



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 227 OF 2012

ERNEST EHENJE IRUNGU NGOLO CLAIMANT

VERSUS

BENSON IRUNGU MUYA RESPONDENT

Claimant in person

M. N. Kamau for Respondent

JUDGMENT

1. The Claimant is Mr. Ernest Ehenje Irungu Ngolo whereas the Respondent is Mr. Benson Irungu Muya.
2. The suit is based on a statement of claim dated 10th February 2012 and filed on 21st February 2012 seeking the following reliefs:
 1. severance pay ($\frac{3,000}{30} \times 15 \times 5$) in the sum of Kshs.7,500/=;
 2. one (1) month salary in lieu of notice in the sum of Kshs.3,000/=;
 3. arrears salary for 34 days in the sum of Kshs.6,800/=;
 4. payment in lieu of 21 days leave for five years in the sum of Kshs.10,500/=; and
 5. maximum compensation for unlawful and unfair termination.

Basis of the claim

3. In terms of the particulars of claim pleaded in the statement of claim and the testimony of the Claimant under oath, the Claimant was employed by the Respondent as a Security Guard on 28th April 2003 earning a monthly salary of Kshs.3,000/=. The Claimant served the Respondent continuously and diligently until 11th August 2009, when the Respondent wrongly and unlawfully terminated the Claimant's services without notice. The Respondent did not give him a hearing and refused to pay him the terminal benefits enumerated above.

4. The Claimant has demanded payment in vain hence the suit. He was not given a letter of

appointment and was stationed at the Respondent's home in Ngong.

He worked seven (7) days a week from 6 p.m. in evening until 6 a.m. in the morning.

5. According to the Claimant, the Respondent delayed paying his salary for the month of July 2009 and when he demanded payment the Respondent verbally terminated his employment without giving him any reason at all. He told the Court that he was still owed by the Respondent thirty four (34) days salary.

Leave days

6. The Claimant told the Court that he did not go on annual leave for five (5) years. The Respondent did not entertain any such request. He at times was given off days as he was entitled to one (1) off day a week. He claims payment of 21 days leave for five (5) years as per his entitlement under the Employment Act.

7. He was dismissed without notice and was not paid in lieu thereof. He therefore claims one (1) month salary in lieu of notice.

The Claimant was registered with the National Social Security Fund (NSSF) and he was paid Kshs.10,900/= in respect thereof by NSSF.

8. The Claimant finally told the Court that his dismissal was unfair as it was not for a valid reason and he was not given any opportunity to explain why he should not be dismissed from employment.

9. He was keenly cross examined by counsel for the Respondent and explained that the Respondent simply told him to go away when he asked for payment of arrear salary.

He denied that he had refused to work as put to him by counsel for the Respondent.

10. He reported the matter to the Ministry of Labour but the Respondent refused to attend conciliation meeting or respond to the letter. He therefore came to Court. He explained that he only got about five (5) off days in a period of six months but was never given annual leave.

He lived in a rented house at Ngong and was not housed by the Respondent.

Response

11. The Respondent relies on an amended statement of claim dated 11th July 2013 and filed on the same day with leave of Court.

The Respondent admits that the Claimant was employed sometimes in July 2003 but avers that he left employment in December 2004 when he absconded from work.

12. The Court notes that in the initial statement of claim, the Respondent admitted that the Claimant had served till August 2009 and he had paid his salary for the month of August 2009 when he absconded from duty.

13. The Respondent further avers that the Claimant went for leave every December and August. This appears to contradict the amended version by the Respondent which indicates that the Claimant served for a period of one year and six months only.

The Respondent denies the entire claim in toto and adds that the same is time barred and would raise a preliminary objection at the time of the hearing for the same to be struck off and or dismissed with costs.

14. The Respondent (RWI) testified in support of his case as follows:

That he lives in Ngong and employed the Claimant as a casual night watchman in July 2003. That the Claimant served at his personal house in Ngong and reported to work in the evening at 6 p.m. till morning at 6 a.m. That he paid him a monthly salary of Kshs.3,000/=. That he worked for approximately one and a half years till December 2004 when he just disappeared from work.

