date of tagging,
- consignment origin, and
- Destination and where possible driver details and contacts.

In this case the Claimant was the journey creator, he was taken for training for one month and upon confirmation he was allocated the duty. In December there was a problem when the Claimant sent wrong details to a client. He created journey and failed to send the identification details to the client. In January 2013 the Claimant failed to create the journey and those on the ground discovered so many seals had not been issued. On 8th January 2014 the Claimant was issued with a warning letter and asked to improve on his performance. Thereafter the Claimant created a journey and when sending the identification codes he did not send with the tracking seal causing the Respondent to lose a truck and this almost made the Respondent lose the client. By luck, the cargo was not stolen.

On 5th February 2014 the Claimant was issued with a second warning letter for repeated mistakes. The Claimant failed to take heed and on 11th February 2014 the Claimant was suspended from duty after he failed to create and send journeys to controls room. On 21st February 2014 the Claimant was called for hearing but was not accompanied by a witness of his choice contrary to advice from the human resource

office. At the hearing the Claimant accepted his mistakes but when asked to give his defence he kept silent. At the close of the hearing, the panel recommended summary dismissal but the witness proposed that on humanitarian grounds it should be made a normal termination so that the Claimant could have benefits.

The witness also testified that appendixes 6 were the kind of journeys created by the Claimant but the schedule in Court was not done by him, rather Dennis did the schedule. The emails forwarded to the Claimant on 13th August 2014 are to his private address after he had already left the Respondent employment. Such emails only indicate the favourable parts for the claimant.

There were complaints against the Claimant which were forwarded to the human resource office to handle. The Claimant had no overtime as he worked within his work schedule. There were clear guidelines on overtime and where due the Respondent paid.

Upon cross-examination, the witness confirmed that the termination of the Claimant was on the grounds of previous warning letter that were not produced. The Claimant had failed to create journey and trucks were not tagged. When the Respondent invoiced the clients, the details for the trucks were missing. One case was Bollore East Africa which had no details for tracking. The Claimant failed to undertake his work diligently as he was trained to do.

The witness also testified that the disciplinary hearing minutes are not filed.

The second Witness Joan Birech testified that she is the human resource manager for the respondent. She worked with the Claimant and on 11th February 2014 he was suspended after working for 7 months. The Claimant earned a net salary of kshs.32, 000.00 and a gross of Kshs.45, 000.00. He was working for 8 hours per day plus 2 hours for rest and was entitled to 4 hours overtime. The Claimant reporting hours were from 8am and left work at 5.30pm. Some time he would work at night from 6pm and leave at 6am the following day. While on night shift, the Claimant worked for 12 hours – 8 hours plus 4 hours overtime – making him earn one (1) rest hour and 3 hours overtime per day. In total the Claimant had 588 hours overtime;

28	rest	days	all	being	164	hours							
The	computation	of	overtime	was	34,783	÷30	-	12	hours	x	1.5		
[Basic	÷month	÷	hours	x	day	x	1.5	=	144.93	overtime	rate	per	day]

This was the formula used by the respondent.

The Claimant was suspended on 11th February 2014 and for that duration he was earning half (1/2) salary at kshs.15, 333.41 for 18 days in March = 666.67 ½ per day rate. The claim for unpaid leave and had 26 day due. The Claimant had not completed a year but had earned 14 days and computed is kshs.18, 729.20. The Claimant was terminated on 5th march 2014, he was to return all Respondent property upon which all dues would be paid but he failed to do so. The Claimant is seeking 24 days of leave but he is entitled to 26 days leave earned at 2 days per month. Salary for February is due at ½ pay as the other ½ was paid. Compensation is not due as the Claimant was lawfully terminated.

In cross-examination, the witness testified that the Claimant was supposed to work for 8 hours a days but he worked for 12. He earned overtime. The Claimant had 28 rests days that ae payable. He failed to undertake clearance for his payment is available.

Submissions

The Claimant submit that he was unfairly terminated as there was no notice issued to him under the provisions of section 42(1) of the Employment Act. A disciplinary meeting was held on 21st February 2015 but the minutes for the same were never produced. Section 74 of the Employment Act requires an employer to produce all employment records for an employee once a suit if filed. See Mercy Kanini Lilian versus Ali Ishmael Mwangi [2013] eklr. In the absence of reasons for termination, the same is unfair.

Upon dismissal, the Claimant was never paid his salaries and terminal dues. The last salary was paid in January 2015 and he was suspended in February on half pay and termination was on 5th march 2015. The

Claimant also worked overtime, he would start work at 7am to 6pm during the day shift and 6pm to 7am on day shifts. There was no rest day given and during all public holidays, he remained at work. Such public holidays were 5 in total. In total the Claimant had 543 hours overtime; 32 rest days and 5 public holidays which amount to 407 overtime hours. Under the Private Security sector regulation of wages order, such overtime should be computed at 1.5 hour rate all being kshs.252, 417.50.

