



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 797 OF 2011

EZEKIEL MULEKANI KEYA.....CLAIMANT

VERSUS

TEREGELA SECURITY SERVICES LIMITED.....1ST RESPONDENT

MR. PETER M. MUSIOMA2ND RESPONDENT

JUDGMENT

THE Claimant Ezekiel Mulekani Keya filed this suit against the Respondents, Teregela Security Services Limited and its Director Peter M. Musioma by way of Memorandum of Claim dated 22nd May 2011 and filed in court on 26th May 2011. He prayed for the following reliefs:

- a. The sum of Kshs.799,230/= particularized in paragraph 8 of the claim,
- b. 12 months salary compensation for unlawful termination @9,500/= = 114,000.00
- c. Cost of the suit,
- d. Interest in (i), (ii), (iii) above,
- e. Any other relief as this court may deem just.
- f. A declaration that the Respondents must obey and respect the law in their dealings with the Claimant;

The Respondents filed a Memorandum of Reply to the Memorandum of Claim on 29th June 2011. They allege that the Claimant was engaged as a casual in September 2010 and worked until March 2011 when he was dismissed for absence without leave or any justifiable cause. A copy of a letter of dismissal dated 20th April 2011 is annexed. The Respondents denied that the Claimant worked for the 1st Respondent for 7 years or that he gave notice of retirement and retired at expiry of the notice. The Respondents prayed that the Claim be dismissed with costs.

The Claimant filed Reply to the Respondents Defence on 19th April, 2012. He attached a letter from the Yemeni Embassy confirming that he worked at the Embassy from March 2004 to March 2011 as an employee of Teregela Security Services.

The case was heard on 18th September 2014. The Claimant who appeared in person testified on his behalf while the Respondents called the Operations Manager George Ogoti RW1.

The Respondent was represented by Mr. Nyachoti instructed by K.A. Nyachoti & Co. Advocates.

The Claimant testified that he was employed by the 2nd Respondent to work for the 1st Respondent in March 2004 and posted to the Yemeni Embassy as a day guard. He worked from 6 am to 6 pm. He worked at the same station for 7 years. He was not getting leave, off days or public holidays. He worked alone during the day while there were 2 guards during the night. On 29th December 2010 he wrote a letter giving his employer notice of his intention to retire on 31st March 2011. He testified that on 31st March he went to the office and was paid his salary for March and nothing else. When he asked for his benefits he was chased away and told he can go anywhere. He reported the issue to the Ministry of Labour which advised him to go back and negotiate settlement with his employer. When he went back to the employer he was told he would not be paid anything. That is when he decided to file the claim in Court. He prayed for orders sought in his Memorandum of Claim. His last salary was Kshs.5,500/=.

RW1 testified that the Claimant was employed in September 2010 as a relief day guard after he was referred to the Respondent by one of its directors who knew the Claimant when he was working with Affiliated Security Managers as a good guard and therefore recommended him to the Respondent. RW1 further stated that the claimant worked as an employee of Yemeni Embassy with another guard by the name Fredrick Onsarigo Momanyi. He testified that the Yemeni Embassy contract expired but the Claimant did not report back to the Respondent's office to be either redeployed or clear and get paid his terminal benefits. RW1 testified that he dismissed the Claimant for absconding duty; that the claimant disappeared after receiving his last salary. He denied refusing to issue a certificate of service to the Claimant. He also denied seeing the Claimant's notice of retirement. He further stated he was not aware the claimant returned his uniforms.

The Respondent filed written submissions while the Claimant who was acting in person did not.

I have considered the pleadings, the evidence adduced in court and the Respondent's written submissions. In my considered opinion the issues for determination are the following:

1. Is the 2nd Respondent properly enjoined in this case?
2. When did the Claimant start working for the Respondents.
3. Whether the Claimant retired or was dismissed and if dismissed, whether the dismissal was fair.
4. Is the Claimant entitled to the reliefs sought?

1. Is the 2nd Respondent properly enjoined in this suit

The Employment Act defines an employer as:

*“**employer**” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.*

It is my opinion that the employee is therefore entitled to sue any of the persons referred to in the definition of an employer. The 2nd Respondent who admits being a director of the 1st Respondent is in my opinion properly enjoined in these proceedings as a Respondent. I therefore find that the 2nd Respondent is properly enjoined to these proceedings, but his liability would be transferred to the 1st Respondent as vicarious liability.

2. When did the Claimant start working with the Respondent?

The Claimant testified that he was employed by the Respondents in March 2004 and posted to work at the Yemeni Embassy where he worked until he handed in his retirement notice on 29th December 2010. He served the notice upto 31st March 2011. He therefore left work after his retirement notice expired. He testified that he was never issued with any letter of appointment by the Respondent. The Claimant further

testified that after his retirement and refusal of the Respondents to issue a certificate of service to him he approached the Yemeni Embassy which issued him with a letter confirming that he worked there as an employee of the 1st Respondent from March 2004 until March 2011. The letter is annexed as Appendix EMK Two to his Reply to the Defence of the Respondent. The Claimant further attached a copy of a personal history record form of the Respondent which he testified that was issued to him by the Respondent to fill at the time of recruitment.

The Respondents witness RW1 testified that the claimant was employed as a casual day relief guard in September 2010, that he worked with another guard by the name Fredrick Onsarigo Momanyi as an employee of the Yemeni Embassy.

The Respondent did not submit any documents or evidence to disprove the evidence adduced by the claimant. Although it was alleged that the claimant worked initially with Affiliated Security Services and with another guard, the other guard was not called to testify on his work history with the claimant nor was the contract between Affiliated Security and Yemeni Embassy or the 1st Respondent's contract with Yemeni Embassy produced to support the Respondent's contention (in its submissions which is not admissible evidence) that it took over the contract at the Yemeni Embassy after Affiliated Security Services ceased operations.

The Respondent submitted that the letter from the Yemeni Embassy relied upon by the claimant is not admissible as the Claimant is not the author. I do not agree. The Claimant testified that the letter was issued to him at his request after the Respondent refused to issue a certificate of service to him. The letter is stamped with the seal of the Embassy and there is a signature on the seal. The fact that there is no name of the author on the letter is not sufficient to make it inadmissible.

Section 10 and 74 of the Employment Act require employers to keep records which include date of commencement of employment, the form and duration of the contract, place of work and hours of work of its employees.

Section 10(7) provides that where in proceedings an employer fails to produce such records it will be the employer's burden to disprove a term of contract as alleged by an employee.

I am satisfied that the claimant has on a balance of probabilities proved that he was employed in March 2004 by the 1st Respondent and the 1st Respondent has failed to disprove the allegations.

I therefore find that the Claimant was employed by the 1st Respondent as day guard deployed at the Yemeni Embassy from March 2004 to March 2011.

3. Whether the Claimant retired or was dismissed

The Claimant alleges that he gave 3 months notice of retirement on 29th December 2010 and left employment at the expiry of the notice. The Claimant testified that he gave the letter to his supervisor, a Mr. Mbithi on 29th December 2010. The Respondent did not deny that Mr. Mbithi was the Claimant's supervisor or that the Claimant gave him the letter.

The Respondents allege that the Claimant absconded duty after the contract with the Yemeni Embassy expired. The Respondent only alleged that the claimant failed to report to the office after the contract expired. It is not stated when the contract with Yemeni Embassy expired or whether the Claimant was informed about the expiry of contract.

RW1 testified that the Claimant absconded duty after earning his salary for March 2011 which he must have been received from the Respondent's office. It cannot therefore be true that the claimant absconded duty after receiving his salary for March 2011 which was paid at the Respondent's office after the Yemeni Embassy contract expired as the Claimant testified that at the time of receiving his salary he also asked for terminal dues but was chased away.

I find the Respondents version of the circumstances of Claimant's absconding duty unbelievable. The dismissal if done, does not comply with Section 41 and 43 of the Employment Act. The Claimant testified that he was not aware of the letter and saw it only in the court documents.

I therefore find that the Claimant retired from employment after giving and serving notice period of 3 months. I further find that the purported dismissal by the Respondents is an afterthought.

4. Is the claimant entitled to the prayers sought?

Apart from the general denial in the Reply to Memorandum of Claim, there was no specific denial of any of the prayers by the Claimant. RW1 did not make as much as a mention of the prayers by the Claimant. In the absence of such denial, the Claimant is entitled to his prayers provided they are legally due to him.

The benefits are payable under Section 48 of the Labour Institutions Act as read with Section 63(2) and 64 and as particularized under the Regulations of Wages (Protective Security Service) Order, 1998 herein referred to as Protective Security Order having been employed in the Protective Security Industry Sector. The Claimant has pointed out that the minimum rate of pay for a day guard in 2010 was Kshs.6,743/= excluding 15% house allowance. The consolidated wage was Kshs7,755/=.

