



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 380 OF 2014

LEONARD ATEBE HAMISICLAIMANT

VERSUS

CREST SECURITY SERVICES LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant brought this suit on 13/8/2014 claiming ksh.839790 being terminal benefits plus compensation for unfair termination of his employment by the respondent on 6/5/2014. It is the claimant case that the termination of his dismissal was without any lawful cause and as such it was unjustified. It is further claimed that the claimant never went for his annual leave, worked overtime and his salary was underpaid.
2. The respondent has denied liability and averred that it is the claimant who terminated his services on 9/5/2014 protesting against an intended transfer. In addition she denied the alleged salary underpayment, accrued leave and overtime for 6 years and admitted only salary for 6 days worked, leave earned from 18/2/2014 to 7/5/2014, uniform refund and certificate of service.
3. The suit was heard on 23/10/2014 and 3/11/2014 when the claimant testified as CW1 and the respondent called James Moi and Musa Katsutsu as RW1 and 2 respectively. Thereafter both parties filed written submissions through their respective counsel.

CLAIMANT'S CASE

4. CW1 was employed by the respondent on 14/8/2009 as a security guard vide a verbal agreement. His starting salary was ksh.7000 which was later reviewed to ksh.10500. The salary was paid through the bank and no payslip was given to the CW1. He was contributing to the NHIF and NSSF. He was also deducted a refundable Ksh.400 every month for uniform from his salary. He worked from 6pm to 6am instead of 8 hours per day. He used to sign an OB register when reporting to work and when leaving work. He contended that he served continuously for over 5 years and not on short term contract.
5. On 7/5/2014, at 10.00am he received a phone call from RW1 telling him to go to the office at Tudor. CW1 however responded that he was washing his uniform then and as such he went to the office at 3pm only to find RW1 absent. When CW1 called RW1, he was told to go back home because he was late. When CW1 returned to the office on 8/5/2014, he was not assigned any duty. In the week that followed, CW1 reported the matter to the labour office and the respondent was summoned there. The respondent denied that she had dismissed CW1 from work and accused him of absconding duty. According to CW1, the labour officer did not resolve the dispute

- prompting him to bring this suit. CW1 denied ever absconding work and accused the respondent of dismissing him without first affording him a hearing and before paying him his accrued employment benefits. In his view the dismissal was unfair and he prayed for ksh.839790 for leave days outstanding, overtime, refund of uniform levy and 12 months salary as compensation for unfair termination.
6. On cross examination by the defence counsel, CW1 denied ever signing any written contract of service with the respondent. He explained that all the ksh.400 NSSF monthly remittances were deducted from his salary and the employer contributed nothing. He however confirmed that the payroll produced by the defence showed that when he worked during his off days, he was paid for the extra days worked. He denied being given any assignment at Agakhan on 7/5/2014 because he was officially off duty. CW1 confirmed that the Nyali Homes, the client he was guarding had requested for his removal but CW1 denied that he objected to being relocated. According to CW1, he had previously been relocated to other places. He contended that he reported to work on 8/5/2014 and 9/5/2014 and he was not assigned any duty and therefore reported the matter to the labour office on 12/5/2014. According to CW1, failure to get assignment for 2 days meant that he had been dismissed.
 7. CW1 denied that he ever worked for Texas Security Services. He further denied that he threatened to sue the respondent if relocated. CW1 contended that he complained to the respondent about labour malpractices against him even before his dismissal but no solution was made. He maintained that he worked continuously without leave. He further maintained that he used to work for 12 hours instead of 8 hours per day and that meant overtime. He contended that in 2009 his minimum salary ought to have been ksh.10911. He denied ever signing the payrolls produced by the defence but admitted that in August 2010 he was paid a salary of ksh.7520. He denied ever agreeing with the respondent that his salary was consolidated.

DEFENCE CASE

8. RW1 is the respondent's commander Nyali are. He confirmed that CW1 worked for the respondent from 2009 as a guard under his command. On 5/5/2014, Mrs. Vyona the manager of Nyali Homes where CW1 was assigned requested RW1 to replace CW1 from guarding her premises and to which he complied. On 7/5/2014, he called CW1 to collect new uniform but he said he was busy washing his clothes because it was his official off day. RW1 told him to go for new uniform in order to go to an assignment at Agakhan Academy but CW1 refused saying that he could not work under M. Gilbert Morara the commander in that area. When RW1 explained that the assignment was for one day, CW1 was categorical that he could not work even for one minute under Mr. Morara and that he was even ready to leave the employment. At 3pm CW1 called RW2 asking him to issue him with a termination letter insisting that his removal from Nyali Homes was tantamount to dismissal but RW1 explained to him that he could not force him on a client. From that day CW1 never returned to work and refused to receive any call from RW1. RW1 met CW1 later at the labour office when he was summoned there.
9. On cross examination by the CW1's counsel, RW1 admitted that CW1 was never served with any warning letter during his service. He maintained that CW1 never gave any reason why he could not work under Mr. Morara. RW1 explained that CW1 was to work at Agakhan for a day while RW1 sought for a place to assign him. He admitted that CW1 was never given any disciplinary action after his refusal to take up the new assignment because he had done nothing wrong and he never returned to the office. RW1 contended that the labour officer found that CW1 is the one who deserted work and CW1 said that he would sue in court. RW1 insisted that CW1 was serving under 6 months contract starting February 2014 and contended that his leave had not yet matured. RW1 admitted that CW1 was entitled to Kshs 4200 as refund for uniform.
10. RW2 is the General Manager for the respondent. He confirmed that CW1 was employed by the respondent from February 2009 and worked on 6 months contract which were renewed automatically and therefore ran continuously until CW1 left work on 6/5/2014. On the said day, CW1 was replaced from his assignment at Nyali homes after the client requested for his replacement. He assigned him to Agakhan but he refused and threatened to sue to stop the transfer. He summoned CW1 to the office but he refused to honour the summons. Instead he went to the labour office and complained that he had been dismissed.

11. He admitted that CW1 never went for any leave but he occasionally took several day off. He admitted to pay for leave earned in the last contract. He denied the claim for overtime and contended that CW1 was contracted to work for 12 hours per day. He denied ever deducting ksh.400 for NSSF from CW1's salary and maintained that he only deducted ksh.200 per month. He denied the claim for underpayment of salary.
12. On cross examination by the CW1's counsel RW2 admitted that CW1 worked for 5 ½ years on 6 months renewable contracts. He did not however produce any such contracts as exhibits. He contended that CW1 was happy with the terms of service and that is why he worked for over 5 years. He admitted that CW1 was never issued with any payslip but there was payroll. He admitted that Section 20 of the Employment Act provides for issuance of a payslip for a contract exceeding 6 months. He admitted his lack of knowledge of the 2009 statutory minimum pay for the security industry. He explained that CW1's pay was determined by the client. He maintained that the salary was consolidated pay. He further maintained that CW1 used to rest for 15 days after expiry of each contract and as such the 15 days break was his leave.

ANALYSIS AND DETERMINATION

13. After perusing the pleadings and considering the evidence and the submissions filed, the court finds no dispute in the fact that CW1 was employed by the respondent as a security guard for a continuous period of 5½ since February 2009. There is also no dispute that CW1's employment ended shortly after his assignment at Nyali homes was discontinued following the client's request for his replacement. The issue arising for determination is whether CW1 deserted work protesting against a transfer or whether he was unfairly dismissed. In addition the court must determine whether the remedies sought should be granted.

Desertion or unfair termination

14. Under Section 47(5) of the Employment Act, the burden of proving unfair termination is upon the employee while the employer's burden is to justify the dismissal. In the present case, CW1 explained that he was on 6/5/2014 replaced by another guard at his place of assignment at Nyali Homes and for 2 days thereafter, that is on 8th and 9th May 2014, he was not assigned any duty by the respondent. He therefore construed the circumstances to mean that he had been dismissed from employment and went to report to the labour office and later brought this suit. On the other hand the respondent maintains that CW1 had not been dismissed but only replaced from his work station on request by the client and that indeed he was given an interim assignment at Agakhan Academy pending substantive transfer but he refused. His reason for refusing the new assignment was the commander of the area where he was being temporarily transferred to.
15. After careful consideration of the two sides of the case, this court finds on a balance of probability that the claimant has not discharged his burden of proving that he was unfairly terminated. In this court's view, it is the claimant who terminated his services when he refused to take up the new duties assigned to him by the employer to guard Agakhan Academy. He is therefore to blame for terminating his own services through desertion and rejected conciliation by the labour officer.

RELIEF

16. In view of the finding that the claimant was never dismissed by the respondent, the prayer for pay in lieu of notice and compensation for unfair termination are dismissed. He will however get the prayer for leave, underpayment and house allowance for the period covered by the limitation period of 3 years prior to the filing of the suit. RW2 admitted that CW1 never went for any leave except for the 15 days break in between the respective six months contracts. There is no evidence of such contracts or any records of paid leave. The court therefore awards 21 days per year for the said 3 years which works to 63 days ÷ 30x10911.70= ksh.22914.50.
17. As regards underpaid salary, CW1 did not clearly indicate the year when his salary was reviewed to ksh.10500 per month. The court will therefore only grant underpayment for the period between May 2013 and May 2014 because during that period the statutory minimum basic salary was ksh.10911.70. The difference between the statutory minimum basic pay and the actual pay was

ksh.411.70 per month x 12 months total to an underpayment of ksh.4940.40 during the said period. There is no evidence that CW1 was receiving a consolidated pay and as such he will be awarded his house allowance in arrears. From August 2011 to April 2012 he is awarded house allowance of ksh.(406.10x30days)-Ksh.8463=3720x9 month = 33480. From May 2012 to April 2013, he is awarded house allowance of ksh.459.30x30dyas-ksh.9571.659nbasic pay) = 4207.35 x 12 months = 50,488.20. lastly from May 2013 to April 2014 he is awarded house allowance of ksh.523.60x30 days – 10911.70(basic pay) = 4796.30 x 12 months = 57555.60. In summary the award for house allowance arrears is ksh.141,523.80

18.The respondent opposed the prayer for gratuity citing Section 35(d) of the Employment Act which disqualify members of NSSF from claiming service pay. The court is however alive to the fact that the regulations made under repealed Regulations of Wages and Conditions of Employment Act Cap 229 are still in force. Under Regulation 17(1) of the Regulation of Wages (Protective Security Services) Order employees in the industry are entitled to gratuity pay. CW1 will therefore get gratuity at rate of 15 days pay per year of service being Ksh.10911.70x15/30x5 years = 27,279.25. The prayer for overtime is however dismissed because it is expected that a watchman is supposed to work for long hours. The claimant will also get certificate of service, ksh.4500 being refund in respect of uniform plus ksh.4188.80 being salary for 7 days worked in May 2014.

DISPOSITION

19.For the reasons stated above, judgment is entered for the claimant in the sum of ksh.205,346.85 plus costs and interest.

Dated, signed and delivered this 13th February 2015.

O. N. Makau

Judge