



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1330 OF 2010
KENYA GUARDS AND ALLIED WORKERS UNION.....CLAIMANT
VS
LAVINGTON SECURITY LIMITED.....RESPONDENT
AWARD

Introduction

1. By a Memorandum of Claim dated 28th October 2010 and filed in Court on even date the Claimant sued the Respondent for wrongful termination of David Kiptanui Arap Ruto, the grievant herein. The Respondent filed a Reply on 21st July 2011.
2. Prior to coming to Court, the Claimant referred the matter to conciliation but no agreement was reached prompting the Conciliator to issue a certificate of disagreement. The matter came up for hearing on several occasions but did not proceed because the grievant was unwell. The Claimant and the Respondent therefore agreed to proceed by way of written submissions.

The Claimant's Case

3. According to the Memorandum of Claim the grievant, David Kiptanui Arap Ruto was employed by the Respondent on 29th April 2009 as a security guard at a consolidated monthly salary of Kshs. 4,000.
4. On 5th May 2010, the Respondent terminated the grievant's employment, without notice or lawful cause. On the same day the grievant was instructed by a supervisor to return his uniform. The grievant's attempt to get audience with the Respondent's management did not yield fruit. The Claimant claimed that prior to his termination, the grievant had a clean employment record. The Claimant submitted that the Respondent did not support the conciliation process.
5. The Claimant's claim on behalf of the grievant is as follows:
 - a. One month's salary in lieu of notice
 - b. Underpayment of wages
 - c. Off duties earned and not paid
 - d. Public holidays
 - e. Leave due and not taken
 - f. Leave traveling allowance
 - g. House allowance
 - h. Overtime
 - i. 12 months' pay in compensation for unfair termination

The Respondent's Case

6. In its Reply, the Respondent stated that the effective date of the grievant's employment was 1st May 2009 and attached an employment contract as evidence. The Respondent denied that the grievant's employment was terminated, rather the grievant was suspended pending investigation. According to the suspension/warning letter dated 6th May 2010, the grievant was to report back on 14th May 2010 for re-deployment.
7. The Respondent averred that the grievant did not report back but instead went to seek assistance from some organisation known as Western Kenya Human Rights, an action which according to the Respondent was premature.
8. In its written submissions, the Respondent submitted that the grievant's suspension letter outlined the reasons for the suspension to wit; failure to wear proper uniform on 29th April 2010 and failure to report to his assigned duty station on 4th May 2010. According to the Respondent, the grievant was to remain under suspension for 10 days after which he was expected to report back for re-deployment but he failed to do so.
9. The Respondent further submitted that there was no Recognition Agreement between the Claimant and the Respondent and that therefore the Claimant had no *locus standi* to negotiate on behalf of the grievant.

Findings and Determination

10. In determining this case, I will begin by addressing the issue of the Claimant's *locus standi* to represent the grievant. In its written submissions, the Respondent stated that because there was no Recognition Agreement between the Claimant and the Respondent, the Claimant could not negotiate on behalf of the grievant.
11. This Court has had occasion to rule on this matter in the past. In the case of **Kenya National Private Security Workers Union Vs Lavington Security Limited (Industrial Court Cause No 377 of 2013)** the Court held that:
- “The notion that the absence of recognition vitiates the employee's right of representation has no place in our time as it flies right in the face of the express provisions of the Constitution. “***
12. Article 41 of the Constitution confers upon employees the right to join and participate in the activities of a trade union of their choice. The absence of a Recognition Agreement between an employer and a trade union does not take away the right of the employee to be represented by his trade union. In line with this principle, the Claimant's *locus standi* to represent the grievant both at the conciliation stage and in these proceedings is unassailable.
13. Having established the Claimant's *locus standi*, I will now deal with the issue of the termination of the grievant's employment. The parties gave conflicting accounts of the circumstances leading to the cessation of the grievant's employment. The Claimant averred that on 5th May 2010, the grievant was instructed by a supervisor to return his uniform and leave his place of work. The grievant's attempt to get audience with the Respondent's management did not yield fruit.
14. The Respondent on the other hand stated that the grievant was suspended for ten days and that he failed to resume duty as instructed in the suspension letter. The Respondent therefore viewed the grievant as a deserter.
15. Section 47(5) of the Employment Act, 2007 provides that :

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest

on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

16. From the evidence on record neither the Claimant nor the Respondent proved their allegations on the circumstances surrounding the termination of the employment relationship between the grievant and the Respondent. The claim for unfair termination therefore fails. I however award the grievant one month's salary in lieu of notice.

17. I will now deal with the claim for underpayment. The Regulation of Wages (General) (Amendment) Order, 2009 which came into effect on 1st May 2009 set the minimum salary for a night watchman working in a municipality at Kshs. 6,340 (exclusive of house allowance). The grievant was therefore underpaid on basic salary by Kshs. 2,340 per month.

18 On the claim for leave, the Respondent did not produce any leave records as required under Section 74 of the Employment Act. In the absence of such records, I award the grievant 21 days pay in lieu of leave.

19. With regard to the claim for house allowance, Section 31(1) of the Employment Act provides that:

An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

20 The Respondent did not lead any evidence to show that the grievant was housed or that his pay included house allowance. I therefore award the grievant house allowance at Kshs. 951 per month being 15% of his basic pay. The Court adopts the resultant figure as the grievant's salary for purposes of this Award.

21. The claims for off duties, public holidays and leave traveling allowance were not proved and are hereby dismissed.

22. The net effect of this Award is as follows:

a) One month's pay in lieu of notice.....	Kshs. 7,291
b) Salary underpayment (2,340x12).....	28,080
c) Leave (7,291x21).....	5,104
30	
d) House Allowance (951x12).....	<u>11,412</u>
Total.....	51,887

The Respondent did not show cooperation at the conciliation stage and will therefore pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF JUNE 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....**Claimant**

.....*Respondent*