



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 360 OF 2013

GEOFFREY KHISA.....CLAIMANT

v

YONGA SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. Geoffrey Khisa (Claimant) lodged a Statement of Claim against Yonga Security Ltd (Respondent) alleging wrongful termination and seeking Kshs 922,691/- being underpayments, house allowance, overtime, off duty worked, gratuity and 12 months damages for wrongful termination.
2. The Respondent was served and on 29 November 2013 it filed a Memorandum of Reply denying all the claims.

Claimant's case

3. The Claimant testified. The Claimant's case is that he was employed by the Respondent on 1 February 2006 as a night security guard at a monthly wage of Kshs 4,000/- but was not issued with a written contract of employment. The Respondent was also not issuing him with a pay slip but he used to sign for his wages in a register kept by the Respondent. He was issued with uniforms (produced but released to him).
4. Sometime in October 2012 the Respondent summarily dismissed him without justifiable/lawful cause. This was when reported back on duty after taking a few days leave. He was not issued with a termination letter and was also not issued with a warning prior to termination or given a hearing.
5. According to the Claimant, he was being underpaid and should have been paid Kshs 9,275/- per month. During the time of employment he never went on leave or off.
6. The Claimant stated that in the course of the relationship, the Respondent's director paid some Kshs 12,000/- to a pedestrian he had knocked down with his bicycle and was deducting the same from his wages on a monthly basis, and that he finished repaying the money.
7. The Claimant further stated that he was a member of the National Social Security Fund but the Respondent did not remit his contributions.
8. The Claimant stated he was seeking the reliefs set out in the Statement of Claim.

Respondent's case

9. The Respondent called one witness Gabriel Juma Munyasya. He stated that the Claimant was introduced to him in 2010 by a friend called Wafula who said the Claimant was his brother in law. He also testified that he had a contract to escort vehicles from the port. He engaged the Claimant to assist escort the trucks but the tasks would be completed in 5-6 days of a month or so after

- which the Claimant would be free.
10. He also confirmed and stated that one time the Claimant called him after knocking down a woman in Kongowea and he paid Kshs 12,000/- on behalf of the Claimant. He used to deduct the same from Claimant's wages. He confirmed the Respondent was not issuing pay slips but paid wages through vouchers.
 11. The witness also stated that in 2011 the Claimant suggested they form a security company but the Claimant did not have capital for the project and so he sought a loan of Kshs 30,000/- from him but which he did not have.
 12. According to the witness, the Respondent was formed in 2012 (copy of certificate produced) and before that he was a security officer with Whylem Security.
 13. The witness in cross examination stated the contract to escort vehicles from the port was from 2010 and that he would engage the Claimant to escort the vehicles and pay him, though Claimant was not his employee.
 14. Before analyzing each party's respective case, the Court notes that the Claimant filed his submissions outside the agreed timeline. No explanation for the delay was given. The Respondent on its part filed its submissions on 24 June 2014 instead of on or before 5 June 2014.

Whether parties had an employment relationship

15. The Claimant's case is that the Respondent engaged him in 2006 as a night security guard. He even produced the uniform issued to him. The Respondent on the other hand contends that it started having a relationship with the Claimant in 2010 to escort vehicles from the port.
16. The Respondent further asserted that it was registered in 2012. The certificate of registration produced show the Respondent was registered as a business name on 20 February 2012.
17. The law recognises oral contracts of service. The Respondent's witness was not forthcoming with information on what his relationship with the Claimant from 2010 was. He did not appear candid.
18. The Court has the testimony of the one against the other. On the basis of the uniform produced the Court gives the benefit of doubt to the Claimant that he was engaged by the Respondent as a security guard.
19. But that conclusion cannot resolve the question of when the relationship started. The Respondent was registered as a business name in 2012. In the view of the Court, a business name is just a business name. It is more probable that Mr. Gabriel Juma Munyasya was carrying on a security guarding business under his name much earlier than the registration of the business name.
20. In my mind the relationship between the Claimant and the Respondent or its proprietor started in 2006. The Claimant was even specific and gave a date when he was engaged. The Court believes him.

Whether the Claimant was being underpaid

21. The Claimant's evidence is that he was being paid Kshs 4,000/- per month right from 2006. He stated that he should have been paid Kshs 9,275/- per month.
22. The Claimant though represented by counsel did not inform the Court what the prescribed minimum wages were during the period of his employment. The Statement of Claim did not set out the law/contract relied on to base this head of claim as required by rule 4(e) of the Industrial Court (Procedure) Rules, 2010.

Whether the termination was unfair

23. The Claimant's testimony was that he was not issued with a termination letter. Prior to termination he had not been given any warnings. He was terminated when he had just returned from a short leave.
24. The Respondent contended the Claimant was not its employee save for intermittent contracts to escort vehicles. The Court has already observed that the Respondent's witness was not forthcoming with information. He did not even reveal how much he used to pay the Claimant for the escort duties.
25. The law (section 41 of Employment Act) requires an employer to follow a fair procedure before

terminating the services of an employee if the reason for termination is based on conduct, performance or incapacity.

26. Further, the law obliges an employer to prove the reasons for termination and that the reasons are valid and fair reasons if related to conduct, capacity or compatibility (sections 43, 45 and 47(5) of Employment Act.

27. The reasons for terminating the services were not revealed. In the circumstances, the only logical conclusion that the Court can reach is that the termination of the services of the Claimant was unfair.

Appropriate relief

Underpayments

28. The Claimant sought Kshs 401,184/-. The formula used to reach this figure was not revealed in Court. The statutory/contractual foundation for the relief was also not laid. This head of claim is declined.

House Allowance

29. For reasons similar to those set out in the previous paragraph this head of claim is declined.

Overtime/hours worked off duty

30. No evidentiary basis was laid. The Claimant did not lead any evidence as to the working hours and how many hours he worked per day and for how long. This claim is equally declined.

Gratuity

31. For similar reasons this claim is also declined.

Compensation for wrongful termination

32. The Court has reached the conclusion the termination of the Claimant was unfair. Compensation equivalent to not more than 12 months gross wages is one of the primary remedies for unfair termination. It is a discretionary remedy though.

33. Like any other discretion, it must be exercised judiciously. Section 49(4) of the Employment Act has set out some 13 factors the Court ought to consider (any, some or all).

34. The Claimant has incurred expenses including, legal, as a result of the unfair termination. The Court has also declined to grant the Claimant's plea for underpayments

35. The Claimant was serving under unknown terms of employment. At time of trial he was working in a construction site.

36. The Court would award the Claimant the equivalent of 6 months wages based on the prescribed gross minimum wage for a night watchman (basic wage and 15% house allowance) which was Kshs 11,006/-. The same is assessed at Kshs 66,039/-.

Costs

37. Costs do not follow the event in the Industrial Court. The Claimant has partly succeeded. The parties did not file submissions on time. The Court would award the Claimant costs assessed at Kshs 20,000/-

Conclusion and Orders

38. The Court, in conclusion finds and holds that the Claimant was engaged by the Respondent from 2006 as a night security guard and that the termination of his services was unfair and awards and orders the Respondent to pay him

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|--------------------------|---------------|
| a. 6 months compensation | Kshs 66,039/- |
| b. Costs | Kshs 20,000/ |

TOTAL Kshs **86,039/-**

39.The claims for underpayments, house allowance, overtime, off duty and gratuity are dismissed.

Delivered, dated and signed in open Court in Mombasa on this 27th day of June 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Okanga instructed by Okanga & Co. Advocates

For Respondent Mr. Angima instructed by Hudson Wafula & Co. Advocates