



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1952 of 2011

MOSES INDIRE MUNZWERE CLAIMANT

-VERSUS-

C AND A SECURITY SERVICES RESPONDENT

AWARD

By a Memorandum of Claim dated 3rd February 2012 and filed in Court on 7th February 2012 the Claimant alleges that he was wrongfully terminated by the Respondent on 19th February 2011 and prays for the following:-

1. 1 months' salary in lieu of notice.
2. Accrued leave for 2 years.
3. Uniform refund.
4. Rest days.
5. Severance pay.
6. 12 months' salary as compensation.
7. Refund of Firimbi SACCO.

The Respondent filed its response to the Claimant's Memorandum of Claim on 7th February 2012 in which it admits employing the Claimant but alleges that the Claimant deserted duty on 19th February 2011. The Respondent further alleges that the dispute was settled by the Labour Officer and that this Court has no jurisdiction to entertain the claim. The Respondent denies owing the Claimant payment as set out in his prayers.

The case was heard on 10th December 2012 when the Claimant appeared in person while the Respondent was represented by Mr. Oyalo.

The Claimant testified on his behalf while the Respondent called 2 witnesses **MR. PETER OUKO OBARA**, the Security Advisor and **MR. JOSEPH OWUOR OKUKU**, the Respondents Operations Manager.

The Claimant testified that he was employed by the Respondent as Security Guard on 1st February 2009 on a salary of Shs.4,000/= per month. He was never issued with a letter of appointment. His duties included opening gate from 6 p.m to 6 a.m. That Respondent owns a hotel and he also lit 2 Jikos and fetched 20 buckets of water every morning before leaving work at 7.30 a.m. He was never given any off days and never took annual leave. He testified that he was absent on 19th February 2012 and when he went to work the following day he was told to go to the office the following day. When he went to the

office he was sent away. On the 3rd day he told the employer to pay him his terminal dues if they do not want to employ him. He also asked for his co-operative contributions was being deducted from his salary at the rate of Shs.300/= per month. That he was told to write a letter asking for payment. He went back to collect his money after 3 months but was not paid. After going several times unsuccessfully he reported to the Ministry of Labour. The Labour Officer called meetings 2 times but the Respondent did not attend forcing him to go to Kituo Cha Sheria for assistance. He testified that he was paid salary for days worked in February 2011. That the employer was not paying NSSF but he was deducted NHIF at shs.100 per month. That he was also charged Shs.100/= per month for uniform. He further testified that he worked on all public holidays and was never given any rest day. He was also never paid overtime. In cross examination the Claimant stated that he was not aware any money was deposited at the Labour Office. The Claimant denied that he left work on his own volitions.

Respondents witness No.1 Peter Ouko Obara testified that he is the Respondents Security Advisor and the Claimant worked under him. He testified that the Claimant absented himself for 3 days on 19th, 20th and 21st February 2011 and reported back to work without going to the office first. That he told the Claimant to report to the office as he had already assigned work to someone else. That from that day he did not see the Claimant until they met in Court, and that 3 months later the Respondent received a letter from the Labour Office.

Respondents witness No.2 Joseph Owuor Okuku testified that he is the Operations Manager of the Respondent and knew the Claimant on 1st March 2009, when he started working for the Respondent as a Security Guard, that the Claimant was a good employee. That the Claimant did not report to work from 19th February to 22nd February 2011. That the Claimant was working at the Director's residence. That he did not see the Claimant from 23rd February 2011. He testified that he received the letter from the Labour Office on 16th May 2011. That he went to the Labour Office on 18th May 2011 and held a meeting with the Labour Officer. That in the notice from the Labour Officer the Claimant demanded notice pay, leave for 1 year, off days, public holidays and uniform deduction. That the Labour Officer told him to pay what was due and he deposited Kshs.7,400 to the Labour Officer who gave him an acknowledgement attached as Appendix "A001" to Respondents Memorandum of Reply. He testified that he was not issued a receipt and that he does not know if the Claimant received the money. He said the Claimant was free to go and collect the Sacco money.

On examination by the Court RW2 stated that the Claimant's salary was Shs.4,500 per month, that he did not take leave, was working from 6 pm to 6 a.m. and worked on public holidays, did not take rest days and did not have a letter of appointment.

