



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT MOMBASA
 CAUSE NUMBER 402 OF 2014

BETWEEN

STEPHEN OCHIENG ONGWENO CLAIMANT

VERSUS

JUSTUS OKETCH ORINDA RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. & Company Advocates for the Claimant

Respondent unrepresented

JUDGMENT

1. The Claimant filed his Statement of Claim on the 28th August 2014, and Amended Claim on 20th February 2015. He states he was employed by the Respondent on 1st August 2011 as a Night Guard, at a monthly salary of Kshs. 10,000. He guarded Respondent’s premises at Maisha Mpya in Malindi, Kilifi County. His contract of employment was terminated by the Respondent without notice or cause, on 5th March 2014. The Respondent did not pay the Claimant salary for 31 months. The Claimant feels termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a) Overtime at Kshs. 360,000
- b) Public holidays worked at Kshs. 15,318.
- c) Leave pay at Kshs. 25,828
- d) Unpaid salary of 31 months at Kshs. 310,000
- TotalKshs. 712,106
- e) Damages for unfair and unlawful termination at Kshs. 120,000

f) Costs, Interest and any other suitable relief.

2. The Respondent filed a Statement of Response and his Witness Statement, through the Law Firm of Khatib & Company Advocates on the 27th October 2014. His position is that the Claimant was his tenant in Respondent's house at Maisha Mpya. The Claimant was evicted in March 2014 for non-payment of rent. He prays the Claim is dismissed with costs to the Respondent.

3. The Claimant initially gave evidence *ex parte*, on the 2nd March 2015. The Court made a Ruling on the 22nd May 2015, directing the Claimant to effect service on the Respondent's Advocates. The dispute was to be heard afresh upon such service. Respondent's Advocates applied and were allowed to cease acting for the Respondent. Hearing was scheduled for 14th July 2016. The record indicates the Respondent was served with the Hearing Notice, but like was the case at the first hearing, opted not to attend Court. The Claimant's Advocate applied to have the Respondent given a chance to state his case. Respondent was to be heard on 1st November 2016. He did not attend Court and proceedings were marked as closed and Judgment day given.

4. The Claimant told the Court he was initially employed by the Respondent on 1st August 2014 as a Shamba Boy and Cleaner. He subsequently was made Caretaker of the Respondent's residential premises at Maisha Mpya. He worked as a Guard at night. He lived in one of the rooms at the premises.

5. He worked from 6.00 a.m. to Midnight. The Respondent went to the premises accompanied by 2 Persons. These Persons carried metal bars. They pulled down the roof of the room where the Claimant resided. They threw out the Claimant, without paying him salary for years worked. He worked excess hours. He did not rest on Public Holidays. He did not go on annual leave. He sought the assistance of the Labour Officer in computing his terminal dues.

6. The Respondent did not issue him notice of termination. He was not given a reason or reasons for termination. He was not a tenant, as alleged by the Respondent. It was not true that the Claimant owed the Respondent rent, and was evicted for non-payment of rent. It was improbable that one stayed in another Person's residential premises without paying rent. The Respondent did not demand for rent from the Claimant at any forum.

7. The Respondent's position, as seen in the Statement of Response, is that the Claimant was Respondent's tenant. He was not an Employee.

The Court Finds:-

8. The Respondent did not give evidence or provide other material, contradicting the Claimant on the Claimant's allegation that the Parties were in an employer-employee relationship.

9. The Respondent employed the Claimant to guard, clean and take care of the Respondent's residential premises, on 1st August 2011, at a monthly salary of Kshs. 10,000. He availed to the Claimant housing accommodation within the workplace. The provision of housing would not make the Claimant a tenant. It was the responsibility of the Respondent, under Section 31 of the Employment Act 2007, to provide reasonable housing accommodation to the Claimant, at or near the workplace. Such provision did not turn the Claimant into a tenant.

10. The Respondent terminated the Claimant's contract under the guise of a Landlord claiming arrears of rent. He did so forcibly, with the assistance of goons. There was no justification in the decision terminating the Claimant's contract of employment. There was no hearing in any form. Sections 41, 43 and 45 of the Employment Act were totally disregarded. Termination was unfair. ***The Claimant is granted the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 120,000.***

11. ***He is granted 1 month salary in lieu of notice at Kshs. 10,000.***

12. The Court was not persuaded that the Claimant worked from 6.00 a.m. up to Midnight. As a caretaker living within the workplace, his hours of work would be expected to be flexible. He regulated his hours of work. He was not routinely under the supervision of the Respondent. He was not reporting to work, or leaving work at any specific hour. He was resident at the premises, and had no clear hours of work. He did not show to the Court a clear line of demarcation between his hours of work, and the period of rest. The Court would be stretching the concept of overtime too far, by agreeing to the proposition that the Claimant, a caretaker of the premises, worked excess hours. The claim for overtime pay is rejected.

13. This applies to the claim for Public Holidays worked. As the Claimant was resident at the workplace, it would be difficult for the Court to conclude that he did not rest on Public Holidays. He may have just been hanging around the compound, or resting in his house over the Public Holidays. There is no way for the Court to conclude that he worked on Public Holidays. The Claimant should have been clear about the effect of his residential status and the nature of his work, in pursuing overtime pay. It is difficult to say when he was actively working, or when he rested in his house. The Court is not convinced that he did excess hours or worked during Public Holidays. These claims are declined.

14. The Respondent did not provide any evidence on payment of the Claimant's salary. His position as seen at the outset was that the Claimant was a tenant, and not entitled to a salary. It is not difficult to agree with the Claimant based on the evidence on record that, he was not paid his salary for the period he took care of the Respondent's premises. The Respondent seems to have assumed that as he was accommodating the Claimant, there would be no need to meet his obligation to pay the Claimant's salary. ***The claim for arrears of salary is allowed at Kshs. 310,000 as prayed.***

15. The prayer for annual leave pay at Kshs. 25,828 appears to the Court reasonable. The computation is captured in the document filed by the Claimant on the 20th February 2015. The Respondent offered no records contradicting the Claimant on his annual leave entitlement. ***Annual leave pay is granted at Kshs. 25,828 as prayed.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant 12 months' salary in compensation at Kshs. 120,000; 1 month salary in notice pay at Kshs. 10,000; arrears of salary at Kshs. 310,000; and annual leave pay at Kshs. 25,828- total Kshs. 465,828.

c) Costs to the Claimant

d) Interest granted at 14% per annum from the date of Judgment until the whole amount is paid.

Dated and delivered at Mombasa this 25th day of November 2016

James Rika

Judge