



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1558 OF 2015

SAFARI MWANGANGI.....CLAIMANT

VERSUS

GOPAL PATEL.....RESPONDENT

JUDGMENT

Introduction

1. Safari Mwangangi, the Claimant in this case worked for the Respondent, Gopal Patel as a night watchman. He brought this claim seeking compensation for unfair termination of employment and payment of his terminal benefits. The claim is contained in a Statement of Claim dated 3rd September 2015 and filed in Court on 4th September 2015.
2. The Respondent filed a Statement of Defence on 13th October 2015. At the hearing the parties testified on their own behalf and thereafter called one witness each.

The Claimant's Case

3. The Claimant states that he was employed as a night watchman at the Respondent's residential home at an initial monthly salary of Kshs. 2,500 effective 5th February 2000. The Claimant's salary was progressively increased to Kshs. 8,500 as at the time he left employment.
4. The Claimant worked for the Respondent until 6th November 2014 when his employment was terminated without cause and without notice. He states that prior to his termination, he had sought permission from the Respondent to travel home for the planting season. The Respondent allowed the Claimant to travel on condition that he made arrangements with the day watchman to cover his shifts for the days he would be away. Upon his return, the Claimant was locked out of the Respondent's residence.
5. The Claimant states that he was not housed by the Respondent and was not registered with the National Social Security Fund (NSSF). He adds that for the entire period of his employment with the Respondent he was not granted annual leave. He further claims to have been underpaid contrary to obtaining Regulation of Wages Orders.
6. The Claimant's claim is as follows:
 - a) A declaration that the termination of his employment was unfair

- b) One month's salary in lieu of notice.....Kshs. 10,911.00
- c) Service pay (8,500/30x15x14).....59,500.00
- d) Annual leave pay (8,500/30x21x14).....83,300.00
- e) House allowance (15/100x8,500x14x12).....214,200.00
- f) Underpayment from May 2003 to November 2014.....319,586.10
- g) Compensation for unfair termination (8,500x12 months).....102,000.00
- h) Certificate of service
- i) Costs plus interest

The Respondent's Case

7. In his Statement of Defence dated 4th October 2015 and filed in Court on 13th October 2015, the Respondent admits having employed the Claimant as a night watchman but disputes the commencement date of 2000 pleaded by the Claimant. According to the Respondent, the Claimant commenced work in 2006.

8. The Respondent denies the Claimant's claim for unfair termination and states that it is the Claimant who absconded duty and chose not to resume even after being asked to do so leading to his eventual termination in November 2013.

9. The Respondent denies the Claimant's averment that he had sought permission to travel home and contends that the Claimant habitually absented himself from work without permission for long periods, including in November 2013 when he absented himself for five (5) days and when he was asked to verify where he had been he chose to stay away hence the termination of his employment.

10. The Respondent states that the Claimant was paid all his dues upon which he discharged the Respondent from liability.

Findings and Determination

11. There are three (3) issues for determination in this case:

- a) The effective date of the Claimant's employment;
- b) Whether the termination of the Claimant's employment was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

Effective Date of Employment

12. The Claimant states that he was employed on 5th February 2000. The Respondent on the other hand maintains that the Claimant started working for him in June 2006.

13. What is common is that the Claimant was not issued with a contract of employment as required by law and in the absence of any such record the Court invokes Section 10(7) of the Employment Act, 2007 and thereby adopts the Claimant's testimony regarding the effective date of his employment.

The Termination

14. Regarding the mode of termination, the Claimant states that upon returning from an authorised off duty, he was locked out of his place of work. On his part, the Respondent states that the Claimant deserted duty. Desertion is a valid ground for dismissal but like all other such grounds, it must be proved.

15. The Respondent told the Court that he asked the Claimant to resume duty but there was no corroborative evidence in this regard. Jurisprudence emerging from this Court is to the effect that an employer alleging desertion against an employee must lead evidence to demonstrate that efforts have been made to contact the employee. Further, it must be shown that such an employee has been put on notice that disciplinary action will be taken against them if they fail to resume duty (see *Stanley Omwoyo v BOM Nakuru YMCA Secondary School [2015] eKLR* and *James Okeyo v Maskant Flowers Limited [2015] eKLR*).

16. In the absence of evidence of any such efforts or notice, the Court rejects the Respondent's defence in this regard and consequently finds that the Claimant was dismissed without valid reason and without due process.

Remedies

17. In light of the foregoing finding I award the Claimant twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process. I further award him one (1) month's salary in lieu of notice.

18. Regarding the claim for underpayment, the Court noted that the General Wages Order (2013) set the minimum wage for a night watchman at Kshs. 10,911.70 exclusive of house allowance. Loading 15% as house allowance the Court arrived at the figure of Kshs. 12,548 as the Claimant's salary for purposes of this claim. That being the case I allow the claim for underpayment for a period of twelve (12) months calculated as the difference between the minimum wage and the salary of Kshs. 8,500 paid to the Claimant.

19. The Claimant was not a registered member of NSSF and the claim for service pay is therefore due and payable. The Respondent did not produce any leave records to counter the claim for leave pay which also succeeds and is allowed.

20. Ultimately, I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....	Kshs. 150,576
b) 1 month's salary in lieu of notice.....	12,548
c) Underpayment (4,048x12).....	48,576
d) Service pay for 14 years (12,548/30x15x14).....	87,836
e) Leave pay for 14 years (12,548/30x21x14).....	122,970
Total.....	422,506

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. I direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF
DECEMBER 2016**

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JUDGE

Appearance:

Safari Mwangangi (the Claimant in person)

Mr. Rombo for the Respondent