On the specific claims I make the following orders:

a. Notice

The claimant is not entitled to notice as he is the one who gave notice and he served the notice.

b. Severance pay

The Claimant is not entitled to severance pay as he was not declared redundant. He is however entitled to gratuity at 18 days per year worked in accordance with the gratuity Clause in the Protective Security Order which provides as follows:

Rule 17

(1) After five years' service with an employer, the employee shall be entitled to eighteen days pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.

(2) An employee who is summarily dismissed for lawful cause or who

terminates his services for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity:

Provided that-

a. In the event of a dispute with regard to termination of services on account of ill-health, the decision of an independent\qualified medical practitioner on such a dispute shall prevail; and

(b) The normal retirement age shall be fifty-five years.

I award him **Kshs.32,571/=**.

c. Annual leave

The Claimant is entitled to annual leave for 7 years at 26 days per year for all 26 days per year worked as provided in paragraph 10 of the Protective Security Order.

I award him **Kshs.47,047/=**.

d. Off duties

According to Section 27 of the Employment Act and Paragraph 8 of the Protective Security Order an employee is entitled to at least one whole rest day each week. The Claimant is therefore entitled to holidays each year for the 7 years he worked with the 1st Respondent.

This amounts to **Kshs.18,095/=** which I award him.

e. Leave travelling allowance

The Claimant is entitled to leave travelling allowance of Kshs.850/= per year for 7 years at **Kshs.5,950/=** as provide in the Protective Security Order Paragraph 13.

f. Weekdays overtime

According to the Protective Security Order, Security Officers are required to work a maximum of 52 hours spread over 6 days a week. The Claimant worked for 12 hours a day making 72 hours a week. He worked 20 hours overtime per week. For 52 weeks for 7 years he worked 7,280 hours. Overtime is paid for at 1.5 times the normal hourly rate. The formula for calculation of overtime according to the Protective Security Order is one-two hundred and twenty –fifth of employee basic monthly wage. He is therefore entitled to **Kshs.31,167.60/=**.

I have awarded overtime for one year only based on 5.90 of Employment Act for continuous injury.

g. Official public holidays

According to the law all employees are entitled to a day off on a public holiday. Should an employee work on a public holiday he is entitled to payment at double the normal hourly rate. The Claimant is therefore entitled to payment of 12 hours at double rate for 12 months. I award the claimant **Kshs.7,192.50/=** being overtime for 12 months.

h. Under payments of basic pay

The basic pay for 2010 was Kshs.6,743/=. The Claimant was paid Kshs.5,500/=. He was therefore underpaid by Kshs.1,243/= per month. Since this wage was only applicable for 12 months, I award the Claimant underpayments for 12 months only in the sum of **Kshs.14,916/=**.

i. House allowance

The Claimant was not paid house allowance for the duration of the contract. House allowance for 1010 at 15% of basic pay was Kshs.1,011.45/=. I award Claimant house allowance for 12 months at **Kshs.12,137.40/=**.

j. Saturday and Sunday overtime

Saturday overtime has already been taken into account under weekly overtime which was based on overtime for 6 days a week while Sunday overtime is included under off duty.

k. 12 months salary compensation

Having found that the Claimant retired on his own application the Claimant was not unfairly terminated and is not entitled to compensation. The claim is dismissed.

In summary, I award the Claimant the following:

| | | |
|--------------------------------|---|-------------------|
| a. Severance pay | - | Kshs. 32,571/= |
| b. Annual leave | - | Kshs. 47,047.00/= |
| c. Off duties | - | Kshs. 18,095.00/= |
| d. Leave travelling allowance | - | Kshs. 5,950.00/= |
| e. Weekdays overtime | - | Kshs. 31,167.60/= |
| f. Official public holidays | - | Kshs. 7,192.50/= |
| g. Under payments of basic pay | - | Kshs. 14,916.00/= |
| h. House allowance | - | Kshs. 12,137.40/= |

TOTAL - **Kshs.169,076.50/=**

The Claimant was not represented and is not entitled to costs. The decretal sum will attract interest at court rates from date of judgment.

Read in open Court this 10th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

K. A Nyachoti for Respondents

Ezekiel Keya present in person