He told the Court that he did not issue the Claimant with a letter of appointment as he worked on a daily basis.

He worked seven (7) days a week and had paid him for all days worked by the time he absconded.

He said that the Claimant went on leave in December 2003 and in August 2004 for 15 and 10 days respectively. That he was registered with NSSF and NHIF. This evidence further contradicts his assertion that the Claimant was employed as a daily paid casual. If it was the case, he would not have been registered as such.

He said that the claim is time barred as the Claimant left work in 2004. He denied owing him thirty four (34) days salary. He said he did not keep any record of his employment.

Determination

15. In terms of *Section 74(1)*

“an employer shall keep a written record of all employees employed by him with whom he has entered into a contract under this Act which shall contain the particulars –

(b) specified in *Section 10(3)*;

(f) of an employee’s annual leave entitlement, days taken and days due specified in *Section 28*.”

Under *Section 10(3)* the employer must keep;

“(a) any terms and conditions relating to any of the following-

i. Entitlement to annual leave, including public holidays and holiday pay”

(b) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.”

Furthermore, under *Section 9(1)(a) & (b)* as read with *Section 9(2)*, the employer is obliged to provide a written contract of service to an employee in respect of a contract of service;

“(a) for a period or a number of working days which amount in aggregate to the equivalent of three months or more; or

(b) which provides for performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months;”

The Claimant was this category of employee but the Respondent admittedly defaulted to provide him with a written contract of employment nor keep any record pertaining to any or all terms of employment.

Section 10(7) reads:

“if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Sub-section (1) the burden of proving or disapproving an alleged term of

employment stipulated in the contract shall be on the employer.”

16. In this regard, the Claimant has stated that he worked from July 2003 up to August 2009 and that his employment was terminated when he demanded to be paid thirty four (34) days arrear salary accrued from July 2009.

He has also told the Court that he was entitled to twenty one (21) days annual leave per year and was not granted any leave for five (5) years.

17. The Court is satisfied that the Claimant has established on a balance of probability that he started working for the Respondent on 28th April 2003 and worked continuously till 11th August 2009.

18. The Court is also satisfied that the Claimant did not go on leave at all for the period of five (5) years and at the time he left he was owed thirty four (34) days salary and his employment was unlawfully and unfairly terminated, when he demanded payment of the arrear salary.

19. The Claimant has not claimed for overtime though the Respondent admits that the Claimant worked for 12 hours per night. He should have been paid 4 hours over time daily at the rate of 1^{1/2} of the salary. The Court notes that this but its hands are tied in this respect.

20. The Respondent has failed to discharge his onus of rebuttal especially because he did not keep any records. He also had made material admissions which support the Claimant's version of the terms of service before he belatedly amended the statement of Response.

21. The testimony by the Claimant was not candid and was contradictory in material respects.

The Court finds that this claim was filed on 21st February 2012 within three (3) years from the date the cause of action arose in August 2009. The preliminary objection is without basis and the same is dismissed.

22. In the final analysis the Court awards the Claimant as against the Respondent as follows:

- (i) Kshs.3,000/= being one month's salary in lieu of notice;
- (ii) unpaid wages for thirty four (34) days in the sum of Kshs.6,800/=;
- (iii) payment in lieu of five (5) years leave in the sum of Kshs.10,500/=;
- (iv) severance pay for five (5) years in the sum of Kshs.7,500/=.

23. The Claimant was also underpaid for the entire period of employment and was not given house allowance. Again these claims were not made and the Court cannot award the same.

24. In view of the entire circumstances of this case the Court awards ten (10) months salary to the Claimant being compensation for the unlawful and unfair termination of the employment per **Section 45(1) & 2(a) & (c)** as read with **Section 49(1)(c)** of the **Employment Act, 2007** in the sum of Kshs.30,000/=.

Total Award is Kshs.50,300/=.

The Award to be paid with interest at Court rates from date of this judgment till payment in full.

The Respondent to also pay the costs of the suit.

Dated and Delivered at Nairobi this 20th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE