



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 342 OF 2015

JASON MOGAKA OTISO CLAIMANT

VERSUS

SHADRACK OBUGA MUKANDA

T/A SECURITY COORDINATES SERVICES RESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful and unfair termination of the Claimant and failure to pay his terminal benefits.
2. The claim is that in February 2013 the Respondent employed the Claimant as a Security Guard at a monthly pay of Kshs.6, 000.00 per month without giving him a letter of appointment. The Claimant served diligently until June 2014 when he resigned from his employment following frustrations when the Respondent refused to pay his salaries. Upon resignation, the Respondent also refused to pay the terminal dues.
3. The Claimant is seeking;
 - a. *notice pay at Kshs.9, 780.95;*
 - b. *Leave for one year at Kshs.6, 846.66;*
 - c. *Salary for May 2014 at Kshs.9, 780.95; service pay for one year at Kshs.4, 890.47;*
 - d. *Salary for 11 days worked in June 2014 at Kshs.3, 586.30;*
 - e. *Underpayments February 2013 to April 2013 at Kshs.7, 561.90;*
 - f. *Underpayments May 2013 to April 2014 at Kshs.41, 590.45;*
 - g. *Underpayments May 2014 to June 2014 Kshs.3, 780.95*
 - h. *House allowance Kshs.41, 079.90*
 - i. *Compensation at 12 months*
4. In support of his case, the Claimant testified that upon employment by the Respondent in February 2013 he was not issued with any document of employment. He was posted at Menelik Court near the ODM head offices in Nairobi and was then moved to Texas Cancer Centre. The Respondent then started moving him from one place to the next and in April 2014 he was not paid his salary. He was told that there was no money. His rent was due by 5th day of the month and by 10th his landlord locked his house. The Claimant asked his supervisor about the non-payment of his salaries and learnt that all other employees of the Respondent had been paid save for him.
5. The Claimant also testified that he worked on day shift and at night he was forced to sleep at the neighbour's house as his landlord had locked his house with everything inside. The supervisor informed

the Claimant that he would move him to night shift and his salary would be paid the next day. He called the Respondent director due to the hardships he was going through but refused to meet the claimant. His supervisor directed him to carry his uniform but his dues were not paid and the Claimant refused to surrender the uniform without his terminal dues. He subsequently stopped attending work on 11th June 2013. All his property was locked in his rented house and he had to leave it and go home.

6. The Respondent has denied employing the Claimant and the Claimant testified that he was not issued with any letter of employment. His salary was paid through **Ufundi Sacco** in an account that the Respondent opened for all employees and posted all salaries. When the Claimant went to check he found his salary had not been sent.

7. In cross-examination, the Claimant testified that he was never given any payslip as his salary was posted to his account at Ufundi Sacco. That he did not resign as stated in his claim which was drafted for him at Kituo cha Sheria. This was an error as the Respondent supervisor told him not to attend to work on 11th June 2013.

8. The Claimant also called Herman Serimba Obura as his witness. He testified that he supervised the Claimant while he was in the employment of the respondent. He supervised the Claimant from February 2013 until 2014 when he left the Respondent employment. They were both employed by the Respondent and all salaries were paid through Ufundi Sacco. The witness also left the Respondent 3 months after the Claimant was terminated as his 3 months salary had not been paid.

9. On cross-examination, the witness testified that he was employed by the Respondent as a security guard and was later promoted to become a supervisor where he supervised the claimant. Salaries were paid through a checklist submitted to Ufundi Sacco and salaries were posted to the individual account.

Defence

10. In defence, the Respondent case is that the claim is bad in law and has been filed contrary to the provisions of section 44 of the Employment Act. That the claim does not disclose any case against the Respondent as they do not operate as Security Coordinates Services and further they never employed the claimant. In any case the Claimant deserted his duties for being drunk at work which amounted to gross misconduct warranting summary dismissal under section 44 of the employment Act. That the Claimant was a perpetual deserter of his duties and on several occasions his station was found unmanned only to come back with unsubstantiated excuses of sickness.

11. The claim for underpayment is denied and the full salary was paid being all inclusive. There are no remedies due, the claim should be dismissed with costs.

12. In evidence, Shadrack Obuya Meshack testified that he is a director to Security Coordinates Services a company registered in 2005 with 3 other directors. The Respondent engage in various activities and as a director he is responsible for consultancies. There are managers who run the company. He does not know the Claimant and when he was served with the summons he asked the other directors and not employed the claimant. All the employees are paid their due salaries. The Respondent did not take any employee to any Sacco as suggested and the security team is paid in accordance with a schedule. He does not know how much is paid to each employee.

13. Where the Claimant resigned no notice is due.

14. The Respondent had no relationship with the Claimant at all and the suit should be dismissed.

Determination

15. It is the duty of an employer to keep all work records of each individual employee. Such is a legal requirement pursuant to section 73 and 74 of the Employment Act. Such a record does not only help an employee, it works to the advantage of the employer as with such a record, once a suit such as this one if

filed, the employer is able to submit these records in support of their defence to show that the Claimant was their employee or not.

16. In this case, the court was left to grope into the darkness as it were. The Claimant was acting in person while the Respondent was represented by his advocates. The Claimant asserted that he was an employee of the Respondent was not issued with any letter to confirm his employment. Indeed this is a practice with some employers who fail to issue any letter of employment under the mistaken belief that such a letter will bind them unnecessarily. However such is a bad practice as upon proof by the employee that indeed they offered their labour to an employer, and the employer failed to issue any letter of employment, such can only work to the disadvantage of the employer as the employee is not the custodian of work records.

17. The Claimant called his witness Mr Obura who confirmed to the court that he was the supervisor and allocated the Claimant work. That all their salaries were paid through Ufundi Sacco.

18. The Respondent denied that there was no employment. That they never paid any employee through the Sacco as alleged.

19. On this basis, where there was challenged to employment relationship, the court under its powers set out under section 12 of the employment and Labour Relations Court Act read together with section 20(4), invoked the rare provisions thus;

(4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to—

(a) furnish in writing or otherwise, such particulars in relation to such matters as it may require;

(b) attend before it;

(c) give evidence on oath or otherwise; and

(d) produce any relevant documents.

20. Such provisions only apply where a party, knowingly and with intention to defeat the course of justice fails to undertake their legal duty such as produce records that ordinary are supposed to be in their custody. In this case, the respondents, being custodians of work records, adamantly refused to give any materials necessary and in their custody. The court therefore applied the above provisions and *Ufundi Co-operative Savings and Credit Society Ltd [Ufundi Sacco Society Ltd]* confirmed that the Claimant had an account with them and salary deposits were made by the respondent, Security Co-ordinates Services.

21. The Respondent witness, Mr Mukanda testified that he is a director with Security Coordinates Services. That this is a company limited by shares and there are 3 other directors. He does not know the Claimant as their employee but the company undertakes security and other services in its work. That there are managers who manager the security component of the business.

22. I find this evidence dishonest, tailored to defeat the course of justice and a sham. Where the Respondent is a director of Security Coordinates Services, he was served it summons to attend court and he has managers and other directors who manage the security function of the business, reason demands that such should have been well coordinated for purposes of submitting all relevant work records for the claimant. A registered company as of requirement has it annual returns. Such should entails the salaries paid to employees. The confirmation made by Ufundi Sacco that they received deposits from the respodnnt of slary payments with regard to the claiamtn is telling. Had the repsondnet witness been truthful, such facts would have been easy to put to the attention of the court. To engage the Claimant in hide and seek to evade justice does nto reflect well for the Respondent as an employer keen to ensure justice to its employees. Such are matter that warrant investigations by the Labour Officer.

23. The wanton disrespect to the court, and lying under oath is a matter so serious that warrant a sanction. The Respondent was dully represented by counsel and such abuse of court process should be addressed by the regulatory body – Law Society of Kenya.

