



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1050 OF 2012

PIUS MACHAFU ISINDU.....CLAIMANT

VERSUS

LAVINGTON SECURITY GUARDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the wrongful dismissal of the Claimant from employment. The Claimant averred that he was employed on 2nd July 2001 and was dismissed on 24th October 2011 without notice. He thus claimed service pay for 3 years – 2008 till 2011, notice pay for 1 month, accrued leave not taken being 216 days, overtime from 2001 till 2011, rest days, unpaid public holidays and house allowance. He also sought compensation for unlawful dismissal as well as unremitted NSSF contributions.
2. The Respondent defended the suit and in its defence denied the claim on overtime, day off and averred that the Respondent did not dismiss the Claimant who absconded from duty. The Respondent asserted that it did not refuse to grant Claimant off days as alleged. The Claimant was liable for deserting the Respondent and ought to pay notice.
3. Claimant testified that he was engaged on 2nd July 2001 by Chelimo but did not receive a letter of employment. He received Ksh. 8,300/= per month consolidated at time of his dismissal. He stated that he was terminated on 24th October 2011. He produced a letter of introduction to Equity Bank which indicated the Claimant was employed in February 2002. He claimed no NSSF dues were paid until 2003. He stated that he worked for 12 hours each day and thus claimed overtime. He stated that he got 4 days off each month but the Respondent deducted the 4 days from salary. He testified that he worked on public holidays and that he did not receive any pay as house allowance.
4. In cross exam he insisted he was employed on 2nd July 2001. He testified that he was hired by Bosco the Operations Manager and Chelimo was the direct manager. His pay rose over the years from 2100/= till 8,300/=. He testified that his supervisor Kibisu sent him to the office and he met Kilonzi when he got to the office and he was sent home. He indicated he had a witness who had a payslip and that marked the end of his testimony.
5. The Claimant called a witness John Elayesa Likhalmi who testified that he knew the Claimant and that they worked together. He confirmed that in October 2011 they were working together and the Claimant was summoned to office. He was not aware of any complaint by a client and

- later heard the Claimant had been dismissed. He denied receiving any payslip. He testified that he did not receive any overtime or house allowance, and that only basic pay was paid. He testified that the Respondent issued 3 payslips to Equity on account of a loan of 15,000/=. The document was not objected to and was produced as evidence. He was employed on 1st February 2003. He referred to payslip to show there was no house allowance and no overtime. There was a deduction of 981/= for overtime. He testified that the Claimant worked well and was not absent from working during the time they worked together.
6. In cross exam he testified that he did not recall any complaint against the Claimant. He testified that he was the Claimant's senior and if there was a complaint it would have been made to him. He did not receive travelling allowance and the payslip he had was an extra copy he had received when he was seeking a loan. He testified no payslips are given.
 7. The Respondent called Edwin Kibisu Alumira, Paul Kilonzi Kithome and Basil Tonto. Edwin Kibisu testified that he was initially operations-in-charge and currently is a supervisor. He testified that he received a complaint from a client on the Claimant's late arrival to work. He summoned the Claimant on 22nd October 2011 to the office and the Claimant met the deployment officer.
 8. In cross examination he testified that he did not have any document to show the employment. He is the one who summoned the Claimant but did not know when the Claimant was terminated. He did not write the dispatch note which had the name Kilonzi on it. He testified that he did not sack the Claimant and neither did he give the Claimant a warning.
 9. In re-exam he stated the dispatch note is from Deployment note which is given to the guard. The deployment is by Deployment note. He testified that the Claimant reported 50 minutes late. He identified the Claimant in court.
 10. The Respondent's second witness was Paul Kilonzi who testified that he was the Deployment officer. The Claimant was sent to him as the Claimant had been given a note which is given to an officer to show an offence was committed by the officer. He saw the note and referred the issue to the HR Officer and she stated the Claimant should undergo a refresher course. A refresher course is for guards who commit an offence. When he told the Claimant the Claimant said he would rather resign than go for the refresher course. He could not force the Claimant to go for training and the Claimant just left and did not return.
 11. In cross exam he testified that his work is to ensure training, refresher courses and deploy those who have to undergo refresher. He also did recruitment and vetting. He testified that Nancy in HR was the one who dealt with employment matters and is the one who recommended the refresher course. He was put on refresher course because he was always a late comer. The instructions for the refresher course were verbal. The Claimant did not go to work from 24th October. He testified that the Claimant absconded from work. He thus was of the view the Claimant is not entitled to be paid the sums claimed.
 12. The final witness for Respondent was Basil Tonto who was the newly appointed HR Manager of the Respondent. He testified that his duties are to recruit, discipline, formulate procedures for human resources reward and discipline. He testified that the Claimant deserted duty. The Claimant was summoned to the office by the supervisor but refused to attend the refresher course. He testified the Claimant declined and left but was not dismissed. If the Claimant had been dismissed the Respondent would have done so in writing. He testified the Claimant was given leave and there was a signed leave form. He denied off days are deducted and stated the salary was inclusive of all monthly dues. He testified that each month payslips are given and salary is paid to the bank. He also testified the NSSF dues were deducted and remitted to NSSF. The Claimant deserted duty and was thus not entitled to notice, and that he was paid all his dues including his last salary. He testified that if there is overtime then it is multiplicand of salary and staff are paid over time when it is due. He testified that house allowance is not shown on the