For the unpaid leave days the Claimant is entitled to Kshs.35, 000.00 for 21 days earned. The salary due for March 2015 is kshs.6, 665.00. Notice pay is due as this was not issued. Compensation is also payable as this was a case of unfair termination.

The Respondent on their part submit that the Claimant was lawfully terminated upon failing to do his work diligently. He was subjected to a disciplinary process and was given a chance to defend himself. He was clear on the allegations against him but was not able to give satisfactory answers. The Claimant served for seven (7) months only and section 45(93) of the Employment Act apply.

The claim for overtime is on the basis that the Claimant relies on Regulations of Wages (Protective Security Services) order 1998 but he was employed as a technician and issued with a contract of employment at a salary of Kshs.40, 000.00 per month. To rely on these regulation would require the Claimant to work for 52 hours a week. For the time served, where the Claimant worked for 11 hours a day and less lunch break, for the 28 weeks worked, overtime pay is due less the time he remained on suspension.

28 rest days are due at 10 hours a week all being 280 hours overtime. The overtime rate is 1.5 as admitted by the respondent. For overtime hours worked the Claimant is entitled to kshs.52, 873.00 and for rest day's kshs.102, 036.00. Leave due is kshs.17, 300.00; unpaid salary is kshs.14, 670.00; and there is no notice pay. No compensation is due as the termination was lawful.
Determination

The participation of an employee in disciplinary proceedings upon notification of allegations against him in itself is not unlawful. Such participation and engagement with the issues raised is a recognition that the employee is aware of the case against him and where there are no objections, or demands for the provisions of the policy rules or regulations, such must be made in advance before such participation. It is however important for an employer such as the Respondent to ensure that the employee such as the Claimant is made aware of their right to have another employee of their choice at such a hearing to ensure the employee his legal protections. This is in pursuant to the provisions of section 41 of the Employment Act. Present at any disciplinary hearing where the employee is accused of misconduct, he must have an employee of his choice.

In this case, the Claimant though notified of allegations against him, it is not clear what legal protections were put in place by the Respondent so as to secure his right to have another employee of his choice present at the hearing on 21st February 2015 which is not disputed. There are no minutes to this disciplinary hearing for the Court to ascertain those present and the outcome of the hearing. It ended up being the word of the clamant against that of the respondent. In the absence of any record, such must be applied to the benefit of the employee.

Termination of employment must be with reason(s). Such reasons are important to give as upon such, the employee has a right to challenge their validity and fairness. Failure to give reasons for termination is also contrary to section 47 read together with section 45 of the Employment Act. It is however not lost to the Court that the Claimant was accused of failing to undertake his duties diligently. He failed to allocate journeys and the necessary information to clients and fellow colleague so as to facilitate the tracking of trucks and cargo. In the process the Respondent was unable to bill clients appropriately and risked losing cargo and payments due. The Claimant was put to task over his conduct and could not explain why he was absent without permission. He was absent from work while sick but he failed to produce a certificate of illness.

Even where the employee enjoy rights at work, they have a duty to be present at work when required to

attend. Sickness or illness is contemplated in any work situation and addressed under section 30 of the Employment Act. Where an employee is sick or unwell, they are permitted to be absent lawfully on condition they inform or cause to be informed on the employer. The law is quite lenient in this regard as an employee who is unwell is required to within a reasonable period inform the employer of their illness. Where not practically possible to reasonably share such information, the law allows a third party to inform the employer of such illness. It is therefore not permissible that an employee should absent from work and simply site illness or sickness ad get away with it. To the contrary, such an employee must produce a certificate of such illness from a medical practitioner to confirm that indeed on the day absent from work they were out sick or ill. The Claimant admitted to being sick but failed to submit any certificate. Such absence without due cause is a matter subject to summary dismissal. The duty having been vested upon the Claimant to prove the reason for his absence from work and failing to do his work as a result, the burden was on him to disprove otherwise. This cannot be upon the employer. The hearing that was conducted, though with procedural flaws, what faced the Claimant was a matter subject for summary dismissal. He was accorded hearing in accordance with section 41(2) of the Employment Act, and failed to defend his absence from work. This does not amount to unfairness at all.

Before I conclude this part, the Respondent has relied on the provisions of section 45(3) of the Employment Act to challenge the claim that the Claimant was unfairly terminated. This Court in the case of Tom Luusa Munyasi & Another versus the Governor Makueni County & Others, Cause No.103 of 2014, made a ruling and on The case of Samuel Momanyi versus The Hon. Attorney General and SDV Transami Kenya Ltd, HCCC No. 341 of 2011 where the Court held that all employees deserve equal protection of the law under Article 27 of the Constitution. I agree with these findings as to separate employee who have ser4ved for 13 months as set out under section 45(3) of the Employment Act and fail to accord them their dues I find is discriminatory without any lawful basis. Such a provision should not have seen the light of day. Rights due to an employee should not be limited in time. Remedies

On the claims made, the Respondent has admitted owing overtime, pay due for rest days and salaries due. The computation is what is contested.

