



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 51 OF 2013

MAURICE OKECH ONYANGO.....CLAIMANT

-VERSUS-

RILEY-FALCON SECURITY SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2013)

JUDGMENT

The claimant Maurice Okech Onyango filed the statement of claim on 20.02.2013 through Githiru & Company Advocates praying for judgment against the respondent for:

- a. **Kshs.100,833.60 as per the official assessment of the claimant's dues by the County Labour Officer, Nakuru County vide their letter dated 1.10.2012 addressed to the respondent.**
- b. **Kshs.72,000/= being unpaid additional salary-responsibility allowance from April 2011 to February 2012 when the claimant served additionally as tally clerk as well as a guard.**
- c. **Compensation of the claimant for wrongful dismissal from employment.**
- d. **Compensation for underpayment under the statutory minimum for the entire period the plaintiff worked.**
- e. **Interest at court rates on the above and costs of the suit.**

The respondent filed the memorandum of defence on 22.03.2013 through S.M. Onyango & Associates and prayed that the court finds that the claimant's termination was lawful and fair and the claim be dismissed with costs.

The case was heard on 23.05.2013 when the claimant gave evidence to support his case and on 5.06.2013 when the respondent's witness (RW) Charles Amolo Mcrege, the Branch Manager gave evidence to support the respondent's defence.

The claimant's evidence was as follows:

1. He was at the time of the hearing employed at K.V.D.A in Eldoret as a night guard.
2. The respondent employed him as a guard from January 2007 to 9.03.2012 performing duties of a guard, dog handler, alarm systems and clerk at a time during the employment.
3. His supervisor was Mcrege, RW, when on 9.03.2012 he was deployed at the respondent's alarm

- systems. He was scheduled for night duty from 6.00 pm to 6.00 am. Upon reporting on duty at about 6.00 pm, RW addressed him and told him to go home because he was a person of short stature and was not required at the workplace because as a person with short stature he could not deal and handle things at work. At employment in 2007, his height had not been an issue.
4. He reported a dispute at the labour office and a meeting was held. The Labour officer found that the respondent had violated statutory requirements regarding to leave, underpayments and notice amounting to Kshs.100,833.60 as per the letter by the officer dated 1.10.2012 attached on the statement of claim.
 5. Sometimes in April 2011, the respondent deployed the claimant to united millers as a stock tallying clerk and by the letter dated 7.06.11 on the statement of claim the claimant complained that he was not competent to perform the job and despite the extra duties his salary remained the same at Kshs.6,000/=. He requested to be deployed as a normal guard. The work as a tallying clerk entailed the work of a cashier, inventory taking on sales of bread and supervising staff.
 6. The reason for termination, namely his short stature had no basis because he had served the respondent for six years and the issue had never been raised before the verbal termination.

RW testified as follows:

1. As the respondent's branch manager, he was responsible for staffing issues, coordinating operations and as the respondent's representative in Nakuru region.
2. The claimant was employed as a guard and deployed to specified stations to keep vigilance, as back up crew for rapid response team, and at radio calls.
3. In 2012, the respondent became ISO certified and the qualifications for respondent's guards under the certification are 5.7 ft height a minimum of D+ at 'O' level and without any physical challenges including perfect sight.
4. The claimant was expected at work at 6.00 am on 8.03.2012 but he did not show up and he could not be reached on phone. He showed up at 7.20 pm that day and the claimant and RW held a meeting at the veranda to RW's office. RW was working late that evening. The claimant wanted to be scheduled to work on the night shift at a station near his residence at a place called KITI in Nakuru. The claimant did not explain his absence from duty as scheduled for the day shift that date. RW narrated to the claimant the previous record of poor performance including failing to keep vigilant while on duty and instead scheming to sleep while on duty as reported by the clients.
5. After the meeting, the claimant walked away and never resurfaced until the meeting with the labour officer around 8.4.2012.
6. The claimant was paid for the days worked from 26.02.2012 to 8.03.2012.
7. The claimant was never engaged as a tally clerk which was a special job requiring at least a score of C plain at 'O' level certificate examinations, computer literacy and a certificate of good conduct from the police. At all material time, the respondent had only one tally clerk deployed in Nakuru region and only 4 countrywide. A guard could be deployed to oversee the work of the tally clerk and the overseeing entailed getting order forms, making postings on dispatch register at stores and confirming loaded goods. Overseeing was a function between guarding and tallying functions.
8. The claimant deserted duty and was deemed to have left employment. The claimant was served the letter dated 13.03.2012 to terminate his services on account of absconding duty on 8.03.2012 attached on the memorandum of defence. The labour officer's computation was not paid.

