



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 539 OF 2010

ALI HUSSEIN DORE 1ST CLAIMANT

ABDI MAHAD IBREN 2ND CLAIMANT

VERSUS

MOHAMED ORIO BURANI 1ST RESPONDENT

NORTHERN CONSTRUCTION LIMITED 2ND RESPONDENT

Mr. Maingi for the Claimant

Mr. Thuku for the Respondent

JUDGMENT

1. The Claim is based on an amended memorandum of claim filed on 12th August 2013 by the 1st Claimant Ali Hussein Dore and 2nd Claimant Abdi Mohamed Ibren against the 1st Respondent Mohamed Orio Burani and 2nd Respondent M/S Northern Construction Limited jointly and severally.

Particulars of Claim

2. The 1st Claimant was pursuant to an oral contract employed by the Respondents on or about 18th May 2004 as a security guard based at the Respondents' construction site in Langata. He was paid Kshs.6,000 and was in addition entitled to the benefits of house allowance and overtime as stipulated in the repealed Regulation of wages and conditions of Employment Act, Legal Notice No. 94 of 2004 attached as Annex I.
3. The 1st Claimant worked continuously and was paid cash at the end of every month up to the year 2008. In 2008, the employer opened a salary account for the 1st Claimant at the First Community Bank details of which are attached to the statement of claim.
4. The Claimant states that the employer deposited Kshs.3,000 by 15th day of every month and the balance of kshs.3,000 at the end of every month. Copy of the Bank statement is attached and marked 'A'2.
5. The Claimant avers that he was never paid house allowance and overtime for the entire period he worked.
6. The employment of the 1st Claimant was terminated on 4th April 2009 and 1st Claimant avers that

the termination was unlawful and unfair in that no reason was given, no notice was given and no termination letter was given.

7. The 1st Claimant seeks;
 - a. one month salary in lieu of notice in the sum of Kshs.6,000.00;
 - b. service pay for the six (6) years worked in the sum of Kshs.24,000.00;
 - c. accrued leave days for three (3) years in the sum of Kshs.8,400.00;
 - d. compensation for the unlawful summary dismissal.

2nd Claimant

8. The 2nd Claimant avers that he was employed pursuant to an oral contract of employment sometimes in the year 2007 as a security guard based at the Respondent's construction site in Langata. In terms thereof, he was paid Kshs.6000.00 per month and was to be paid house allowance and overtime. That the house allowance and overtime was not paid.
9. That the 1st and 2nd Claimants worked from 6 a.m. to 6 p.m. every day including weekends and holidays. That his salary was deposited in a salary account as being Kshs.3,000.00 by 15th day of every month and Kshs. 3,000.00 by end of every month as per Annex 'AM2.'
10. That the 2nd Claimant was summarily dismissed without notice and without any reason assigned verbally on 4th April 2009. The 2nd Claimant seeks;
 - a. one month salary in lieu of notice in the sum of Kshs.6,000.00;
 - b. service pay for two years worked in the sum of Kshs.12,000.00;
 - c. accrued leave for two (2) years in the sum of kshs.4,000.00; and
 - d. compensation for the unlawful summary dismissal.

Response

11. The Respondents filed a memorandum of Defence on 14th November 2012 in which they denied that the Respondents had ever employed the 1st and 2nd Claimants. The Respondents stated therefore that the question of summary dismissal does not arise at all. The Respondents denied particulars of terminal benefits sought by the 1st and 2nd Claimants.

Oral testimony

12. The 1st and 2nd Claimants gave oral testimony in support of the particulars of employment, summary dismissal and the claims sought.
13. The Respondents also called one Hussein Nor Mohamed, a security officer employed by the 2nd Respondent from 2009 to date.