I have considered the pleadings and the evidence and the testimony of the Claimant and the Respondents witnesses. From the evidence on record, the issues for determination are whether the Claimant was unlawfully terminated or left employment on his own volition and whether he is entitled to the prayers sought.

It is not contested that the Claimant was employed on 1st February 2009 and worked until 19th February 2011 when he absented himself from duty. It is also not contested that he did not take leave or day off for the duration of his employment, and worked for a minimum period of 12 hours every day. It is also not contested that the Claimant absented himself from work on 19th February 2011 and was sent away when he reported back to work.

From the evidence, the Claimant was never given a hearing in terms of Section 41 of the Employment Act. His termination was therefore unfair both procedurally and substantively. The next issue is whether he is entitled to the prayers sought.

In both the Memorandum of Claim and in his testimony, the Claimant has prayed for the following:-

- 1) 1 months' salary in lieu of notice.
- 2) Acrued leave for 2 years.

- 3) Uniform refund.
- 4) Rest days.
- 5) Severance pay.
- 6) 12 months' salary as compensation.
- 7) Refund of SACCO contributions.

1) 1 months' Salary in lieu of notice

Having found that the termination of the Claimant's employment was unfair, he is entitled to 1 month's salary in lieu of notice in terms of Section 49(1) (a) of the Employment Act. The Claimant alleged that he was paid Shs.4,000/= per month while the Respondent's witness RW2 stated that he was paid Shs,4500 per month. Both rates are below the statutory minimum rate of pay which was Shs.6,839 from 1st May 2009 and Shs7,523 from 1st May 2010. Section 10(7) of the Employment Act places the burden of proof of terms of Employment on an employer who fails to produce records of terms of employment while Section 48(1) of the Labour Institutions Act mandates the Court to read in the statutory minimum rate of pay in the event of underpayment.

In this case the Respondent failed to discharge the responsibility of producing statutory employment records and I therefore have no alternative but to rely on the figure submitted by the Claimant of Shs.4,000 per month.

I will therefore use the statutory minimum wage for night watchmen of Shs.7,523+15% house allowance as provided in the Regulation of Wages and Conditions (General Order) 2010 as the proper rate for payment of 1 months gross salary in lieu of notice.

I award the Claimant the sum of Shs.8,651.45.

(2) Accrued leave for 2 years

The Respondent's witness RW2 admitted that the Claimant did not take leave for the 2 years he worked for the Respondent. He is therefore entitled to 21 days leave each year as provided by law. This adds up to 42 days leave which translates to $8,651.45 \div 30 \times 2 = 12112.00$.

I award the Claimant the said sum of Shs.12,112.00 as payment in lieu of leave for 2 years.

(3) Uniform Refund

The Claimant testified that he was charged Shs.100 per month for uniform. The Respondent did not deny this allegation either in the Reply to the Memorandum of Claim or in the testimony of its 2 witnesses.

I therefore find that the Claimant is entitled to refund of Shs.100/= per month for the 24 months he worked for the Respondent and award him the sum of Shs.2,400 as prayed.

(4) Rest days

The Respondent admitted that the Claimant did not take any off days for the duration of his employment. According to the law every employee is entitled to 1 rest day in every period of 7 days. The Claimant was therefore entitled to 52 rest days every year and 104 days in 2 years. An employee who works on a rest day is entitled to payment at double the rate payable on a normal working day. The Claimant is therefore entitled to $7,523 \div 30 \times 102 \times 2$ Shs.51,156.40.

I award him the said sum of Kshs.51,156.40 in lieu of rest days.

(5) Severance Pay

An employee is only entitled to severance pay if he has been declared redundant. The Claimant was not declared redundant and is therefore not entitled to severance pay. The claim for severance pay is therefore dismissed.

The Claimant is however entitled to service pay in terms of Section 35(5) as read together with 35(6) of the employment Act. I award him service pay for 2 years at the rate of 15 days salary per year worked amounting to Kshs.7,523.

(6) 12 months compensation

Section 49(1)(c) of the Employment Act provides for payment of a maximum of the equivalent of 12 months' gross salary as compensation to an employee who has been unfairly dismissed. Having found that the Claimant was unfairly dismissed, he is entitled to compensation. However taking into account the length of service which was just 2 years, 12 months' would be on the higher side.

