



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 283 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PAUL ILING'A ICHILAYI.....CLAIMANT

-Versus-

GILLY'S SECURITY & INVESTIGATION SERVICES LTD.....RESPONDENT

J U D G E M E N T

The issue in dispute in this claim is unfair termination and non-payment of terminal dues. The Claimant states that he was employed by the Respondent, a limited liability company carrying out private security and investigation services, as a night security guard in Kisumu. He worked at several work stations until 23rd October, 2012 when he was verbally dismissed.

The Claimant testified that on that day he arrived at his work station at Kasagam substation of Kenya Power Company Limited Kisumu but was called by Mr. Nyakundi, the Respondent's Western Branch Manager (RW2) who instructed him to report to Ondiek Estate. After reporting and signing the occurrence Book at Ondiek Estate, another security guard by the name Robert reported to the same station and informed the Claimant that Mr. Nyakundi said he should go back home. After a few minutes Mr. Nyakundi called the Claimant on his cell phone and told him there was no work and he should return his uniform. The following day the Claimant returned the uniform and was later paid Shs.5,893 being salary for 30 days worked in October 2012 and a further Shs.1,200 being uniform deduction refund.

The Respondent on the other hand averred that the Claimant who was working two jobs, one as day guard at Liberty Secondary School and the second as night guard for the Respondent, absconded duty after being informed that he would be shifted to work on a day job or be posted out of town to Homabay following changes in Kenya Power assignments. The Respondent denied dismissing the Claimant verbally.

The issues for determination are whether the claimant was unfairly terminated and whether he is entitled to the prayers sought.

Findings and Determination

The Employment Act provides for the procedure for termination of employment at section 41 and 43. The sections provide as follows:-

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

In the present case, there is no letter of termination. The claimant alleges he was verbally dismissed while the Respondent avers that he absconded duty.

According to section 44(4) (a), absconding duty is a ground for summary dismissal. In the present case, there is no letter that was written to the Claimant dismissing him from employment for absconding duty. On the contrary, the Claimant was on 13th November 2012 paid salary for 30 days worked in October 2012 and refunded Shs.1,200 withheld by the Respondent as refundable uniform deductions. This is not consistent with an employee who has absconded duty. The clearance form annexed to the Respondent's bundle of documents is signed by the Claimant and RW2, which is also not consistent with absconding duty.

The Respondent alleges there were complaints about the claimant sleeping on the job but no evidence to that effect was adduced by the Respondent. RW2 further testified that the Claimant was working at Liberty Secondary School, a discovery he made after carrying out investigations yet he allowed the Claimant to continue working for the Respondent without as much as a cautionary letter.

From the foregoing, I find that the claimant was unfairly dismissed from employment by the Respondent.

Remedies

The Claimant prayed for the following:-

a) 1 months notice pay	Kshs. 11,007.39
b) October 2012 salary	Kshs. 11,007.39
c) Leave due - 42 days	Kshs. 15,410.34
d) Unpaid House Allowance from 2009-2012=	Kshs. 55,320.07
e) Rest/off days from 2009 - 2012	Kshs. 56,549.40
f) Underpayments from 2009 - 2012	Kshs.206,549.28

g) Public Holidays from 2009 - 2012 Kshs. 27,289.11

h) 12 months salary as compensation Kshs.132,088.77

Total Kshs.515,221.75

RW2 admitted that the Claimant was paid shs.5,000 per month which is below statutory minimum rate of pay for all the years worked. RW1 also admitted that the Claimant was never paid house allowance or housed, never went on annual leave and worked on public holidays. The Respondent did not contest the figures tabulated in the Memorandum of claim.

Section 26 of the Employment Act provides for statutory minimum terms of employment as follows:-

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Section 48 of Labour Institutions Act also provides for statutory minimum conditions for pay as follows:-

48. (1) Notwithstanding anything contained in this Act or any other written law

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to—

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order, commits an offence.

(3) If an employer, is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.

(4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—

(a) if an employer is found guilty of the offence, evidence may be given of any like

contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and

(b) on proof of such contravention, the court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid:

Provided that evidence shall not be given under paragraph

(a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.

(5) The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings:

Provided that no person shall be liable to pay twice in respect of the same cause of action.

The Respondent's contention that the Claimant accepted to be paid Shs.5,000/- only without other benefits cannot stand in law as it is unlawful to agree on employment terms below statutory minimum terms. Such a contract would be illegal and unenforceable. The Law is categorical that it is a criminal offence for an employer to engage an employee on terms inferior to the prescribed statutory minimum terms.

For the foregoing reasons, I find that the Claimant is entitled to notice, pay in lieu of annual leave, unpaid house allowance, underpayments and pay in lieu of public holidays as prayed.

I however find that the Claimant was paid salary for October 2012 and he is not entitled to payment of the same. He is not entitled to off days as both himself and RW2 testified that the Claimant was given 4 off days every month.

On compensation for unfair termination, I find 12 months salary prayed for to be excessive taking into account all the circumstances of the case especially the Claimant's length of service. I award him 2 months salary as compensation in the sum of Kshs.22,428.80 being statutory basic salary and house allowance for two months.

In conclusions I award the claimant the following:-

1. Notice	Kshs. 11,214.40
2. Leave	Kshs. 15,410.34
3. House allowances	Kshs. 55,320.07
4. Underpayments	Kshs.206,549.28
5. Public Holidays	Kshs. 27,289.11
6. Compensation	<u>Kshs. 22,428.80</u>
Total	Kshs.338,212.00

=====

The Respondent shall also pay Claimant's Costs.

Judgement Dated, signed and delivered this 26th day of May, 2016

MAUREEN ONYANGO

JUDGE