



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 325 OF 2013

SHADRACK NDUNDACLAIMANT

VERSUS

ORITH SYSTEMS LTDRESPONDENT

J U D G M E N T

I N T R O D U C T I O N

The claimant brings this suit alleging that the respondent underpaid him during his tenure of service and finally unlawfully and wrongfully dismissed him on 7th April 2013. He prays for accrued employment benefits plus damages for unfair termination totaling to ksh.251,703/ plus costs and interest. The respondent has however denied liability and contended that it is the claimant who deserted work without notice after being paid all his salary worked for. She further denied the alleged underpayment and contended that the salary was mutually agreed between herself and the claimant. The suit was heard on 12/2/2014 when the claimant testified as CW1 and Alice Simbar testified as RW1 for the respondent.

CLAIMANTS' CASE

CW1 was employed by the respondent as a guard on 14/1/2012 and continued until 7/4/2013 when he was dismissed by RW1. His salary per month was ksh.4500 and he worked 7 days in a week sometimes day and night. He never had rest day or leave during his 15 months service at the respondent. During his service he used to be send by RW1 to bring other persons for recruitment as guards. One of the persons he brought was Mr. kinyamasyo Munyoki who worked for only 2 months and disappeared after he allegedly stole a metal.

The RW1 gave him a police note to take to the chief for arrest of Mr. Munyoki. The claimant complied and indeed the suspect was arrested and taken to the police custody but later he escaped. When the employer was notified of the escape she told CW1 not to return to work. When the month ended CW1 went for his pay but he was denied for the reason that he deserted work.

CW1 then reported matter to the labour office for conciliation but the respondent declined to honor summons. CW1 then made a demand through his lawyer but again the respondent refused to pay.

CW1 maintained that he had no problem with the employer before the said incidence by Kinyamasyo Munyoki and as such the termination was unfair. He prayed for the underpaid salary compensation in line with the statutory minimum salary of ksh.11007, leave not taken and notice pay.

On cross examination, he dismissed the record by the employer showing that he never worked continuously as mere fabrication which he did not sign on. He also dismissed the record showing that he worked throughout April 2013 and maintained that he worked only upto 7th April 2013 and then he was send to pursue the arrest of kinyamasyo Munyoki for the remainder of the month only to be denied pay on return at the end f the month.

As regards the underpayment, he contended that he could not complain about the ksh.4500 salary in fear of losing his job.

DEFENCE CASE

RW1 is the respondents manager. She admitted that CW1 had worked for the respondent for many years and he used to report to the supervisor Mr. Isaack Kumba who used to check attendance at the sites. The said supervisor is still working for the respondent.

According to RW1, CW1 used to go home with permission whenever he received his salary but not every month. RW1 confirmed that CW1 worked from Monday to Saturday as night guard but on Sunday he worked day and night. In addition there were days when he worked overtime like in September 2012. She confirmed that the claimant had agreed on a salary of ksh.4500 only because the client paid ksh.9000 per guard. She also used to give extra pay for overtime.

She denied that CW1 was entitled to any leave contending that he never worked for a complete month. She also clarified that whenever CW1 went off duty, he received no pay. She further explained that CW1 left employment in September 2012 after receiving his salary complaining that it was little but resumed in October 2012 after he left hospital where he was admitted. RW1 denied ever dismissing claimant in May 2013. She maintained that she paid him his April salary and he went home to follow up Munyoki. That while at his home, he called Rw1 asking for money to use for the arrest of Munyoki whom he had seen. RW1 send money by Mpesa to CW1 but no arrest was made. RW1 later received a demand letter from claimants lawyer to which she responded on 21/8/2013 by her letter annexing master roll marked exhibit 1 and 2.

On cross examination RW1 admitted that the master roll she produced as exhibit did not bear the signature for CW1 or herself. She also confirmed that the alleged theft by Munyoki did not take place at the claimants work station. After the close of the hearing both parties filed written submissions

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- a. **Whether the claimant was unfairly dismissed or he deserted work.**
- b. **Whether the claimant is entitled to the reliefs sought.**

Unfair dismissal or desertion

Upon careful consideration of the evidence, the court is persuaded by the explanation given by the claimant. It is highly probable that when Munyoki allegedly disappeared after an alleged theft, the employer demanded that the claimant had an obligation to pursue him because he is the one who introduced him to the employer. It is not probable that he deserted work without permission of the employer to pursue Munyoki. If that was the case why did the RW1 send money to him by Mpesa to assist on the arrest? The court finds that the failure to call Mr. Kumba the supervisor denied the court vital evidence to the detriment of the respondent. Had he testified, he would have verified the attendance to duty by the claimant in the month of April 2013.

On the other hand, the roll produced as defence exhibit 2 is a photocopy and does not bear any signature of either of the two witnesses who testified in this case. The court therefore is satisfied on a balance of probability that the claimant employment was unfairly terminated by the respondent and not by desertion

of work by the claimant.

Reliefs Sought

In view of the findings above this court is satisfied that the claimant is entitled to 12 months gross salary for unfair termination because there was no justifiable reason for dismissal and no hearing was accorded to him. He is also entitled to one month salary in lieu of notice. He is also entitled to leave for period served being one month salary as prayed. The foregoing compensation will be based on the minimum statutory salary of ksh11007.

As regards the underpayment claim, the court appreciates that the claimant acquiesced to the underpayment. He should have raised the issue much earlier before the dismissal. The court will therefore not award that retrospective prayer. The summary of the award is therefore ksh.132,084 being compensation for unfair termination, ksh.11007 being salary in lieu of notice and ksh.11007 for leave. The court also awards salary of ksh.11007 for the month of April 2013 which he alleged in evidence to have been denied when he returned from pursuing the runaway guard Mr. Kinymasyo Munyoki. The court awards the said salary under Section 12 of the Industrial Court Act because the claimant was not represented by counsel. In addition no documentary evidence was adduced to rebut the allegation.

DISPOSITION

Consequently, and based on the findings above, judgment is entered for the claimant in the sum of ksh.154,105. The claimant will also have costs and interest from date of filing suit.

Orders accordingly.

Dated, Signed and delivered this 25th day of April 2014.

O.N. Makau

Judge