



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 293 OF 2013

PAMELA ATIENO

CLAIMANT

v

ALINA SECURITY SERVICES LTD

RESPONDENT

JUDGMENT

1. Pamela Atieno (Claimant) was employed by Alina Security Services Ltd (Respondent) on 1 May 2008 as a security guard at a monthly wage of Kshs 3,800/- . The Respondent allegedly terminated her services on 10 March 2012 after which she sought legal advice and filed a Statement of Claim in Court on 13 September 2013, stating the issue in dispute as *underpayment of the general wages order, unfair termination and non-payment of the terminal dues to Pamela Atieno by the employer herein referred to as the Respondent.*
2. The Statement of Claim and Notice of Summons were served upon the Respondent on 17 September 2013, and an affidavit of service sworn by one Paul Odhiambo Outo on 28 October 2013 filed in Court on 30 October 2013. The Respondent's Saida Abeid acknowledged the service by signing and stamping the Notice of Summons, a copy of which was annexed to the affidavit of service.
3. The Respondent therefore had upto or about 30 September 2013 to file a Response. The Respondent did not file a Response.
4. The Cause was placed before Court on 15 November 2013 wherein a hearing date of 3 March 2014 was given with a directive to the Claimant to serve a hearing notice upon the Respondent.
5. When the Cause was called up for hearing on 3 March 2014, Mr. Okemwa appeared for the Claimant while there was no representation for the Respondent. There was proof of service of a hearing notice through the affidavit of service sworn by Paul Odhiambo Outo, deposing that the Respondent was served with a hearing notice on 24 February 2014 which was accepted by a Mr. Pua Gufu who declined to sign the hearing notice. Because there was proof of service, the Court directed the hearing to proceed.

6. The Claimant pleaded that the Respondent did not issue her with a written contract but only issued an employment identity card at employment on 1 May 2008, and that she was earning Kshs 3,800/- per month up to 30 January 2012 when the monthly wage was increased to Kshs 4,000/- .She was on this wage until her services were terminated on 10 March 2012. She also pleaded she was not being paid house allowance, and was being paid below the gazetted minimum wages outlined in various Legal Notices.

7. The Claimant also pleaded that the Respondent never gave her leave during the period of employment contrary to section 28 of the Employment Act, and that she worked 12 hours every day instead of the set 10 hours thus she worked 2 hours overtime every day.

8. It was also pleaded that the Claimant was not given a hearing or explanation before termination contrary to the provisions of sections 35 and 41 of the Employment Act.

9. The Claimant gave sworn testimony and stated that at the time of trial she was working with Times Security Ltd; had been issued with an employment card; was terminated on 10 March 2012 while earning Kshs 4,000/- per month without house allowance; was not granted leave or paid overtime; was not issued with a certificate of service; was not issued with pay slips and was not a member of the National Social Security Fund.

10. In conclusion, the Claimant stated that was not given an opportunity to be heard before verbal termination and that she was seeking the reliefs set out in the Statement of Claim. The total claim is computed at Kshs 310,326/50.

11. The Claimant filed written submissions on 5 March 2014.

Issues for determination

12. Arising from the pleadings, testimony and submissions the questions which arise for determination by the Court are, what is the legal effect of failure by Respondent to file Response, whether the Claimant was entitled to a written contract, whether the Claimant's termination was unfair, and appropriate remedies.

Legal effect of failure to file Response

13. The Court reached a factual conclusion that the Respondent was served with both Notice of Summons and hearing notice, but it failed to file a Response or appear during the hearing.

14. The legal effect of the failure is that there are no real disputes of fact arising because the averments by the Claimant have not been denied, no contrary evidence has been produced to controvert the same or facts pleaded or alleged in opposition.

15. Under this scenario, the Court is at liberty to consider a robust approach and award appropriate relief as sought. This is unlike the practice and procedure obtaining under the Civil Procedure Act and Rules where the party claiming must move on to formal proof.

16. The distinction comes in because in complaints of unfair termination there is a statutory obligation on an employer to produce in legal proceedings a written contract with prescribed particulars to prove or disprove an alleged term of employment asserted by the employee (section 10(3) and (9) of Employment Act, prove reasons for dismissal and that the reasons are valid and fair (sections 43 and 45 of the Act) and that it complied with a fair procedure before taking decision to terminate (section 41 of the Act).

Whether Claimant was entitled to a written contract

17. The material before Court is that the Claimant was employed by the Respondent in 2008 and

was terminated in 2012. The Respondent was under a statutory obligation pursuant to sections 9 and 10 of the Employment Act to cause the contract between it and the Claimant to be reduced into writing so that the Claimant would know and be clear under what conditions she was serving.

18. By failing to issue the Claimant with a written contract, the Respondent was in gross violation of sections 9,10 and 13 of the Employment Act, which failure amounts to an offence under section 16(4) and (5) of the Employment Act.

Whether the Claimant's termination was unfair

19. It cannot be disputed that the Claimant was an employee of the Respondent. A copy of the Claimant's employment card issued by the Respondent with her designation as a guard was produced.

20. The Claimant testified that she was verbally terminated. She was earning a monthly wage. Pursuant to section 35(1) of the Employment Act, she was entitled to written notice in writing of termination, which was not given.

21. The Respondent was also under an obligation under section 41 of the Act to notify and hear the Claimant before taking the decision to terminate her services.

22. Under sections 43 and 45 of the Act, the Respondent was required to prove in Court the reasons for the termination and that the reasons were valid and fair reasons.

23. The Respondent was served with the Statement of Claim but chose not to respond. The effect is that the pleadings and testimony by the Claimant remain unchallenged.

24. The Court on the basis of the pleadings and testimony of the Claimant can only reach the conclusion that the termination of the Claimant was both procedurally and substantively unfair.

Appropriate remedies

One month pay in lieu of Notice

25. The Respondent did not issue the Claimant with a written contract setting out the requisite notice period. By virtue of section 35 of the Employment Act and regulation 24 of the Regulation of Wages (Protective Security Services) Order, 1998 the Respondent ought to have given at least one month notice before termination.

26. The Court would award the Claimant Kshs 7,586/- as one month pay in lieu of notice. This was the gazetted minimum wage for a day watchman as per Legal Notice No. 64 of 2011 which was applicable at the time of termination.

Pending leave

27. The Court having accepted the Claimant's version and considering the provisions of sections 10 and 28 of the Employment Act and regulation 10 of the Regulation of Wages (Protective Security Services) Order, 1998 find the Claimant is entitled to Kshs 21,445/- as pay for accrued/pending leave.

Days worked in March 2012

28. The Claimant is entitled to Kshs 3,355/- being earned wages for days worked before termination.

Underpayments

1 May 2010 to 30 April 2011

29. The basic minimum monthly wage for the period 1 May 2010 to 30 April 2011 for a day watchman was Kshs 6,743/- according to Legal Notice No. 98 of 2010. When house allowance at 15% is factored in a day watchman not provided with housing was entitled to Kshs 7,754/- per month.

30. The Claimant's testimony was that she was not getting a house allowance. The uncontroverted evidence before Court is that the Respondent was paying the Claimant a monthly wage of Kshs 3,800/- which translates to Kshs 45,600/- for the period 1 May 2010 to 30 April 2011. If the Claimant had been paid the minimum wage inclusive of house allowance she would have received a total of Kshs 93,053/-.

31. The Claimant was thus underpaid by Kshs 47,453/- as pleaded.

1 May 2011 to 30 January 2012

32. The gazetted minimum wage for this period according to Legal Notice No. 64 of 2011 for a day watchman was set at a basic of Kshs 7,586/- per month or Kshs 8,723/90 inclusive of house allowance. During this 9 month period, the Claimant received Kshs 34,200/- instead of Kshs 78,515/10 and was thus underpaid by Kshs 44,315/- as claimed.

February 2012 and 10 days worked in March 2012

33. The Claimant's wage was increased to Kshs 4,000/- per month in February 2012. This was still below the minimum wage of Kshs 7,586/- by Kshs 4,723/-. For the 10 days worked in March 2012 the Claimant was entitled to Kshs 3,355/- based on the formula of the gross monthly wage divided by twenty six to get the daily rate which is then multiplied by number of days worked, in this case 10 days.

Overtime

34. The uncontroverted evidence is that the Claimant used to work 12 hours per day instead of 10 hours. There were two shifts each per day. Based on this, the Court finds the Claimant entitled to Kshs 59,712/- .

11 days holiday

35. The testimony presented was that the Claimant was working during holidays. The Court finds that she was entitled to compensation or off days and therefore the claim for Kshs 738/- is merited.

Severance pay

36. There was no plea or evidence of redundancy and this relief is dismissed.

Maximum compensation for unfair termination

37. An award of the equivalent of a number of months gross wages not exceeding twelve months is one of the primary remedies for unfair termination. The award is discretionary, and the Court is enjoined to consider any, some or all of the thirteen factors set out in section 49(4) of the Employment Act.

38. The Claimant did not lead any evidence as to which of the factors the Court should consider in her case. She secured alternative employment after the termination with Times Security Ltd. She has also incurred expenses as a consequence of the termination.

39. The conduct or legal compliance with the requirements of the Employment Act is not one of the factors set out. But the Court notes that the Respondent was in utter disregard of the statutory provisions requiring it to cause the contract to be reduced into writing and not to pay wages below the gazetted minimums.

40. The Court must be able to express its displeasure with these type of practices which go against the entitlement of all workers to fair labour practices. Failing to provide an employee, especially of the level of the Claimant with a written contract cannot be anything other than an unfair labour practice. Paying wages below the gazetted minimum wages is equally an unfair labour practice.

41. Putting the above factors into consideration, the Court is of the view that an award equivalent to twelve months gross wages would be just in the circumstances such as obtain in the instant case.

42. At the time of the termination the minimum wage inclusive of house allowance was Kshs 8,723/- per month. The Court assesses the compensation payable to the Claimant under this head at Kshs 104,686/-.

Certificate of service

43. A certificate of service is a right of an employee and the Respondent is under an obligation to issue the Claimant with one.

Conclusion and Orders

44. In conclusion, the Court finds and holds that the termination of the Claimant was unfair and awards her

(a)	One month pay in lieu of Notice	Kshs 7,586/-
(b)	Accrued leave	Kshs 21,445/-
(c)	Underpayments	Kshs 95,123/-
(d)	Overtime	Kshs 59,712/- .
(e)	11 days holiday	Kshs 738/-
(f)	Twelve months pay as compensation	Kshs 104,686/-
	TOTAL	Kshs 289,290/-

45. The Respondent to issue Claimant with a Certificate of Service within 7 days.

46. There is no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 4th day of April 2014.

Radido Stephen

Judge

Appearances

Mr. Okemwa instructed by

Siocha Okemwa & Co. Advocates

for Claimant

Respondent did not file Response