



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 542 OF 2014

SIMON EBENYO EKARANI.....CLAIMANT

v

SAMBA ENTERPRISES LTD..... RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on 30 October 2014 alleging unfair termination of employment and seeking a total of Kshs 333,882/15 being compensation for unfair termination of employment, wages for 12 days, accrued leave, overtime (public holidays and normal), underpayments of wages and pay in lieu of notice.
2. The Respondent was served and it filed a Memorandum of Appearance through Nganga & Associates Advocates on 27 November 2014. But no Response was filed.
3. The Cause was mentioned on 28 November 2014 and the Claimant informed the Court that service had been effected and an affidavit of service filed. Considering the affidavit of service, a Response should have been filed on or before 21 November 2014.
4. The Court being satisfied with the service directed that the Cause be heard on 21 July 2015 and a hearing notice to be served.
5. On 21 July 2015, the parties appeared in Court and the Respondent sought leave to file a Response out of time and to attempt out of Court settlement. The Court declined to grant the leave sought but advised the parties to reach any settlement before judgment.
6. The parties did not inform the Court of any settlement before delivery of this judgment.
7. The Claimant testified and stated that he was employed by the Respondent as a security guard in August 2012 and that he served until August 2014 when he sought and was granted 3 days leave to go and attend to a personal issue in Kitale.
8. He stated that before the lapse of the 3 days, a colleague guard Kipkorir called him and advised him not to resume work and that this prompted him to return to the office where he met a Manager who told him there had been a theft from the stores and thereafter he sent him to the Respondent's Director Patrick Muyaya.
9. When he went to see the Director he sent him back to the Manager but the Manager sent him away after informing him that he would think over his case.
10. According to the Claimant, he was stationed at the gates and was not involved in any theft and was not issued with a dismissal letter/notice of termination or granted an opportunity to make representations before termination of employment.
11. On working hours, the Claimant stated that he used to work from 6.00 pm to 7.00am even during public holidays, and was earning Kshs 8,000/- gross wages, without overtime pay and he was not getting a pay slip.
12. He also stated that he was not granted annual leave during the period of employment except once in 2013 and that he was not paid wages for August 2014.
13. The Claimant also stated he was not earning house allowance though he did not include this head

- of claim in the prayers sought.
14. During cross examination, the Claimant denied that the Respondent's Manager had informed him some employees had stolen and left with alcohol. He admitted being a member of the National Social Security Fund.
 15. Pursuant to section 35 (1)(c) of the Employment Act, 2007, the Respondent ought to have given the Claimant at least 28 days written notice of termination of employment. The Respondent did not demonstrate it gave such notice and in the circumstances, the Court finds that the termination of employment was unlawful and unfair.
 16. Further, by failing to file a Response or call any evidence, the Court finds that the Respondent failed to discharge the burden placed upon employers by sections 41, 43, 45 and 47(5) of the Employment Act, 2007, hence the termination of the Claimant's services was both procedurally and substantively unfair.

Appropriate remedies

17. The Claimant's pleadings and evidence remain unchallenged and uncontroverted. The failure to file a Response or call witnesses/evidence means that there are no real disputes of fact to discuss or unravel.
18. The Claimant set out the details/particulars of the reliefs he was seeking in the Memorandum of Claim. Some of them being contractual/statutory entitlements (underpayments, overtime and leave) which accrue by the very nature of the employment relationship.
19. On the underpayments, according to Legal Notice No. 197 of 2013, the prescribed minimum wage for a night watchman exclusive of house allowance was Kshs 10,116/15 for Nakuru and factoring in 15% house allowance, the monthly remuneration should have been Kshs 11,633/-).
20. The Court can also take and takes judicial notice of the fact that security guards in this country ordinarily work 12 hour shifts (day and night) and this is a notorious fact which needs no evidence to be proved.
21. Pay in lieu of notice and compensation however are dependent on a finding of unfairness in the termination of the relationship and the Court has determined the dismissal unfair.
22. The Court will therefore find for the Claimant as claimed, save for compensation which is assessed at the equivalent of 3 months wages (based on prescribed minimum wage inclusive of house allowance), considering that the Claimant served the Respondent for 2 years only.

Conclusion and Orders

23. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

a. 1 month pay in lieu of notice	Kshs 10,116/15
b. Underpayments	Kshs 44,492/65
c. Normal overtime	Kshs 110,043/40
d. Public holidays	Kshs 21,258/45
e. Leave	Kshs 17,988/10
f. August 2014 wages	Kshs 5,188/80
g. 3 months wages compensation	Kshs 34,900/-
TOTAL	Kshs 227,787/55

24. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 4th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Alwala instructed by Wambeyi Makomere & Co. Advocates

For Respondent Mr. Onyancha instructed by Nganga & Associates

Court Assistant Nixon