I consider 3 months' salary to be reasonable compensation in the circumstances and award him Shs.25,954.35 being 3 months gross salary at the rate of the statutory minimum rate for night watchman at the rate of Shs.8,651.45 per month.

(7) Refund of Firimbi SACCO contributions.

The Claimant alleges that he was not refunded his SACCO contributions which he paid at the rate of Shs.300 per month. The Respondent admitted the same and stated they are ready to pay the Claimants contributions whenever the Claimant goes to collect it. The Claimant is therefore entitled to refund of the same and I award him Shs.7,200 being his Firimbi SACCO contributions.

Overtime, Public Holidays and underpayments

The Claimant did not pray for payment of overtime and Public Holidays. He however stated he worked every day from 6 pm in the evening to 7.30 a.m. in the morning. The Respondents witness RW2 admitted that the Claimant worked from 6 p.m. to 6 a.m. every day without a break for rest day, Public Holiday or Annual leave.

Section 48 of the Labour Institutions Act provides that where an employer gives an employee terms that are less favourable than those provided for under minimum statutory terms, the minimum terms will be deemed to replace the inferior terms. The Section reads as follows:-

(a) The minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement.

(b) If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

The Claimant is therefore entitled to the overtime worked in excess of 52 hours per week. Having already compensated him for off days, the overtime would be based on 6 days a week at 12 hours per day adding up-to 72 hours a week. From this is deducted 52 which is the prescribed working hours per week according to the Protective Security (1998) Order.

The Claimant thus worked overtime 20 hours every week. For the 104 weeks he was in employment, he worked overtime of 2080 hours. This at the rate of 1.5 per hour worked amounts to Shs. 7,523 ÷ 30 ÷ 10 × 2080 × 1.5 = 78,239.20.

I award the Claimant the sum of Shs.78,239.20 as overtime.

Public Holidays

The law provides that any employee who works on a public holiday is entitled to be paid at the rate of double. The Claimant worked on all public holidays during the 24 months he worked for the Respondent. Each year has 11 public holidays. Thus for the 2 years he worked on 22 public holidays. At double rate he is entitled to Shs.7,523÷30x22x2=11,033.73.

Under Payments

As I have already stated above, the Claimant was paid at the rate of Shs.4,000 per month. The statutory minimum rate of pay for night watchmen during the period that the Claimant worked for the Respondent was as follows:-

1st February to April 2009 – Kshs.5,796 (add 15% House allowance)=6,665.40.

1st May 2009 to April 2010 – Kshs.6,839 (add 15% House allowance)=7,864.85.

1st May 2010 to February 2011 – Kshs.7,523 (add 15% House Allowance)=8,651.45.

The underpayments were therefore as follows:-

February, March and April 2009 (3 months) at 6,665.40-4,000(x3)=7,996.20

1st May 2009 to April 2010 (12 months) 7,864.85-4,000(x12)=40,135.

1st May 2010 to February 2011(10 months) 8,651.45-4,000(x10)=31,348.55.

The total under payments for the period worked by the Claimant is therefore Shs.79,479.75.

I award the Claimant the said sum of kshs.79,479.75 accordingly.

The total under payments for the period worked by the Claimant is therefore Shs.79,479.75.

I award the Claimant the said sum of Kshs.79,479.75 accordingly.

In summary, I award the Claimant the following:-

1.	1 months notice	-	kshs.8,651.45
2.	Accrued leave	-	Kshs.12,112.00
3.	Uniform refund	-	Kshs.2,400
4.	Rest days	-	Kshs.51,156.40
5.	Service pay	-	Kshs.7,523
6.	Compensation	-	Kshs.25,954.35
7.	SACCO Refund	-	Kshs.7,200
8.	Overtime	-	Kshs.78,239.20
9.	Public holidays	-	Kshs.11,033.73
10.	Under payments	-	<u>Kshs.79,479.75</u>
	Total:	-	Kshs.283,749.88

The same should be paid to the Claimant within 30 days failing which interest shall start to accrue at Court rates from the date of expiry of the 30 days to the date of payment in full.

There shall be no orders for costs.

Orders accordingly.

Read in open Court and signed on this 23rd day of April 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Moses IndireMunzwere

In the presence of:- _____ Claimant

No appearance

_____ for Respondent