The claimant's written submissions were filed on 12.06.2013 and the respondent's on 19.06.2013. The court has considered the pleadings, the evidence and the submissions and makes the following findings:

1. The first issue for determination is whether the respondent terminated the claimant's contract of service unfairly. RW1 stated that he did not have power to terminate the claimant and that a due process of justice was necessary. The letter dated 13.03.2012 as attached on the memorandum of defence is clear as it is the termination letter. The respondent is said to have been absent on 8.3.2012 and was not on duty as expected. The letter states the absence led to the claimant being declared an absconder and was deemed to have voluntarily terminated his services as of own volition. On account of the alleged absence, the court finds that the respondent was required to follow the due process of fairness as envisaged in section 45(2) (c) of the Employment Act, 2007.

The court finds that the respondent failed to inform the claimant by notice the allegations against him and also failed to afford him the hearing as prescribed in section 41 of the Act. It is the opinion of the court that where the employee has absconded duty as alleged in the present case, it is the prerogative of the employer to invoke the relevant disciplinary procedure failing which, the employer thereby confers the entitlement to the employee to plead unfair termination.

As for the reasons for termination, the respondent has stated that the claimant raised concerns about his station of deployment. The claimant says he was orally dismissed on alleged short stature that was not needed by the respondent but the respondent has denied the claimant's assertion. Concerns about the deployment are, in the opinion of the court, justified grievances as envisaged in section 46(h) of the Employment Act, 2007 that required amicable resolution under the respondent's grievance management procedures. The ISO certification policy prescribing height as a qualification to serve as the respondent's guard suggests that RW may have taken such offensive in dealing with the claimant's case. In any event, the claimant has failed to establish the reason for the dismissal and on a balance of probabilities the court finds that the claimant was dismissed on account of urging a grievance on his duty station, an unjust ground for termination in the court's view.

Accordingly, the court finds that the termination was unfair.

2. The claimant has prayed for several remedies and the court makes the following findings:
 - a. The respondent has submitted that the due statutory wage was Kshs.7,846/= and house allowance of Kshs.1,176.90 making a gross monthly pay of Kshs.9,022/=. The claimant having been paid a monthly gross salary of Kshs.5,720/=:, the respondent has submitted that the underpayment was Kshs.3,302.90 making **Kshs.39,634.80** for the twelve months and the court finds the claimant entitled accordingly.
 - b. In view of the under payment, the respondent has submitted that leave was paid on the basis of the under payment and the due leave payment taking into account the statutory payment is the difference being **Kshs.4,624.06** for 2 years and the court finds the claimant is entitled accordingly.
 - c. The court finds that the claimant has not established that he was deployed to serve as a tally clerk and is not entitled to pay on that account as prayed for.
 - d. RW admitted that there were occasions the claimant was required to work for long hours without formal break and the court finds that the claimant is entitled to **Kshs.3,138.40** for overtime as computed by the labour officer as a reasonable pay on that claim.
 - e. The claimant was dismissed without any termination notice and the court finds that he is entitled to one month pay in lieu of notice being **Kshs.9,022.90** as per section 35(1) (c) as read with section 36 of the Act.
 - f. The court has found that the termination was unfair. The court has considered the bumpy claimant's employment record and finds that a pay of six gross monthly salaries will be a fair pay for the unfair termination being **Kshs.54,137.40** at the rate of Kshs.9,022.90 per month.

In conclusion judgment is entered for the claimant against the respondent for:

- a. A declaration the termination of the claimant's employment was unfair.
- b. The respondent to pay the claimant **Kshs.140,557.56** by 1.08.2013 failing interest to be payable thereon from the date of the judgment till full payment.
- c. The respondent to pay the costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 28th June, 2013.**

BYRAM ONGAYA

JUDGE