



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 2042 OF 2014

RICHARD O MOSETI.....1ST CLAIMANT

CORNELIUS JUMA WEKESA.....2ND CLAIMANT

VERSUS

RADAR SECURITY COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The issue in dispute herein is the unfair termination of the claimants, Richard Moseti and Cornelius Juma Wekesa from their employment and refusal to pay them their terminal dues.

2. On 17th November 2014 the Claimants filed their claims herein as former employees of the Respondent Radar Security Company Limited. Despite service of summons and pleadings herein, the Respondent failed to enter appearance or file any defence. Service was effected upon the Respondent on 20th November 2014 and Affidavit of Service filed and sworn by Peter Mwangi Njoroge on 28th November 2014 is evidence of such service. The matter was fixed for hearing, the Respondent was swerved but still failed to attend hearing on as evidenced by the Affidavit of Service sworn by Peter Mwangi Njoroge on 7th May 2014 noting the Respondent acknowledged service and the subsequent hearing on 13th May 2015 was dully notified of the respondent. The Court thus heard the Claimants in the absence of the Respondent having been satisfied that service was properly effected.

3. The claimant’s case is that on 1st June 2012 the Claimants were employed by the Respondent at its company at a salary of kshs.13, 250.00 per month each which was exclusive of the house allowance but no contract or letters of appointment were issued. The Claimants remained in employment undertaking their duties diligently until 17th April 2014 when the Respondent unilaterally terminated their services without notice or giving any reasons for such action. The Claimants made effort to be heard or be paid their terminal dues, but the Respondent remained adamant and did not reply. The Claimants are seeking as follows

- i. One month’s salary in lieu of notice.....15,238*
- ii. Pending leave for 2 years 15,238 x 2.....30,476*
- iii. House allowances 15% of basic 15/100x1988x24.....47,712*

iv. *Public holidays 18 days for 2 years*

10x4582x2x18 days.....21,099

v. *Overtime 73x4x6x12x2x1.5....252,288*

vi. *Service gratuity 15 days for each years worked.....15,238*

vii. *Deducted but unremitted NHIF 320x24months.....7,680*

viii. *Welfare contribution 200 per month for 24 months....4,800*

ix. *Salary for March and 17 days in April 2014.....25,132*

x. *A certificate of service original KCSE certificate*

xi. *Original KCPE certificate*

xii. *Original secondary leaving certificate*

xiii. *Original primary leaving certificate*

xiv. *12 months compensation for unfair termination182,856*

Total Kshs.602, 519.00

4. The Claimants are thus seeking for orders that the Court finds they were unfairly terminated and be awarded as outlined in their claims.

In evidence, the 1st claimant gave evidence for and on behalf of the 2nd claimant and testified that they were both employed on the same date and equally terminated on the same day. They were Night Guards deployed at Kenya Power premises at Mlolongo area to guard the place. They reported to work at 6pm and left at 6am making it 1 hours of work per day/night for 6 days in a week and only took rest on the 7th day. They were however not paid for the overtime hours served. Housing was not provided or allowances in lieu and the salary paid was never inclusive of such a provision.

5. The claimant also testified that on 27th February 2014 they were attacked by robbers while at work. The robbers stole property at the premises they were guarding and upon report the Claimants were arrested at Mlolongo Police Station where they remained until 3rd March 2014 when their statements were recorded and charged in court. The Court held that the Claimants were not guilty. Upon release the Claimants went to the Respondent to report back to work but were told there was no work and had to wait. In April they went back and were told to still wait. They were however told to return the Respondent uniforms and to tender resignation. The Claimants opted to instruct an advocate upon this development as they did not want to resign from their jobs for no reason.

6. The Claimants instructed their advocate who did a demand notice and the Respondent has never responded. There was no letter of termination issued or notice given indicating the reasons as to why the Claimants had been terminated. When they were told to return uniforms, the Respondent secretary Ms Dinah indicated that due to the robbery that had taken place while the Claimants were at work, the Respondent lost the contract with Kenya Power and hence their termination. This was however never formally communicated to the claimants.

7. The Claimants are seeking notice pay; leave earned; house allowance; 18 public holidays worked; overtime for 4 hours worked over and above normal hours per day; service gratuity that was due; the deductions made for NHIF were not remitted and this is due to claimants; a welfare deducted at 200/= per

months that is now due. The Claimants were never paid for March 2014 and 17 days worked in April 2014 as they were kept waiting for deployment. Certificate of Service was not issued upon termination as well as compensation for unfair termination.

8. It is trite that all employers should issue employees with written contracts of employment spelling out their terms and conditions of service as per section 8 and 9 of the Employment Act. Section 9(2) further states;

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

9. Thus the duty rests upon the employer to ensure each employee has written terms of engagement. In the absence of such written terms, the Court has to apply the applicable law in each claim.

10. In this regard, the Court relies on the evidence submitted by the Claimants in that while they were in employment as Night Guards, the premises where they were placed was invaded by robbers and as a result they were arrested but later released. Upon report back to work they were advised to wait without any formal communication. They were later told to return their uniforms and that due to the robbery that had taken place, the Respondent had lost the contract hence there was no work.

11. Without any defence or evidence by the Respondent to controvert this evidence, where termination is effected by whichever means, oral or in writing and such termination has no reason or the reasons are not shown to be valid or just, the Court must find unfairness. The fact of their having been a robbery or the Claimants being arrested is not in itself evidence for their culpability in terms of their employment. Where the Respondent wished to take disciplinary action against the claimants, investigations into the robbery or any misconduct that may have arisen should have been separately addressed other than the criminal trial.

12. Section 43 of the Employment Act requires each employer to give reasons of termination for whatever reason and even where such reasons amount to gross acts of misconduct, follow the provisions of section 44 of the Act that guarantee rights outlined under section 41. Section 41 goes to the tenets of natural justice where each employee must be given a hearing before termination. I find that such procedure was not applied on the claimants. There was no notice or reasons given for their termination. This amounted to unfair termination in terms of section 45 of the Employment Act.

13. Upon such finding, the Claimants are entitled to compensation which is granted at six (6) months of their monthly salary. Each claimant is awarded Kshs.91, 428.00.

4. Notice pay is due in terms of section 35 read together with 36 of the Employment Act at one month's salary and Kshs.15, 235.00.

15. Leave is an entitlement to each employee. Where not taken or paid for, upon termination, this becomes due. Claimants awarded Kshs.30, 476.00.

16. Where there is no written contract to outline housing or allowances in lieu of such provision is to be addressed, such is due in law. Claimants are awarded Kshs.47, 712.00.

17. Public holidays worked attract different pay. Where there is evidence that an employee was at work on such days, payment is due. Claimants awarded 21,099.00.

18. Normal working hours are 8 hours per day. Where an employee remains at work over and above the legal and normal work hours, every hour worked beyond attracts extra pay. In this case the Claimants were at work for 12 hours a day. The 4 extra hours should be compensated. Claimants awarded Kshs.252, 288.00.

19. Service pay is due where NSSF deductions are not made and where NHIF remittances are not effected. In this case the Respondent did a deduction of NHIF but failed to remit. Section 35 apply and the claimant shall receive service pay at ksh.15, 238.00.

20. Welfare contribution not utilised after deduction are due. Such deduction should be refunded to the Claimants at kshs.4, 800.00.

21. Salaries earned are a legal entitlement whatever the reason for termination. Pay for March 2014 and 17 days in April 2014 when the Claimants were verbally informed of their termination is due. Claimants are awarded Kshs.25, 132.00

22. The Claimants should also receive their Certificate of Service as under section 51 of the Employment Act. All other original certificates of the Claimants in the possession of the Respondent should be released unconditionally.

Judgement is hereby entered for the two Claimants for;

- a. **Compensation at Kshs.91,428.00 each;**
- b. **One month's salary in lieu of notice at Kshs. 15,238.00 each;**
- c. **Pending leave at Kshs.30,476.00 each;**
- d. **House allowances at kshs. 47,712.00 each;**
- e. **Public holidays pay at kshs.21,099.00 each;**
- f. **Overtime pay at Kshs.252,288.00 each;**
- g. **Service gratuity pay at kshs.15,238.00 each;**
- h. **Welfare contribution refund at kshs.4,800.00 each;**
- i. **Salary for March and 17 days in April 2014 at kshs.25,132.00 each;**
- j. **A certificate of service be issued forthwith together with all original certificates of the Claimants held in the custody of the respondent.**
- k. **Claimants are awarded costs.**

Delivered in open Court, dated and signed at Nairobi on this 28th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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