24. On the substantive issues before court, I find there was an employment relationship between the Claimant and the Respondent based on his evidence and the fact that his supervisor confirmed this fact. The salaries paid to the Claimant by the Respondent also confirm that he was an employee paid monthly through his account with Ufundi Sacco. Such salaries were regularly remitted by the Respondent company. The Claimant had a uniform from the Respondent and was allocated work at various sites where he was under the supervision, control and management of the respondent. For his labours, the Claimant was paid a monthly salary. See the case of **Christine Adot Lopeiyio versus Wycliffe Pere, Cause No.1688 of 2012.**

25. On the reasons of termination, a case of summary dismissal is a subject the court has had chance to address in several cases. in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2014] eklr** the court in analysing a similar matter held that in cases of gross misconduct which render an employee liable to summary dismissal, the procedural fairness requirements set out under section 41 of the Employment Act must be followed as they are mandatory. The requirement is to call the employee to attend hearing in the presence of a fellow employee of his choice where his defence is submitted for consideration by the employer. Similar findings were held in the case of **Henry Ondari versus Top Security Systems Limited, Cause No.572 of 2011** held;

... Without such defence [before summary dismissal] being heard and discussed, the employee is left exposed to the whims of the employer to terminate at will. The right to terminate an employee is no longer unrestricted as section 41 of the Employment Act has created a safeguard to ensure natural justice is achieved at the shop floor where the facts are best established.

26. The defence that the Claimant was attending work while drunk, that he was a deserter and gave excuses of sickness were matters that warranted warnings or summary dismissal subject to procedural requirements under section 41(2) of the Employment Act. I find no compliance with such mandatory provisions by the respondent.

27. Where an employee has misconducted himself, the employee is required to follow due procedures under section 41 of the Employment Act. However an employer who fails to pay the employee for their labours puts such an employee to a live of servitude, it is inhumane, degrading and a serious violation of constitutional rights to earn a living and live a life of dignity. An employee who has laboured for a full months and depends on such a wage to support this basic needs, and such a wage is denied of him is not only denied such wage unlawfully but is reduced to his lowest ebb in life. Such becomes a death warrant. Such is similar to taking away the life of such an employee.

28. The Claimant testified that upon the non-payment of his wages, his landlord locked his rented house. He was forced to seek shelter with a neighbour. He was forced to ask his supervisor to give him a night shift. I take it that all this were copying mechanisms that the Claimant had to take upon the non-payment of his wage. Such wage was an underpayment for a security guard as required under **The Regulation of Wages (Protective Security Service) Order, 1998** (the Wages orders). The Wages Orders apply to all persons employed directly or indirectly in private investigations or security consultancy; guarding of industrial plants, home or any other property or establishment; or in escort services. The Respondent witness confirmed that the Respondent is such firm/company that engages in various security related matters. As such, the Wage orders apply to the Respondent and its employees.

29. Wages are a legal entitlement. Such is regulated under section 18 of the Employment Act. Section 18(2), (4) and (5) provides;

(2) Subject to subsection (1), wages or salaries shall be deemed to be due—

...

(b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

...

(4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.

....

(5) Upon the termination of a contract of service—

...

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employees dismissal.

30. Why this provisions above are relevant to state is because of the penalty attached to it at section 25 of the Employment Act thus;

25. (1) Without prejudice to any other liability for a breach of the provisions of this Part, an employer who contravenes the provisions of this Part commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both and shall be required to repay any remuneration wrongfully withheld or wrongfully deducted from the employee. [emphasis added].

31. The fine and imprisonment due apply in this case. However, without foreclosing what the Labour Officer shall do, this court under the power granted under section 12 of the Employment and Labour Relations Court Act, and the Claimant having invoked the all-encompassing prayer for the court to grant as appropriate, the fine payable shall herein be paid in damages to the claimant. For the reason of the Respondent withholding due salaries to the claimant, the Respondent shall pay him damages of Kshs.100, 000.00.