The Claimant was employed as a technician by the respondent. it is not stated that the Respondent is an employer of security guards or in the business of providing security services of the nature covered under the Regulation of Wages (Protective Security Services) Order 1998. That aside, where overtime is due, the practice is to pay at 1.5 of the hourly rate where the employment contract does not address the same. With the admission that such overtime is due and payable, I shall apply this rate.

Hours of work are regulated in law and under section 27 of the Employment Act thus;
27. (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.
(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

In this case, the employment contract does not the state the number of hours and in that regard, an ordinary work schedule is for 8 hours a day plus one (1) rest day per week. Any time served over and above such time is paid as overtime as 1.5 hourly rate. Such overtime is inclusive of any break for lunch hour or for a rest hour. The lunch/rest hour cannot be separated from the 8 hours for a full day or where there is overtime that goes beyond the ordinary work hours. The computation of the Respondent of one (1) hour during overtime hour's work is not correct. The pay due should be inclusive.

The Claimant testified that he worked for day or night shift. Each shift would start from 7am to 6pm or vice versa. Each shift was therefore for 12 hours. The Respondent held the records of employment and where this was not the case, when challenged, the duty to prove that the shifts were of less hours was on the respondent. Such record is not submitted. The evidence of Joan Birech as the human resource officer was also very crucial. She admitted the Claimant worked overtime but her computation of such hours were less the lunch hour. Such removal of the lunch/rest hour lack basis and should have been included in computation of overtime payable.

Therefore, work from 7am to 6pm is 12 full hours. Similarly, work from 6pm to 7am is a full 12 hours. This constitutes 4 overtime hours served. Pay for such extra hours is due. There was also evidence that the Claimant worked for 7 days per week and rest days is admitted as payable as it was not taken.

The Claimant commenced work with the Respondent on 8th July 2014. He was suspended from duty on 11th February 2015. This was after serving for 30 full weeks. Without the records and schedule of the work hours, I take it the Claimant had 4 overtime work hours each day from employment to the date of suspension. This amounts to a total of 120 overtime hours. On a salary of 40,000.00 per month, the daily rate amounts to kshs.1, 333.00 and hourly rate becomes kshs.167.00. the hourly rate multiplied by 1.5 the overtime rate for each hour worked overtime is kshs.250.00 and noting the Claimant served for 4 hour extra each day all being 120 hours from 8th July 2014 to 11th February 2015, the total dues are 30,000.00 – [40,000 ÷ 30 ÷ 8 x 1.5 x 4 x 30]. This is on the basis of gross pay due in a month of 30 days for 8 hours due in a normal work hours at the rate of 1.5 for each overtime hour served. The due amount is therefore Kshs.30, 000.00. Owing dues are computed on the basis of the gross pay due.

For the rest days due and not paid for, for the 30 full weeks served, where the Claimant remained at work thus, he is entitled to his pay. The application of the formula above, such are 12 hours served for 30 week without rest. On the overtime rate at kshs.250 for each hour, the rests days being 12 hours served and this having taken 30 full week, the sum of kshs.90, and 000.00 is due to the claimant.

Where the Claimant worked during Public holidays, he was supposed to have been paid for his time as such as such are supposed to be rest days. I find not contest. There are listed 5 days. At the rate of kshs.250 for each overtime worked on a public holiday, the 5 days have a total of 60 hours all being kshs.15,000.00 due.

Leave days are allocated at 21 days. Section 28 of the Employment Act contemplates an annual leave of 21 days for each full year served. However section 28(1) (b) qualifies it thus; (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

In this case, the Claimant was at work for 7 full months before suspension. At the rate of 1 ¾ leave earned each month, he had earned 12 full days for the 7 months worked. On the gross pay, leave earned and payable is kshs.16, 000.00. 46. While on suspension, the Claimant was paid ½ salary. The other ½ is due. This is admitted as kshs.14, 670.00.

For the 5 days worked in March, the Respondent has not stated how such were treated. What is clear is that hearing of the case was in February 2015 but termination was effected on 5th march 2015. Full pay is due for the 5 days of March 2015 all being kshs.6, 667.00.

On the basis that the Claimant failed to explain his absence from work, he was given a hearing as under section 41(2) of the Employment Act and failed to give satisfactory explanation, he has not attached any certificate of sickness to mitigate his case, notice or compensation are not due. Judgement is entered for the Claimant for;

- a) overtime pay at kshs.30,000.00;
- b) rest days' pay Kshs.90,000.00;
- c) public holidays pay kshs.15,000.00;
- d) annual leave pay Kshs.16,000.00;
- e) pay for February kshs.14,670.00;
- f) 5 days worked in March 2015 kshs.6,667.00;
- g) Certificate of service to issue unconditionally; and
- h) 50% costs of the suit.

Orders accordingly.
Read in open court at Nairobi this 10th day of March 2016.

**M.
JUDGE**

**In
Court**

**the
Assistant:**

**presence
Lilian**

Mbaru

**of
Njenga**