itemized payslip and he thus did not know if staff were paid house allowance.

13. In cross exam he testified that he relied on the statement of Shallet Kanus filed in court and the file. He relied 100% on what he was told on the matter and confirmed the Claimant was paid everything up to his October salary. He testified that the certificate of service was not given as Claimant deserted employment. He testified there was a summon letter by the supervisor but there is no other letter he had seen to the Claimant notifying the Claimant he had deserted.
14. The Claimant filed submissions which reiterated his position. He submitted that it was responsibility of the employer to keep a written record of all employees employed by the said employer. The Claimant was abruptly stopped from employment while on duty at Glenbrook Apartments in Kilimani. The Respondent's representative Edwin Kibisu summoned the Claimant to the office the next day for the lateness. It was submitted that no record was produced to show that. It was submitted that Paul Kilonzi failed to produce any evidence of desertion. No record was produced to show the Claimant was a habitual late comer. The Claimant submitted there was no show cause letter issued to the Claimant or even a warning letter for lateness. The Claimant submitted the payslip produced by the Claimant's witness proved that no house allowance was paid.
15. The Respondent submitted that the Claimant had failed to prove his case and that he was summoned to the office and met Kibisu who had summoned him due to lateness at the workplace. The Claimant's witness, it was submitted was not a supervisor of the Claimant and did not have authority to receive complaints against his colleague. Kilonzi in his testimony stated the Claimant was told to attend refresher course and deserted employment. It was thus submitted the Claimant deserted duty. The Respondent submitted the evidence of the Claimant was unreliable and not credible. No record or evidence of complaint to labour office was produced.
16. The issue for determination is principally if the Claimant was unlawfully or unfairly dismissed from employment. The Claimant testified that he was employed in 2001 yet his letter of Equity stated he was employed in February 2002. His witness who was employed in February 2003 testified that the Claimant was junior. The Claimant testified that he was employed by Chelimo a director but in cross-exam testified that he was employed by Bosco the Operations Manager. He was adamant that he never received a payslip and was not paid house allowance. If indeed that was true how then did he determine that he was not paid house allowance? What led him to believe that his salary excluded house allowance? The Claimant testified that he was asked to go to the offices of the Respondent and when he reported he met Kibisu and Kilonzi. He says that he was told by an Arce Manager he could not name to go home and wait to be called. He did not produce any letter to that effect and it would seem the Respondents version of what transpired on their respective roles in the summons to the Claimant and their evidence was consistent. The Claimant sought overtime for the period he worked yet there was no record he availed of his alleged extra hours. No note demanding payment of overtime was produced either and it is ample clear that the Claimant made many allegations but failed to prove them. He displayed a statement from NSSF which proved that his employ placed him in the category of employees who are not entitled to service. He however was able to demonstrate that the Respondent was tardy in remittance of NSSF dues.

The Court orders the Respondent to avail to Court a statement showing the state of the Claimant's NSSF account between February 2002 and October 2011. This must be done within 2 weeks of today. The Claimant actually went on leave and had no leave balance due.

17. The upshot of the foregoing is that the Claimant failed to prove his case on a balance of probabilities and the same is dismissed with costs. He admitted receiving his salary in October and since he deserted is not eligible for notice or compensation. Claimant must get certificate of service in any event per S.51 Employment Act.

Orders accordingly.

Dated and Delivered at Nairobi this 8th day of May 2014.

Nzioki wa Makau

JUDGE