



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 259 OF 2011

WYCLIFFE MAKHOHA OUMACLAIMANT

VERSUS

SECURITY GUARDS SERVICES LIMITEDRESPONDENT

JUDGMENT

This claim was filed by **Wycliffe Makokha** the Claimant by Memorandum of Claim dated 21st February 2011 and filed in court on 25th February 2011. The Claimant prays for judgment against the Respondent for breach of contract and for Service Pay amounting to Kshs.257,614/= as well as costs and interest. Annexed to the claim are copies of his employment card, identity card, national social security fund (NSSF) provisional member statement of account, demand letter and a handwritten slip dated 9th February 2011 acknowledging return of his uniform.

The Claimant filed a Supplementary Memorandum of Claim on 14th October 2011 in which he claimed severance pay for 28 years amounting to Kshs.257,614/=, one month's pay in lieu of notice amounting to Kshs.18,401/= accrued leave for a period of 7 years from 1982 to 1990 amounting to Kshs.90,118.45 and full compensation of 12 months wages amounting to Kshs.220,812/=. He further prays for costs and interest.

The Respondent filed a Memorandum of Reply on 16th March 2011. The respondent denied that the claimant was employed on 2nd February 1982. It submits that the claimant was employed in February 1990. The respondent further avers that it did not terminate the claimant's employment but on the contrary the claimant was deemed to have deserted his employment around 1st January 2011. The respondent has annexed letters from K-REP Bank, Kawangware branch dated 3rd January 2011 and 24th January 2011 and the Warning Order dated 31st December 2010 in support of its averments in the Memorandum of Reply.

The Respondent filed an Amended Memorandum of Reply to the Supplementary Memorandum of Claim on 24th October 2011 denying all the allegations made by the Claimant in the Supplementary Memorandum of Claim.

The case was heard on 2nd October and 23rd November 2012 and on 26th September 2013. The claimant testified on his behalf while the Respondent called its Operations Manager Mr. Joseph Ndungu Maina (DW1) who testified on its behalf.

The claimant testified that he was employed on 2nd February 1982. He produced a copy of his employment identification card and NSSF provisional member statement of account. His account of the

events of 31st December 2010 was that he went to K-REP Bank, Kawangware Branch where he used to receive his salary to check if his salary had been paid but found that the salary had not been paid. Since it was 8 am and the bank had not been opened he waited until the bank was opened at 9.00 am and inquired about the salary and was told it had not been paid. He was told to go back at 12 noon. At noon he checked at the ATM but there was still no money. When he inquired again in the bank he was told to wait until his boss came. The boss arrived around 1.30 pm and after that the salary was paid. He went back home and reported for to the office for evening duty at about 3 pm. He was told by the clerk, Peterson that he was one of the guards whose photograph was taken at the bank creating a disturbance.

He denied involvement in the disturbance but was told to sign a warning and apologize failing which he would not be allowed to report for work. When he refused to sign the warning he was told to return his uniforms. The bank wrote a letter absolving him from the accusation which letter he delivered to Mr. Edward Mbugua, a co-owner of the respondent who told him that even if the bank had written the law must be followed. He was not given any termination letter.

During cross-examination he testified that the Respondent did not require its employees to collect pay slips before collecting their salaries, that Peterson was alone when they talked. That the next day he went to Mr. Ndungu's office. Mr. Ndungu told him he has a case and should go back home and report on 3rd January to answer charges as directed.

Mr. Ndungu told him to return his uniforms in the presence of Mr. Mbugua.

For the Respondent DW1, Mr. Ndung'u testified that he was the Respondent's Operations Manager and his duties as the involved handling complaints from clients, guard matters, processing salaries and taking it to the bank. DW1 testified that according to the employment records in his possession, the Claimant was employed in February 1990.

He explained that the Respondent's employees salaries were paid through K-REP Bank, Kawangware Branch. On 31st December 2010, a Manager at the bank by the name Robinson Oyaro called the Respondent's office to report that some of the respondent's guards were disrupting operations and making noise at the bank. Mr. Oyaro wanted DW1 to go and address the workers. DW1 went to the bank immediately and met the Claimant and another guard Martin Onyango Aroka outside the bank. He also noticed other guards who dispersed when they saw his vehicle. He spoke to the two who complained that the bank had not paid them. He asked them to report to his office. He then went into the bank to talk to Mr. Oyaro whom he asked to identify the particular guards who were complaining but Mr. Oyaro informed him that he could not. He informed Mr. Oyaro that the guards action was misconduct and they were going to raise warning letters so that the guards do not repeat the offence. That the guards are supposed to get their pays lips before going to the bank as that is the document that showed how much would be taken to the bank. When he got back to the office he raised the warning orders for the 2 and asked them to sign but they refused and started talking rudely but were told that the warning letters still stand. The 2 then walked out of the office. The claimant returned to the office on 3rd January 2011 with the letter from the bank of the same date signed by Mr. Oyaro who stated in the letter that the claimant was not among the guards who caused a disturbance in the bank on 31st December 2010. The claimant delivered the letter from the bank and left. That the respondent wrote to the bank to ask how they knew the claimant was not among the employees causing a scene at the bank. That according to the respondent the letter did not rule out the claimant being among those who caused a disturbance at the bank. Having brought the letter the claimant walked away. He went back to the office on 4th and then did not go back until 9th February to return his uniforms. That the claimant's employment was not terminated.

I have considered the pleadings, the annexures thereto, the oral evidence of the witnesses who testified in court and the submissions filed on behalf of the parties. The parties agree that the dispute herein was provoked by events that took place on 31st December 2010.

The points of divergence are the Claimant's date of employment; whether or not it was the respondent's policy for employees to go to the bank to collect salaries after issuance of pay slips; whether the claimant

participated in the disturbance that occurred at the bank as the Respondent's employees demanded for their salaries. The other issues that the court has to determine are the rate of pay for the claimant for purposes of calculation of terminal benefits and whether the claimant is entitled to the prayers sought.

1. Date of employment of claimant

Claimant alleges that he was employed on 2nd February 1982 while the Respondent's position is that he was employed in February 1990. The claimant produced a membership registration certificate from NSSF which shows date of registration as 1st October 1991. No letter of appointment was produced by either party.

Section 9 of the Employment Act requires every employer to issue a written contract of employment to every employee who is employed for a period that is for 3 months or longer, or on a contract that is not likely to be completed in less than 3 months, or which is for a shorter period but is likely to be extended to cover a period beyond 3 months. Section 10(7) of the Act provides that it is the burden of the employer to prove or disprove an alleged term of employment in any proceedings where an employer fails to produce a written contract or the written particulars of prescribed terms of employment.

In the present case the Respondent did not submit such contract to prove the date of employment of the claimant as February 1990. It did not even specify the date of such employment. The NSSF certificate produced by the claimant does not prove date of employment but only date of registration. It is important to note that the certificate shows that the respondent remitted NSSF contributions for the period 1991 to 1998 only meaning that it cannot be a reflection of the claimant's employment dates as it does not cover the full employment period that is not contested by the parties.

For these reasons I find that the respondent has not disproved the claimant's allegation that he was employed on 2nd February 1982.

I therefore find that the claimant was employed by the respondent on 2nd February 1982.

2. Whether or not it was the respondent's policy for employees to go to the bank to collect salaries after issuance of pay slips

The respondent submitted that the law requires employers to issue pay slips to their employees before payment of salaries. That in strict adherence to the law, the Respondent established a procedure requiring its employees to collect their pay slips before collecting their dues from the bank. That the pay slip was the only way for the guards to ascertain their wage or salaries before collecting them because their pay varies every month.

The respondent submitted further that the procedure applicable in the issuance of pay slips is enshrined in Section 20(1) of the Employment Act, 2007 which provides that:

“An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.”

It is on this basis that the respondent found the claimant guilty of misconduct for which he was required to sign a warning letter. As provided in section 10 the employer is supposed to keep written particulars of employment including such salary payment policy. Such policy was not produced in court. The respondent did not even demonstrate to the court that the claimant was aware of such policy. The Respondent also did not explain why so many employees went to the bank to collect their salary without pay slips or that there was no employee who did not go to the bank because they were aware of such policy.

In the circumstances I find that there is no proof that such a policy existed or that if such a policy existed it had been brought to the attention of the claimant.

3. Whether the claimant participated in the disturbance that occurred at the bank as the Respondent's employees demanded for their salaries

The claimant denied participation in the disturbances at the bank. He refused to sign the warning letter and vehemently pleaded his innocence. He explained in detail what transpired when he went to the bank. He even went to the bank and obtained a letter absolving him from blame. The respondent has annexed not one but 2 letters from Mr. Oyaro, the very person who made the complaint to the respondent, absolving the claimant.

The respondent in its evidence stated that the claimant did not deny being in the bank.

There can be no better evidence of the claimant's innocence than what was produced by the respondent.

On these grounds I find that the claimant did not participate in the disturbances at the bank.

4. Rate of pay for the claimant for purposes of calculation of terminal benefits

The Employment Act provides for rate of pay for purposes of payment of terminal benefits at section 49 as gross monthly wage or salary at the time of termination or dismissal or what the employee would have earned but for the termination. My understanding of this is that it is the regular remuneration that an employee is entitled to with the exception of one off payments such as leave pay. In the present case the claimant submitted one pay slip which contains the basic pay, house allowance, public holidays, overtime and rest days. The respondent did not submit any documents but only stated through DW1 that the claimant is entitled to basic salary. In my opinion from the evidence on record the claimant's terminal dues would be the basic pay and house allowance making a total sum of Kshs. 8,651.00.

5. Whether the claimant is entitled to the prayers sought

In the memorandum of claim and the 2 supplementary memoranda of claim filed by the claimant he has made the following claims

- i. notice
- ii. accrued leave
- iii. weekday overtime
- iv. severance pay
- v. compensation
- vi. service pay
- vii. costs
- viii. interest

i. notice

Before determining whether the claimant is entitled to notice I must determine whether or not he was wrongfully or unfairly terminated. The respondent has submitted that the burden of proof lies with the claimant and has relied on the case of **Wallen Nyaberi Onsario v Protective Custody Limited (2013)eKLR** where in dismissing the claim the court held that *"in circumstances like the instant case, a test of balance of probabilities is applied to resolve situations of your word against mine, like we have here. A strict application of this would tilt in favour of the respondent and against the claimant."*

I find that the case is not applicable in this case as in this case the claimant was told that he would not be allowed to work until he signed the warning letter while in the case cited the claimant

absconded and could not be found by the respondent when it tried to reach him. As I have already stated herein the claimant was not part of the employees who caused a disturbance. The decision to issue a warning letter to him was reached before he was asked to defend himself. According to the testimony of DW1 he told Mr. Oyaro that he would issue warning letters to the claimant and Martin Onyango Aroka so that the guards do not repeat the offence. This means the claimant was already condemned at that point. DW1 further stated that he went back to the office and issued the warning letters which the claimant refused to sign. This amounted to constructive dismissal.

I find that the claimant was not given a hearing and there was no valid reason for his termination.

I therefore find that the claimant was unfairly terminated and is entitled to notice. I award him one month's salary in lieu of notice in the sum of Kshs. 8,651.00.

ii. Accrued leave

The claimant did not adduce any evidence in support of the claim for accrued leave. In any event the leave claimed is for the period 1983 to 1990 which would be statute barred.

For these reasons I dismiss the claim.

iii. Weekday overtime

Again as in the claim in (ii) above no evidence was adduced in support of this claim and I dismiss it for want of proof.

iv. Severance pay

The claimant seeks payment of severance pay for 28 years. Severance pay is provided for in section 40 of the Employment Act where an employee has been declared redundant. I agree with the respondent that the claimant was not declared redundant and is therefore not entitled to severance pay.

I accordingly dismiss the claim.

v. Service pay

Service pay is provided for in section 35(5) of the Employment Act. The respondent has submitted that the claimant was a member of NSSF as evidenced by the provisional member statement produced by the claimant. As I have observed elsewhere in this judgment the statement is for the period 1991 to 1998 only meaning that the claimant was not a contributor of NSSF at the time of the termination of his employment. Subsection 35(6) therefore does not exclude the claimant from payment of service pay.

The foregoing notwithstanding the claimant was employed in protective security sector and is covered by the Regulation of Wages (Protective Security) Order 1998 which provides for payment of service gratuity irrespective of membership of NSSF. The Order provides for payment of service gratuity at the rate of 18 days pay for each year worked. Section 48 of Labour Institutions Act provides that the terms of a wages order may not be varied and further that where less favourable terms of employment are given to an employee the provisions of the wages order shall be substituted therefor. For this reasons the claimant is entitled to service gratuity for the 28 years worked. This adds up to Kshs. 145,336.80.

I award the claimant the said sum of Kshs. 145336.80

vi. Compensation

Having found that the claimant was unfairly terminated and taking into account the length of service I am of the opinion that he is entitled to maximum compensation of 12 months' salary. This adds up to Kshs.

103,812.00. I award the claimant the said sum.

vii. Costs

Having been substantially successful in his claim I award the claimant costs of this claim.

viii. Interest

Interest shall accrue from the date of judgment.

Orders accordingly.

Delivered and signed in open court on **28th** day of **January** 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Wycliffe Makokha Ouma Claimant in person

Omariba h/b for Kamara for Respondent