



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 543N of 2009

NAMAREI ILWAS

CLAIMANT

VERSUS

AJAY VELJI SHAH RESPONDENT

JUDGMENT

The Claimant herein Namarei Ilwas filed his memorandum of claim dated 7th August, 2009 on the 5th September, 2009 through the firm of Kabiru and Company Advocates.

The issue in dispute according to the claimant is unfair and unlawful dismissal of the claimant.

The Claimant's case is that he was in continuous employment of the Respondent from 3rd March, 1998 to 29th February, 2009 as a Security Guard at the Respondent's premises in Gigiri Nairobi. The claimant states that he worked satisfactorily but on 29th February 2008, the Respondent verbally without notice terminated his services. That prior to this date of termination, the claimant states that he had severally demanded compensation for the rest days and public holidays he worked for the Respondent since 2nd March, 1998 and the Respondent reluctantly agreed to and finally paid the claimant Ksh.307,108/= as partial payment in respect thereof.

The Claimant further avers that following the aforementioned partial settlement, the Respondent allowed the claimant to take one rest day in every seven days and similarly not to work on every public holiday, but made the claimant work for 24 hours without lawfully compensating the claimant fully as is provided by law and there is outstanding payment due to him of Ksh.3,462,188/= itemized as below:

- | | | | |
|----|--|---|---------------|
| 1. | Payment in lieu of notice | - | Ksh.10,991/= |
| 2. | Balance of unpaid arrears, rest days and
Public holidays from 3 rd March 1998 up to
September, 2006 | - | Ksh.78,271/= |
| 3. | Service pay for period worked | - | Ksh.79,560/= |
| 4. | Housing allowance | - | Ksh.197,880/= |

5.	Accrued but untaken leave for the period		
	2007 November up to February 2008	-	Ksh.2,954/=
6.	Excess hours (overtime) worked for period		
	3 rd March 1998 up to 29 th February 2008	-	Ksh.3,037,140/=
	TOTAL	-	Ksh.3,462,188/=

The Claimant states that he has suffered loss and mental torture due to the unfair dismissal and seeks to be compensated as tabulated above plus leave days taken but underpaid – Ksh.50,640/=.

He also prays for costs of this cause.

The claimant in his oral evidence told court that he worked for Respondent since 1998 and he used to work as a night guard for 12 hours. That he was initially employed to work at night but there was no one to relieve him so he ended up working day and night. He says he used to stay at the sentry house and was not given a house nor house allowance.

This sentry had no bathroom and he used to cook at the gate. He says he was not given food. He indicates that if he had to go away on leave, one Ishmael used to stand in for him. He says he used to go on leave for 21 days but would be paid only 11 days.

In cross examination, the claimant told court that his salary increased gradually from 4500/= to 10,999/= in 2006. He says he used to open and close the gate and also guard the compound and wash the boss' cars. He says there were times he used to sleep but just at the sentry. He says he used to sleep when everyone had gone to bed about 2 to 3 a.m.

He also told court that he never had a house in Nairobi. He says he used to open and close the gate about 40 times daily. The home had 6 vehicles. He says his relatives used to visit him and they would sit under a tree. Whenever his wife visited, they would sleep on carton boxes at the sentry. He says a mattress could not fit at the sentry. He says he never refused to rent a house outside but his boss did not allow him. Claimant called 2 witnesses who gave evidence on his behalf.

CW2 told court that he is an advocate of the High Court of Kenya and that he assisted the claimant in writing some letters to his employer in March 2004 as claimant is illiterate. CW2 says he had to meet claimant at his work station as claimant had indicated that he could not leave his work station. The CW2 therefore talked to the claimant at the gate sentry and he could write the letter in his car. He says he saw a carton box on floor of the sentry house where claimant was staying. He says he also saw claimant cooking outside the sentry gate. He says he did not advise claimant in his capacity as an advocate and there was no advocate-client relationship.

CW3 says he used to work with the claimant at Respondent's home and he could at times stand in for claimant. He says the claimant was staying at the sentry gate and he used to cook his food at the gate. That claimant used to go on leave but would ask someone to stand in for him.

The Respondent on the other hand filed their memorandum of response on 9th November, 2009 through the firm of Mwaniki Gachoka and Company Advocates. They also called one witness who gave his oral evidence.

In their evidence, the Respondent informed court that the claimant had made calculation on his final dues at 2,244,882/=. The parties did not agree on dues payable and the matter ended up in court. The Respondent admits he employed claimant as a security guard at his residential premises from March 1998 up to 29th February 2009 when the claimant terminated his employment.

The Respondent denies that the claimant worked as both day and night watchman as alleged but that at all material times was a day guard. The Respondent admits he terminated the claimant's services without notice and is willing to pay one month's salary in lieu of notice – Ksh.10,991/=.

The Respondent further avers that they did pay the grievant Ksh.307,108/= vide cheque No.000041 dated 8th December 2006 for unpaid arrears, rest days and public holidays from 3rd March 1990 to 30th September 2006 which amount was acknowledged by the grievant. As for the 2 holidays and 5 Sundays in the month of October, 2006, the same were off-set against the grievant extended annual leave in month of November whereby he was supposed to report on duty on 29th November 2006 but reported on 1st December 2006. Thereafter, the respondent avers that he did give the grievant one day leave in every seven days and the respondent refutes the balance of Ksh.78,271/= claimed by the claimant. The Respondent admits he owes the grievant service pay of Ksh.79,560/=. On issue of house allowance the Respondent avers that the claimant is not entitled to any as he was provided with an accommodation and meals at his place during the entire period of his employment. The Respondent admits that claimant is entitled to Ksh.4,752/= as unpaid rest days and public holiday in December 2007 to February 2008 which is calculated at 8 x double the daily rate which is Ksh.422 x 2 x 8 = less 2000 paid in advance.

The Respondent also avers that the grievant is entitled to accrued but untaken leave from November 2007 to February 2008 which is 7 days for Ksh.2954 = 422 x 7. The Respondent however avers that the grievant is not entitled to any claim for overtime as he worked during the day as day guard. He also denies that grievant is entitled to any underpaid leave. In essence the Respondent avers that what is owing to claimant is only Ksh.88,477/= being payment in lieu of notice Ksh.10,991/=:, and service pay Ksh.69,750/=:, unpaid rest days and public holidays in year 2007 to February 2008 = 4752 and accrued but untaken leave for November 2007 to February 2008 = 2954/=: . The respondent indicates that he is willing to pay the stated amount as final settlement of claimant's dues.

I have considered evidence adduced by both parties plus submissions made. Issues for determination are:

1. Whether claimant was unfairly and unlawfully dismissed by the claimant.
2. What remedies if any, the claimant is entitled to.

In respect to the first question the Respondent has admitted that, they terminated the grievant's employment without notice as required by the law and are willing to pay 1 month salary in lieu of notice. This settles the first question because any termination other than as required by law and without issuance of notice nor a hearing is unfair and unlawful.

Now of question two, given that the claimant was unfairly terminated, he is entitled to notice pay which I award 1 month's salary – Ksh.10,991/=.

The Respondent is also willing to pay and have admitted to owing the claimant:-

- Service pay - Ksh.69,750/=
- Unpaid rest days and public holidays
in 2007 to February 2008 - Ksh.4,752/=
- Accrued but untaken leave for the
Period November 2007 up to February 2008 - Ksh.2954/=

I therefore at the onset enter judgment for claimant for Ksh.88,447/= as admitted by the Respondent.

Other claims by the claimant which are contended by Respondent include:

Balance of unpaid arrears, rest days and public holidays from March 1998 to 30th September 2006 of Ksh.78,271/=. Between March 1998 to 2006 September, the number of rest days were 412 days. The number of holidays were 90. Total number were 502. These days x 2 x 384.61 = 386,148.44/=

Claimant indicated he was paid 307,108/=. It is therefore apparent that some holidays, rest days were not paid for = 79,040.44, which I also award for claimant.

Another area of contention is service pay which claimant wants calculated at 18 days for each year worked. The usual amount is calculated at 15 days for each year worked. The Respondent is willing to pay this and I will award as consented by Respondent.

The one area that stands contested is on house allowance. The Respondent contends that he gave claimant a house at his premises. It is however apparent that the house was the sentry house at the gate of Respondent which does not count as a house. I find that claimant is entitled to house allowance and I find for him and award this prayer of house allowance = 15% of salary

$$= 1649 \times 10 \text{ years} \times 12 \text{ months} = 197,880/=$$

Claimant sought to be paid overtime contesting he was working day and night for 10 years. This is practically impracticable in fact the claimant conceded that he used to occasionally go for leave and ask one Ismael to stand for him. RW3 also told court that he could stand in for Claimant when claimant had to go out. In essence this prayer is not proved and I decline to award it.

The prayer for leave days taken but underpaid is also not proved.

In essence I find for claimant and enter for him as follows:

1. 1 month's salary in lieu of notice - Ksh.10,991/=
2. Service pay - ksh.69,750/=
3. Unpaid rest days and public holidays is 2007
to February 2008 - Ksh.4,752/=
4. Accrued but untaken leave for the period
from November 2007 up to February 2008 - Ksh.2,954/=
5. Balance of unpaid arrears, rest days and
public holidays from March, 1998 to 30th
September 2006 - Ksh.79,040.44/=
6. House allowance 15% of salary =1649x10x12 - Ksh.197,880/=
7. 6 months salary as damages for unfair
dismissal - 10997 x 6 - Ksh.71,982/=
- TOTAL AWARDED - Ksh.437,349/=**

8. Claimant is also entitled to be issued with a Certificate of Service.

9. Respondent will meet costs of this suit.

Signed, dated and delivered in court at Nairobi this 5th day of December, 2012.

**HELLEN WASILWA
JUDGE**

Appearances:

Mr. Kabiru of Kabiru & Company Advocates for Claimant

Mr. Nyaanga of

Mwaniki Gachoka & Company Advocates for Respondent

Rachel Gichuki Court Clerk