



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1760 OF 2013

WILLIAM ONYANGO RUBIA.....CLAIMANT

VS

MAKINI SECURITY SERVICES.....RESPONDENT

AWARD

Introduction

1. William Onyango Rubia, the Claimant in this case was an employee of Makini Security Services, the Respondent herein. Following the termination of his employment on 7th October 2013, the Claimant brought this action seeking relief for unfair termination. The Respondent filed a Statement of Defence on 29th November 2013 and the matter proceeded to hearing with the Claimant testifying on his own behalf and Stanley Maina Kamau for the Respondent.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent as a Security Guard at a monthly basic salary of Kshs. 6,500 effective 5th May 2011. The Claimant worked for the Respondent until 7th October 2013 when his employment was terminated.

3. The Claimant pleads that the termination of his employment was unlawful. He claims the following:

a) One month's salary in lieu of notice	Kshs. 9,788
b) Severance pay for 2 years.....	11,280
c) Annual leave for 30 months.....	24,470
d) Weekdays overtime.....	74,400
e) House allowance.....	44,046
f) Underpayment of basic pay.....	98,640
g) Off duties.....	90,240
h) Official public holidays.....	15,040

i) Saturdays overtime.....	22,320
j) Sundays overtime.....	89,280
k) Transport.....	3,000
l) 12 months' salary in compensation.....	177,456
m) Certificate of service	
n) Costs plus interest	

The Respondent's Case

4. In its Statement of Defence filed on 29th November 2013, the Respondent denies the employment date of 5th May 2011 pleaded by the Claimant stating that the Claimant was employed on 6th May 2012. The Respondent further states that the Claimant worked until 30th October 2012 when he absconded duty for the entire month of November 2012.

5. On the Claimant's request, the Respondent allowed him to resume duty on 1st December 2012. On 1st March 2013, the Respondent ranked the Claimant as a relief guard. On 31st August 2013, several items were reported missing from the Claimant's place of assignment. On 7th October 2013, the Claimant was re-deployed back to the office and on 8th October 2013, he absconded duty never to return.

Findings and Determination

6. The following are the issues for determination in this case:

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

7. In his Memorandum of Claim, the Claimant pleads that his employment was unlawfully terminated on 7th October 2013. However, in his testimony before the Court, he stated that he left employment after a cheque left at the guard house went missing. The Claimant added that he had been told by his supervisor, a Mr. Situma that he should not go back to work if he did not find the cheque and he therefore chose not to go back.

8. On its part, the Respondent denies terminating the Claimant's employment, stating that it was the Claimant who deserted duty. The Respondent's position on this issue is consistent with the Claimant's testimony that he left employment because he did not find the cheque that had been left at the guard house. With this testimony in view, the Court did not find any evidence that the Claimant was unlawfully terminated.

9. That being the case, I find no need to delve into the question of the constitutionality of Section 45(3) of the Employment Act, 2007 as enunciated by **Lenaola J** in **Samuel G. Momanyi v SDV Transami & Another [2012] eKLR**.

Remedies

10. In light of the foregoing finding, the Claimant's claims for compensation for unlawful termination and one month's salary in lieu of notice fail and are dismissed.

11. Before proceeding to consider the other claims made by the Claimant, I need to determine the

question of the effective date of his employment. The Claimant states that he was employed on 5th May 2011 while the Respondent's pleads 6th May 2012, as the effective date of the Claimant's employment.

12. In support of its case, the Respondent produced a document titled a '*Guards Contract Application Document*' signed by the Claimant on 6th May 2012. Having read this document, the Court reached the conclusion that it does not qualify as a letter of appointment. The Claimant's employment was therefore oral and it is now left to the Court to interpret the terms of his employment.

13. Section 9(2) of the Employment Act places the responsibility of drawing and issuing an employment contract on the employer and where the employer fails to discharge this responsibility, Section 10(6) of the Act allows the Court to adopt the Claimant's testimony on the terms of employment. For this reason, the Court adopts 5th May 2011 as the effective date of the Claimant's employment. The Court also rejects the argument advanced by the Respondent that there was a break in the Claimant's employment period as there was no documentary evidence to support such an argument.

14. I will now deal with the claim for house allowance. Section 31(1) and (2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2). This section shall not apply to an employee whose contract of service-

(a). contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b). is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

15. The Respondent did not produce a payslip to show that the salary paid to the Claimant was inclusive of house allowance and looking at the monthly figure itself it seems to me that it only covered basic salary. I therefore award the Claimant house allowance at the rate of 15% of the basic salary and adopt the resultant figure of Kshs. 7,475 as the Claimant's salary for purposes of this claim.

16. In the absence of any leave records to counter the claim for leave pay, this claim also succeeds and is allowed.

17. No basis was laid for the claim for severance pay which is hereby dismissed. The claims for overtime compensation, underpayment and transport were not proved and are also dismissed.

18. Overall I make an award in favour of the Claimant as follows:

a) House allowance for 28 months (975x28).....	Kshs. 27,300
b) Leave pay for 2 years & 4 months	
(7,475/30x21+7,475/30x1.75x4).....	<u>12,209</u>
Total.....	39,509

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19. I direct the Respondent to issue the Claimant with a certificate of service.

20. The award amount will attract interest at court rates from the date of the award until payment in full. As the Claimant's claim succeeds only in part each party will bear their own costs.

21. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JULY 2016

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JUDGE

Appearance:

William Onyango Rubia (the Claimant in person)

Miss Wambugu for the Respondent