



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 70 OF 2013**

(Before Hon. Justice Hellen Wasilwa on 27<sup>th</sup> November, 2013)

THOMAS NDIEGE OYUGI ..... CLAIMANT

**-VERSUS-**

RILEY FALCON SECURITY SERVICES ..... RESPONDENTS

**JUDGMENT**

The claimant herein filed his memorandum of claim in person on 26.3.2013. His case is that he was employed by the respondents on 8.7.2008 as a driver earning Ksh 6629/= as per his appendix employee TO1. He claims he was a permanent employee because of a letter written to the National Bank of Kenya dated 10.2.2009 appendix TO2. He stated that his services were unprocedurally and unlawfully terminated on 30th November 2012 as per appendix 703. He avers that the respondent did not give him any reasons for terminating his services and they never paid him his house allowance. He also avers that he was also underpaid his wage from 2010 to 2012 as per the various government legal notices. He seeks orders that he be paid up where he was underpaid and also seeks for damages for wrongful termination plus costs of this suit. The claimant also gave oral evidence before court and was cross examined by counsel for the respondent and agreed that he signed an employment contract. He says he previously worked for the government but his contract came to an end and he was paid his terminal dues. He stated that he was 56 years old when the respondent employed him.

The respondents on the other hand filed their memorandum of response on 24.4.2013 through the firm of S. M. Onyango and Associates. It is the respondents case that they employed the claimant on 21.7.2008 on a one year contract as per their exhibit marked RFSL – 1. That this contract was subsequently renewed as per exhibits RFSL 3(a)(b)(c) and (d). The last of these contracts started on 1.4.2012. It is the respondents case that the claimant's accusations as enumerated in the memorandum of claim is baseless. They deny that the claimant is entitled to any underpayment. The respondents submitted that they were justified in terminating the claimant's contract for acts of performing his work carelessly and improperly as per their exhibits RFSL – 4(a) (b) and RFSL – 5. They avers that they exercised their right to terminate the claimant's contract as per the terms of this contract and taking into consideration the claimant's conduct.

Having considered the evidence of the claimant and respondents and also their respective submissions, the issues for consideration are:-

- 1. What were the terms of engagement between the claimant and respondents.**
- 2. Whether the respondents breached any of these terms of engagement.**
- 3. Whether claimant is entitled to any of the prayers sought.**

On 1st issue, the claimant was employed by the respondents on 21.7.2008 vide an appointment letter Exh TO1. On the same day he signed an employment contract detailing his duties and responsibilities and other factors that would guide this relationship. According to clause 2; 1-1, the contract stated that the claimant had been offered one year contract commencing on 8.7.2008. The contention by claimant that he was engaged on permanent and pensionable terms is not true. This contract was subsequently renewed as demonstrated by the respondents yearly with the last contract being the one dated 31.3.2012 for 9 months with effect from 1.4.2012. This contract would have terminated on 31.12.2012. The respondents terminated this contract as scheduled on 31.12.2012 vide their letter dated 30.11.2012 when the claimant was given 1 month notice of termination of the contract. The issue therefore of unfair and unprocedural terminal of employment does not arise.

Under this contract, the claimant was employed as a driver and initially his salary was consolidated to Kshs 6,629.00/= which fact the claimant also accepted. The issue of house allowance did not therefore arise. This is in line with Section 31(2) of the Employment Act 2007 which states that:-

**“This Section shall not apply to an employee whose contract of service;**

**(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation ---”**

In the claimant's contract, the element of a consolidated pay was included and this in essence covered any anticipated claim of house allowance. The claim for payment of house allowance by the claimant cannot therefore stand. The claimant also sought to be paid any underpayment of his salary. He produced before this court his payslips for January to April 2010 showing he was earning Ksh 8,889. However, he did not exhibit any document to show that he was otherwise entitled to.

Between May 2010 and April 2011, he was earning the same amount. However, as per Legal Notice No. 64 of 2011, the basic minimum wage for a driver was Ksh 12,877. It is therefore true that during this period of 12 months he was underpaid by Ksh 3,988 per month which translates to Ksh 47,856/= for that period.

From May 2011 to April he was paid Ksh 9,889/= per month instead of the basic minimum of Ksh 14,563/= as per Legal Notice for 2012. He was thus underpaid by Ksh 4,674/= per month translating to Ksh 56,088 during that period. He did not exhibit what was due to him from May, 2012 to December, 2012 and therefore I find he was not entitled to any payment for underpayment.

What the claimant has therefore proved is his underpayment which I find to be Ksh 103,944/=. All other claims must not succeed. The upshot is I find for claimant in the sum of Ksh 103,944/= being underpayment amount less statutory deductions. The respondents will also meet costs of this suit.

**HELLEN WASILWA**

**JUDGE**

**27/11/2013**

**Appearances:-**

Claimant present in person

N/A for respondents present

CC. Sammy Wamache.