Determination

14. The testimony given by the Claimants on the one hand and the Respondent on the other on the issue of employment was mutually destructive.
15. The Claimants stated that they were security guards in the employ of the Respondent whereas the Respondents denied ever having employed the Claimants.
16. The Court made an order dated 20th November 2013 to discover the salary statements of the Claimants, from the First Community Bank pursuant to an application by the Claimants and the Bank complied. Ali Hussein Dore (1st Claimant) held a salary account number 09990810 - 000 and he produced a statement for the period 7th January 2008 to 30th April 2009 showing that Kshs.3,000 was consistently deposited twice in his account per month for the period although the identity of the employer who deposited the salary is not indicated.
17. The 2nd Claimant produced a salary current Account card for Account number 09990481-000 held

- at the First Community Bank. He also produced a statement for the period 15th September 2008 to 30th November 2008, showing deposits of Kshs.3,000.00 in the middle and at the end of each month.
- 18.RW1 for the Respondent admitted that he knew the 1st and 2nd Claimants in his testimony although he joined the employ of the Respondent in 2009 and so he did not know if the two had worked for the Respondents or not.
 - 19.The Claimants stated that they were recruited by the 1st Respondent. RW1, confirmed that the 1st Respondent Mohamed Burani was the owner of the 2nd Respondent. RW1 also confirmed that he holds a salary account at the 1st Community Bank and his salary was paid by the 2nd Respondent through the account. RW1 stated that he did not know who deposited his salary in the account.
 - 20.RW1 also confirmed that he worked for 12 hours for 7 days a week.

All this evidence is consistent with that of the 1st and 2nd Claimant.

- 21.The Court finds that the evidence by the 1st and 2nd Claimants that they were employed by the Respondents credible and most likely true.
- 22.The Court finds the averments by the Respondents in this regard not credible and in fact untruthful. The Respondents could have brought the particulars of employment but chose not to without giving any reason. The testimony of the Claimants is largely uncontroverted in this regard.
- 23.The Court further finds, that the 1st and 2nd Claimants were summarily dismissed from employment on 1st April 2009. The Court finds that the Respondents did not provide any reason to the 1st and 2nd Claimants for the dismissal and did not give notice of termination of employment to the 1st and 2nd Claimants.
- 24.The Court finds that the manner in which the summary dismissal was effected was contrary to the provisions of Sections 37, 40, 41, 43 and 45 of the Employment Act and was therefore unlawful and unfair.
- 25.The 1st and 2nd Claimants were not registered with the National Social Security Fund and therefore are entitled to gratuity for the number of years worked. They are also entitled to payment in lieu of notice.
- 26.The 1st Claimant had worked for the Respondent for six (6) years with a good record of service. He suffered loss and damage as a result of the sudden loss of employment and is entitled to compensation in terms of Section 49(1) as read with Section 49(4) of the Employment Act, 2007.
- 27.The deception by the Respondent that it did not employ the 1st and 2nd Claimants is despicable and should be discouraged and is entitled to compensation.
- 28.The 2nd Claimant had worked for two (2) years and lost career prospects unlawfully and without notice. The 2nd Claimant also suffered loss and damage and entitled to compensation.
- 29.The Court awards the 1st Claimant ten (10) months' salary as compensation for the unlawful and unfair dismissal. In consideration of the shorter period worked, the Court awards the 2nd Claimant eight (8) months' salary being compensation for the unlawful and unfair loss of employment.
- 30.Accordingly the Court Award is as follows;

1st Claimant

- a. Kshs.6,000 being one month's salary in lieu of notice;
- b. Kshs.24,000 being service gratuity calculated at ½ month salary for every completed year of service;
- c. Kshs.60,000.00 being ten (10) months salary compensation for the unlawful and unfair loss of employment.

Total award Kshs.90,000.00.

2nd Claimant

- a. one month salary in lieu of notice in the sum of Kshs.6,000.00;
- b. service pay in the sum of Kshs.12,000.00 being ½ month salary for every completed year of service;
- c. Kshs.48,000.00 being compensation for the unlawful and unfair summary dismissal.

Total Kshs.66,000.00.

- 31.The 1st and 2nd Claimants did not prove the claims for overtime and payment in lieu of leave days not taken. The prayers were not made in the amended statement of claim.
- 32.The Awards are to be paid with interest at Court rates from date of filing this suit till payment in full. The Respondents to also pay the costs of the suit.
- 33.The Awards are made jointly and severally against the 1st and 2nd Respondents.

Dated and Delivered Nairobi this 23rd day of October, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE