



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 2018 OF 2012
 [Consolidated with Cause Number 2019 of 2012

BETWEEN

1. JOSEPH OKINDO

2. RONALD BARASA.....
 CLAIMANTS

VERSUS

VAPOR SPORTS MINISTRIES
 RESPONDENT

Rika J

CC. Jane Sikulu

Ms. Ng’etich instructed by Ng’etich & Company Advocates for the Claimants

Mr. Njoroge instructed by Lesinko, Njoroge & Gathoga Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. These two Claims were consolidated on 25th February 2013. They were initiated through Statements of Claim, filed on 5th October 2012. The Respondent filed its Statements of Reply on 22nd February 2013. The Claimants gave evidence on 25th February 2013, and called one Witness Howard Ombeva Jajuga, who testified on 17th May 2013 when the Claimants closed their case. The Respondent called one Witness John Amboko on 4th July 2013 when the hearing closed. The dispute was last mentioned on 29th July 2013 when Parties confirmed the filing of their Final Arguments and were advised Award would be delivered on notice.

Case for the 1st Claimant, JOSEPH OKINDO

2. He states he was employed by the Respondent Company as a Security Guard. He was employed on or

around the year 2006. He signed a contract on 1st December 2009, which indicated he would earn Kshs. 6,000 per month, and work for 5 hours in a day. This monthly rate was later improved to Kshs. 8,160. He was confirmed in employment and was entitled to annual leave. Contrary to the terms of the contract, he was made to work for twelve hours in a day, from 6.00 a.m. to 6.00 p.m. He was only granted leave once, between 10th February 2012 and 8th March 2012. His contract was terminated without notice, warning or reason on 30th July 2012. He was alleged to have absented himself without the leave of the Respondent. He was not heard. He testified the termination was contrary to the Employment Act 2007. He seeks:-

- a. Service pay at Kshs. 24,480;
- b. One month salary in lieu of notice at Kshs. 8,160;
- c. Annual leave pay for 5 years at Kshs. 40,800;
- d. Overtime pay at Kshs. 62 per hour for 7 hours for 6 years at Kshs. 530,480; and
- e. Twelve months salary in compensation for unfair termination at Kshs. 97,920;

Total..... Kshs. 701,840

Less paid..... Kshs. 34,400

Total Claimed..... Kshs. 667,440

He seeks this sum together with costs, and any other relief the Court may deem fit to grant.

2. Okindo testified that he did not forfeit his previous creditable years of service from 2006, when he signed the contract of 2009. It was not true that he had been absent without the leave of the Respondent, or that he left the gate to the premises opened as alleged by the Respondent. He had no warnings in his file. He used to demand for overtime pay, but the Respondent did not pay. He made these demands through his Supervisor John Amboko, who advised that he in turn, had communicated the demand to the Respondent's Proprietor Mr. Micah, who was a 'Mzungu' [White person]. The Respondent is involved in the promotion of football at Kawangware in Nairobi. The 1st Claimant's child was sponsored to school by the Respondent, but on termination of the 1st Claimant's contract, the sponsorship was discontinued. The contract was signed between Okindo and Amboko for the Respondent.

3. Cross-examined, Okindo stated he did not know how the Respondent was started. He was not told he would work as a volunteer. There was no written contract initially. He was told by the 'Mzungu' he would be under the supervision of Amboko, and would have to follow his Supervisor's instructions. It is not true that Amboko found him out of his duty station. He never saw the warning letter of 23rd May 2011. He worked 24 hours a day. It is not true that the 1st Claimant sneaked out of his workplace to go and sell football match tickets. He did not receive the Respondent's letter of 18th May 2012 reminding him to report to work between 6.00 a.m. and 6.00 p.m. The contract required him to man the main gate, on the lower side of the compound. He was not a volunteer. He did not complain about the hours of work. He did not know why his contract was terminated. On redirection, the 1st Claimant stated he was not a volunteer, and was being paid a salary every month. The contract shows he worked day and night, 24 hours. His off-duty was on Friday.

4. Ronald Barasa, the 2nd Claimant was similarly employed by the Respondent as Security Guard, in 2006. He signed his contract on 1st December 2009. The contract stipulated he would work 5 hours a day, for a monthly salary of Kshs. 6,000. This was subsequently raised to Kshs. 8,160. He was confirmed in his position, and became eligible for annual leave. He was made to work for 12 hours a day, between 6.00 a.m. and 6.00 p.m. He only went on leave once, between 1st June 2011 and 26th June 2011. Without reason, notice or warning, his contract was terminated by the Respondent on 30th July 2012. The Respondent alleged the 2nd Claimant was absent from work without leave. Barasa's child was denied sponsorship by the Respondent after termination. His prayers are:-

- a. Service pay for 6 years at Kshs. 24,480;

- b. One month salary in lieu of notice at Kshs. 8,160;
- c. Annual leave entitlement of 5 years at Kshs. 40,800;
- d. Overtime pay at Kshs. 62 per hour for 7 hours for 6 years at Kshs. 530,480; and
- e. 12 months' salary in compensation for unfair termination at Kshs. 97,920

Total Kshs. 701, 840

Less paid Kshs. 30,100

Total Claimed Kshs. 671, 740

He prays for costs and any other relief the Court may deem it fit to grant.

5. Barasa testified he did not forfeit his previous years of service on signing the contract of 2009. He never reported to work late. He did not receive the letter dated 18th May 2012. He used to complain to his Supervisor about the hours of work. He did not receive any warning letter. He was paid Kshs. 30, 100 on termination. He was not advised on the details of this payment. Cross-examined, the 2nd Claimant testified he was employed as a Security Guard, not in any other capacity. There were no complaints at the facility that items, were getting lost. He was employed to man the main gate. John Amboko was the Director and Howard the Supervisor. Barasa received the warning dated 11th October 2011. The contract had a clause for summary dismissal. He was advised Kshs. 30,100 was severance pay for 4 years worked. He clarified on redirection that the contract was in continuity from 2006.

6. Howard was the Administrator/ Supervisor at Vapor Sports up to 2011. He served with the Respondent from its foundation as a Church Institution. The Claimants worked under him. The Claimants complained to him that they never went on leave, and worked overtime without compensation. He forwarded their complaints to his Supervisor John Amboko. Amboko trivialized the matter. Okindo worked 24 hours, while Barasa worked 12 hours at night. The agreement was that each would work 5 hours. Amboko told Howard that the Claimants' overtime work would be compensated, even if it amounted to Kshs. 1 million. Howard was dismissed when he reminded Amboko to pay the Claimants their dues. He was first demoted in May, and then dismissed altogether in November 2011. There were no volunteers at the facility. Cross-examined Howard stated he did not have any document to show he served as the Administrator/ Supervisor. He registered the complaints by the Claimants in his e-mail account, but did not extract these for the benefit of the Court. He was dismissed for advocating the Claimants' cause. His duties included pitch and security supervision. He worked with the Respondent from its foundation, and understood its operations well.

7. The Respondent's position is that both Claimants were employed as Security Guards, but only from 1st December 2009. Prior to this, they worked as volunteers. They were not to work for 5 hours; they would work from 6.00 a.m. to 6.00 p.m. The agreed working hours were 12, from Monday to Saturday. They were summarily dismissed on account of gross misconduct. The decision of the Respondent was made within the Employment Act 2007. The Respondent has always been ready and willing to pay to the Claimants the proper terminal dues, but they persisted in making unjustified claims. The sponsorship to school from the Respondent only benefited children of the employees, and would not be continued where one ceased to be an employee. The Claimants had received warning letters. They were afforded the opportunity to be heard, and paid terminal benefits. Termination was fair.

8. John Amboko testified the Respondent was founded in 2006 as a Church Ministry. It was registered in 2009, as a Trust. Okindo was employed by the Director Mr. Christian. Amboko joined in 2009. Okindo signed his contract on 8th December 2009. He worked as a Guard, and had worked in this position prior to the signing of his contract. His Supervisor was Mr. Ombeva. He was supposed to work for 12 hours, and lived within the premises. He earned Kshs. 6,000 monthly. He was absenting himself from work. He would report to work late and leave early. He was issued a letter of warning. He did unauthorized duties for another company called Ticket Masters. Amboko once found Okindo at the Bus Stage ticketing, and issued him another warning. On 29th August 2012, Amboko had returned to the premises from a football

game. He played for a team called City Stars. He found the gates open. When he called Okindo, Okindo lied, saying he was at the gate. Amboko saw Okindo emerge from his house which was nearby. He did not explain why he was not on duty. Amboko issued him a letter of summary dismissal. He was paid terminal dues based on the number of years worked. The employees went on recess when the Football League took its break in June to August of every year.

9. Amboko came to know Ronald Barasa in 2009. The Witness did not know where Barasa came from. By the time he signed his contract, Amboko had already employed him. He agreed to work 12 hours as a Night Guard. He too had similar disciplinary problems as Okindo and was issued letters of warning before being summarily dismissed. He was paid his terminal benefits. Howard was dismissed on similar grounds as the Claimants. The Claimants' children ceased to be sponsored by the Respondent because they were not participating in the Football League. The Respondent deducted and forwarded monthly contributions to the N.S.S.F for the Claimants. Amboko testified the only item the Respondent would be willing to pay the Claimants is the annual leave pay.

10. Cross-examined, Amboko stated he is a Director of the Respondent. He was a volunteer in 2006. He was there from its inception. Okindo was a Member of the Hope Baptist Church, and was Guard from 2008. Amboko came to know Barasa in 2009. The Ministry became a Trust in 2009, and gave the Claimants written contracts of employment in 2009. The contracts indicated 'night' and 'day'. It did not mean they worked 24 hours. They worked for 12 hours. There is no person who can work 24 hours. They were issued warning letters. Both letters were received by Okindo. They did not acknowledge receipt. They demanded to be paid overtime. Ombeva never approached Amboko with regard to the Claimants' overtime pay. They were paid service for the years worked. Okindo worked for 5 years. The Statement of Reply says he worked from 1st December 2009. Amboko confirmed Okindo was an employee before 2009. The Children were participating in the Respondent's internal Football League, and were granted school sponsorship on the basis of such participation. Okindo did not take leave from 2008. He took leave in 2011 and 2012. The Respondent did not have documentation for 2011. Barasa worked for 12 hours, not 5 as indicated in the contract. The Respondent made an error by not printing a fresh contract. He was employed in 2009, and took leave for the first time in 2011. Amboko closed his evidence with the clarification that the Claimants did not work for 24 hours. They worked 12 hours a day. Okindo lived in the compound. The Respondent did not seek legal advice in paying service pay. The Respondent urges the Court to dismiss the consolidated Claim.

The Court Finds and Awards:-

11. There is ample evidence the two Claimants were employed by the Respondent in 2006, as Security Guards. The Ministry was founded in 2006, and Howard Ombeva, the Witness called by the Claimants was working for the Respondent at its inception, and largely corroborated the evidence given by the Claimants. John Amboko joined in 2009. He conceded Okindo worked for the Respondent before 2009, while he did not appear sure on the tenure of Barasa. Amboko stated he did not know where Barasa came from, but it was Amboko who employed Barasa in 2009. From the evidence of the Claimants and in particular that of Howard, it is clear the Claimants were in service before the Ministry became a Trust in 2009. It was then that the Claimants were issued written contracts of employment. The formalization of their terms and conditions of employment did not affect their accrued years of service. The Court is satisfied that in computation of terminal benefits, the Respondent ought to have taken the year 2006 as the starting point.

12. The contracts signed on 1st December 2009 were misrepresented by the Claimants. They allege they were supposed to work for 5 hours, between 8.00 a.m. and 1.00 p.m. from Monday to Friday, and on Saturday from 8.30 a.m. to 12.30 p.m. Instead, they were made to work night and day, for 24 hours. This is inconceivable and a misinterpretation of the contract. The Court understood Mr. Amboko's evidence to explain that the Parties made an error while drawing the contracts, by failing to correct the hours of work to read 6.00 a.m. to 6.00 p.m. The contracts are clear the Claimants served as Night and Day Guards and took one day off each week. It would not make sense for the contracts to provide for 5 hours of work between 8.00 a.m. and 1.00 p.m. while at the same time designating the Claimants as Night and Day Guards. The practice in the industry does not support the 5 hours of work in a Day for Security Guards.

The designation did not mean the Claimants worked continuously for 24 hours as Okindo attempted to persuade the Court. It is not humanly possible for any person to work nonstop. The understanding of the Court is that they worked for 12 hours, 6 days a week. The contracts they signed on 1st December 2009 seem to have been standard contracts intended for other cadre of employees at the Facility. The Parties took these templates, and modified them to suit the peculiar nature of guarding duties, but made excusable errors in the process of modification. Such errors cannot confer unintended rights and obligations on the Parties. It was of course easy for Okindo to be liberal in his interpretation of his hours of work, considering that he had his residence within the premises, and could walk in and out his workplace at will.

13. The maximum hours of work permitted under the Regulation of Wages [Protective Security] Services Order 1998, under Regulation 6 for all employees including Day and Night Guards shall be 52 hours, spread over 6 days a week. The Claimants worked 12 hours for 6 days, bringing their total hours to 72 in a week. The Respondent's evidence, as supported by its letters to the Claimants, was that the Claimants worked for 12 hours in a day. They worked from 2006, a period of 6 years. Every week, they worked 20 hours of overtime. These are the hours which merit overtime compensation, over a period of 6 years. Regulation 7 stipulates that where an employee has done overtime as shown above, he/she is compensated at one and a half times the normal hourly rate of wages per hour, in respect of the overtime hours. The rate is taken at twice the normal hourly rate for overtime done during rest day. The Claimants did not work on rest days, but did 20 hours of overtime every week. Where an employee is not employed by the hour, his/ her hourly rate is deemed to be 1/225 of the basic wage. In the case of the Claimants, they were not paid by the hour, and their hourly rate would be Kshs. 8,160 x 1/225 = Kshs. 36.30. One and a half the hourly rate would be Kshs. 54.40. The overtime hours over 6 years amount to 5,760 x Kshs. 54.40 = Kshs. 313,344, not Kshs. 530,480 as pleaded. ***Each Claimant is allowed Kshs. 313,344 in overtime pay.***

14. The Respondent did not discount the evidence by Okindo that he only took annual leave once, between 10th February 2012 and 8th March 2012. Barasa only took leave between 1st June 2011 and 26th June 2011. The Claimants are entitled to have annual leave pay for the balance of the 5 years they did not get this break or compensation in lieu. ***They are each granted 21 days' salary in annual leave pay for 5 years, at Kshs. 32,953 each.***

15. The Claimants were paid what was described as severance pay. Okindo received and acknowledged Kshs. 34, 400 based on 5 years of service. Barasa received Kshs. 30,100 based on 4 years of service. It was not made clear how many days' salary this is calculated from. Taking a minimum of 18 days' salary for each completed year of service, as is prevailing in the private security industry, the Claimants would have been entitled to Kshs. 33,895, within the range paid by the Respondent. Service pay would only have been mandatorily payable if the Claimants were not Members of the N.S.S.F. Their pay slips, and the evidence of Mr. Amboko, suggest they were subscribed to the N.S.S.F. They are not entitled to further social security payments. Their claims for gratuity/service pay are disallowed.

16. There was sufficient reason or reasons given by the Respondent to justify termination. Amboko's letters dated 30th July 2012 gave similar reasons which were:-

- The Claimants were continuously absent from duty;
- The code of conduct [?] had been reported to Amboko by many concerned parties;
- Amboko had found no one manning the gate at 12.30 a.m. on 29th July 2012; and
- The Respondent had lost its properties in mysterious ways.

These were regular accusations and are recorded in writing. The Court was persuaded by the evidence of Amboko that the letters were received by the Claimants. Barasa was reminded he should be reporting to work from 6.00 p.m. to 6.00 a.m. Okindo was reminded in a letter written the same day as the one to Barasa, that he should report to work from 6.00 p.m. to 6.00 a.m. He received what was described as 2nd Warning Letter on 25th November 2011, which complained that Okindo had been selling tickets at football matches, while leaving the gates unmanned. It is possible that the Claimants took the advantage

of their proximity to the Football Stadium to engage in other activities outside their Guard Duties, which placed the Respondent's property at risk. There were valid reasons to justify termination.

17. Mr. Amboko failed the fair procedure test, in arriving at his decision. The letters of dismissal issued on 30th July 2012. Amboko simply told the Claimants he had decided to terminate the Claimant's contracts with immediate effect, for the reasons given above. There was no chance given to the Claimants to explain themselves. No hearing took place as intended by Section 41 of the Employment Act 2007. In this regard, the decisions were unfair. ***The Claimants are entitled to compensation which the Court grants at 3 months' gross salary each calculated at Kshs. 25,500 each. They shall also have one month salary in lieu of notice each at Kshs 8,160.*** In sum the Court Orders-:

- a. ***Termination of the Claimants' contracts of employment was unfair on account of procedure***
- b. ***The Respondent shall pay to each Claimant Kshs. 25,500 in compensation; Kshs. 8,160 in notice pay; Kshs. 32,953 each in annual leave pay; and Kshs. 313,344 in overtime pay;***
- c. ***The total sum of Kshs. 379,957 shall be paid to each Claimant by the Respondent within 30 days of the delivery of this Award; and***
- d. ***No order on the costs.***

Dated and delivered at Nairobi this 5th day of February 2014

James Rika

Judge