



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 252 OF 2014

ABRAHAM KIPKOECH KOSGEI

CLAIMANT

v

EDLY SECURITY SERVICES LIMITED

1st RESPONDENT

K.V SHAH t/a NEW LOOK STORES

2nd RESPONDENT

JUDGMENT

1. For inquiry and determination are the questions, *which was Abraham Kipkoech Kosgei (Claimant's) employer as between Edly Security Services Ltd (1st Respondent) and K. V Shah t/a New Look Stores (2nd Respondent)-(legal liability), whether the dismissal of the Claimant was unfair, whether the Claimant was underpaid and appropriate remedies/entitlements.*
2. The Cause was partly heard on 19 January 2015, when the Claimant was represented by Mr. Kirwa and the Respondents by Mr. Awiti. The hearing was then adjourned to 17 March 2015.
3. When the Cause was called for hearing on 17 March 2015, the Respondents were not represented. Their counsel was also not in Court and no explanation was tendered for the absence.
4. Therefore, apart from cross examining the Claimant, the Respondents did not call any witnesses/offer any evidence.

The employer

5. The Claimant pleaded that he was employed by the 1st Respondent and was deployed to the 2nd Respondent as a shop Assistant on 6 September 2005.
6. The Respondents filed a joint Response and they denied employing the Claimant as pleaded.
7. In testimony, the Claimant stated that he was employed by the 1st Respondent on 6 September 2005 and then got deployed to the 2nd Respondent's store and therefore both of them were his employers. He was not issued with a written contract. Initially, the 1st Respondent had sent him to another store.
8. On 10 April 2014, the 2nd Respondent attempted to reassign him to his residence but he declined.
9. The Claimant also stated that he was registered with the National Social Security Fund in 2005 and he produced a copy of membership card and Provisional Statement of Account.
10. In cross examination the Claimant stated that both Respondents would pay his wages in turns and that it is the 1st Respondent which employed him then seconded him to the 2nd Respondent.
11. The primary document which prima facie establishes an employment relationship is a written contract. But the statute also contemplates oral contracts but under limited circumstances.

12. Without a written contract, parties can rely on secondary evidence/documentation to establish a contract of service.
13. The Claimant produced his National Social Security Fund registration card (Certificate of Registration). Registration with the Fund is and was mandatory for certain cadre of employees.
14. According to the registration card, the Claimant's employer was indicated as Edly Security of P.O. Box 4664 Eldoret and date of registration was given as 19 December 2005.
15. On the strength of the registration card, the Court finds that the 1st Respondent was the employer of the Claimant.
16. The Claimant's evidence that he was seconded by the 1st Respondent to the 2nd Respondent was not challenged. Further, his testimony that the 2nd Respondent would pay him wages at times was not controverted or challenged.
17. In this regard, and having consideration of the definition of employer in section 2 of the Employment Act, 2007, the 2nd Respondent was equally a legal employer of the Claimant.
18. Both Respondents are jointly and severally liable for the Claimant's statutory and contractual entitlements.

Whether dismissal was unfair

19. On the dismissal question, the Claimant stated that his duties were to sell in the 2nd Respondent's store but around 10 April 2014, the 2nd Respondent told him to leave because he wanted to employ somebody else and on 15 April 2014 he attempted to deploy him to his residence to take up domestic chores. He declined and he requested him to leave.
20. The Claimant also stated that he was not given notice of dismissal.
21. In cross examination, the Claimant stated that after the 2nd Respondent asked him to leave, he went to the 1st Respondent and was told to wait to be called but the call never came.
22. The Court has only the Claimant's version given under oath. The testimony was not challenged or an alternative narration given.
23. Although an employer reserves the prerogative to reassign an employee to other duties, a fundamental variation in duties such as from working in a shop to domestic chores requires an employee's consent.
24. There was no consent in this case and the Claimant was asked to leave. The Claimant was in the circumstances dismissed.
25. No notice was given. A hearing as contemplated by section 41 of the Employment Act, 2007 was apparently not held.
26. The Court finds the dismissal unfair.

Underpayments

27. The Claimant contended in the pleadings that he was a Shop Assistant and was underpaid from 2009 to 30 March 2014.
28. In testimony, the Claimant stated that he used to sell in the 2nd Respondent's shop and that he earned a salary of Kshs 3,000/- from 2005 to 2009 when the salary was increased to Kshs 6,500/-.
29. The testimony was not challenged or controverted.

Appropriate remedies/contractual and statutory entitlements

1 month pay in lieu of notice

30. The Claimant sought 1 month pay in lieu of notice. He was not given notice as required by section 35(1)(c) of the Employment Act, 2007.
31. At the time of dismissal, the prescribed basic wage for a shop Assistant was Kshs 12,184/- and he is entitled to an equivalent.

Days worked in April 2014

32.The Claimant is entitled to earned wages up to 15 April 2014. He quantified the same as Kshs 7,005/- and the Respondents did not challenge the calculation.

Compensation

33.The Court has found the dismissal of the Claimant unfair. Compensation is one of the primary, though discretionary remedies for unfair termination/wrongful dismissal.

34.The Claimant served the Respondents for about 9 years. Considering the length of service, the Court would award him the equivalent of 10 months gross wages based on the prescribed minimum wage inclusive of house allowance (Kshs 14,011/60) as compensation. The same is assessed as Kshs 140,116/-.

Service benefits

35.The Claimant produced documents showing he was a member of the National Social Security Fund. He is not entitled to service pay therefore by dint of section 35(5) & (6) of the Employment Act, 2007.

36.If contributions were not remitted he should make a complaint to the Fund, which has the statutory power to demand the arrears and also to levy penalties.

Underpayments

37.The Claimant cited the relevant Legal Notices in the Memorandum of Claim and sought underpayments adding to Kshs 262,290/- and this was not challenged.

38.He is entitled to the same.

Overtime

39.The Claimant sought overtime of Kshs 539,808/- based on a 45 hour week, but contending he used to work a 60 hour week.

40.He stated that he used to report at 7.00am and leave at 6.00pm.

41.Minimum hours of work are regulated by statute. Various sectors of industry have different prescribed hours. The Claimant did not disclose which particular Regulation of Wages Order applied to him.

42.This head of claim is declined.

Rest days

43.Under this head of claim, the Claimant sought Kshs 78,466/-. He stated that he used to work 7 days in a week.

44.This was not controverted and the calculation was not challenged. The Claimant is entitled to the same.

Leave days

45.In examination in chief, the Claimant merely stated that he did not go on leave. The period or years was not disclosed. This would have laid some basis for the claim.

46.It is the employer's duty to keep records, but a Claimant should lay some evidential basis for this type of claim.

47.This claim is declined.

Conclusion and Orders

48.From the foregoing, the Court finds and holds that both Respondents are liable to the Claimant jointly and severally and that the dismissal of the Claimant was unfair.

49.The Court awards the Claimant and orders the Respondent to pay him

a. 1 month pay in lieu of Notice	Kshs 12,184/-
b. April 2014 wages	Kshs 7,005/-
c. 10 months wages compensation	Kshs 140,116/-
d. Underpayments	Kshs 262,290/-
e. Rest days	Kshs 78,466/-

TOTAL Kshs 500,061/-

50. The heads of claim for overtime and leave are dismissed.

51. Claimant to have costs of Kshs 75,000/-.

Delivered, dated and signed in Nakuru on this 29th day of May 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kirwa instructed by Mwakio, Kirwa & Co. Advocates

For Respondents Mr. Awiti instructed by Juma Awiti & Associates

Court Assistant Nixon