32. The claim is that there was a resignation. The Claimant testified that this was an error by the drafter as his was a dismissal. However, even where the Claimant resigned, I find it was justified. To be subjected to such inhumane practices, such qualify for a resignation. Even though the Claimant testified that the claim for 'resignation' was by error and the person who drafted the claim is from Kituo cha Sheria, I find the circumstances under which the Claimant was placed, such resignation has a basis. Constructive termination can be inferred. Such resignation was forced upon the Claimant based on his circumstances and failure by the Respondent to pay his due wages a matter that was brought to the attention of the supervisor and the management. Even where the Claimant resigned, such was not accepted by the Respondent in any written form. To allow the Claimant go, without follow up and or issue of show cause for any misconduct was in effect, terminating his employment for no due cause. Such is an unfair labour practice and cannot find justification.

33. I find such to be inhumane and deliberate of the respondent. The conduct of the Respondent and how they treat their employee, save for the Claimant who has since left their employment, requires investigations. Mr Obura the supervisor has left due to non-payment of his wages. There are no employment records kept and where there are such records, they are manipulated to evade due process. Such requires specific interrogation and an investigation by the Minister.

Remedies

34. I will start with the prayer for underpayments. The Wage Orders are set to regulate the employment of Security Guards such as the Claimant was. A minimum wage is set to guide employers in ensuring a fair remuneration of its employees. Such minimum does not prevent an employer to increase the wage.
35. Without any records to confirm that the Claimant took his annual leave, such is due under the provisions of section 28 of the Employment Act, 21 days of annual leave are due payable at a full month wage. The Claimant is awarded Kshs.9, 780.00.
36. Notice pay is due under section 35 of the Employment Act all being Kshs.9, 780.00.
37. Without any work records to confirm payment of statutory dues, service pay is due for the full year worked at 15 days' pay. The Claimant is awarded Kshs. 4,890.00.
38. For the 11 days worked in June 2014, the due salary is payable under section 18 of the Employment Act. The Claimant is awarded Kshs.3, 586.00. And Without any challenge to the underpayments made, this claim is awarded all being Kshs.52, 931.00.
39. House allowance is due where the Claimant was not provided with any housing or an allowance in lieu thereof. Such is awarded as claimed at Kshs.41, 079.00.
40. For the unfair procedures applied in the termination of the claimant's employment, putting all matters into account, he is awarded compensation at 10 months gross pay all being Kshs.97,800.00.
41. Damages herein are awarded at Kshs.100, 000.00.
42. Before final orders, I wish to thank **Ufundi Co-operative Savings and Credit Society Limited**, especially the **Chief Executive Officer Mr Alphonse Makori**. The support given by this institution to the court requires commendation. The purpose for which the court required information from this institution is noted above. To ensure continued support, the Registrar of the Court shall serve Ufundi Sacco with the judgement herein with a note of appreciation from the court.

Judgement is entered for the Claimant against the Respondent in the following terms;

- a. **I declare the termination of the Claimant from his employment with the Respondent was procedurally unfair;**
 - i. **Compensation awarded at kshs.97, 800.00;**
 - ii. **Damages awarded at kshs.100, 000.00;**
 - iii. **Notice pay Kshs.9, 780.00;**
 - iv. **Salary due for 11 days worked in June 2014 Kshs.3, 586.00;**
 - v. **Service pay Kshs.4, 890.00;**
 - vi. **Underpayment Kshs.52, 931.00;**
 - vii. **House allowance kshs.41, 079.00;**
- b. **The Respondent shall issue the Claimant with a Certificate of Service within 14 days;**
- c. **The Registrar shall serve the Commissioner for Labour with the Judgement herein for investigations of the Respondent on the noted malpractices and deal as appropriate. Where sanctions are found appropriate, the awards of the judgement herein stand.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF APRIL 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

.....

.....