



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 281 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**SAMWEL AGWATA OGARO ..... CLAIMANT**

**-Versus-**

**LAVINGTON SECURITY ..... RESPONDENT**

**AND**

**KENYA NATIONAL PRIVATE SECURITY**

**WORKERS UNION ..... INTERESTED PARTY**

**J U D G E M E N T**

This suit was filed by the Interested Party, the **Kenya National Private Security Workers Union whom it states was its member**. By Memorandum of Claim filed in court on 30th October 2013 the Claimant alleges the following against the Respondent:

1. Violation of labour relations act 12 of 2007
2. Failing to pay one month notice on termination
3. Failing to grant leave for 6 years
4. Underpayment of wages
5. Failing to pay House Allowance for all those years
6. Six years gratuity
7. Failing to pay overtime for six years
8. Failing to pay overtime for public holidays.

The Claimant states that he was employed by the Respondent in August 2006 at a salary of Kshs. 5000 per month. He was not paid house allowance or given accommodation by the Respondent. He was also

not allowed to go on annual leave. He also avers that he worked overtime and was not paid for the same. He prays for judgment against the Respondent for the following:

1. House allowance for 6 years
2. Annual leave for 6 years
3. Underpayments
4. Gratuity
5. Overtime

The Respondent filed a defence and Answer to the Claim in which it denies the averments in the Memorandum of Claim and states that the Claimant was employed as a casual guard on 4th September 2006 at a daily wage of Kshs. 150 which was inclusive of house allowance and was deployed at BTS site in Kisumu. He worked on and off until 1st April 2011 when he deserted duty.

The Respondent avers that the Claimant is not entitled to annual leave as he did not work for a continuous period of 12 months. The Respondent also denies that the Claimant was underpaid and avers that he was only entitled to the daily wage as he was employed as a casual worker.

The Claimant died on 6th August 2015 and was substituted by JANE MAGOMA NYAMOSI after she obtained Letters of Administration dated 19th October 2015. Following the demise of the Claimant the parties agreed to dispose of the case by way of written submissions and documents on record.

### **Submission of the Claimant**

In the submissions filed by the Interested Party on behalf of the Claimant it is submitted that the dispute was reported to the Minister for Labour who accepted the dispute and appointed a Conciliator but the Respondent failed to attend meetings called by the Conciliator. The Conciliator issued a Certificate of Disagreement paving way for the filing of the present suit.

It is submitted that the Claimant was dismissed verbally for demanding a salary increase. The Claimant disowned the letters dated 7th and 12th April 2011 and wondered why those letters were not filed in court together with the defence in 2013 and only surfaced in 2016 after the Claimant's demise. The letter dated 7<sup>th</sup> April, 2011 is a report from Kisumu Region Office to the Respondent's Nairobi Office to the effect that the Claimant deserted duty and was undisciplined. The letter dated 12<sup>th</sup> April, 2011 is a letter of dismissal. The Interested Party urged the court to reject the two letters and enter judgment in favour of the Claimant as prayed.

### **Submission of the Respondent**

In the Respondent's submissions filed on 23rd November 2016 it is submitted that the Claimant was engaged as a casual employee between 2006 and 2010 and was paid daily on days when he worked. That his employment was temporary in nature and subject to termination without notice.

The Respondent submitted that the three Casual Agreements filed by the Claimant dated 4th September, 2006, 23rd March 2007 and 1st August 2008 were proof of the casual and/or temporary nature of the Claimant's engagement by the Respondent.

It was submitted that sometimes in 2006 the Claimant expressed the interest to be employed permanently by letter dated 4th September 2006. It is submitted that the Respondent rejected the application because the Claimant was not a reliable performer. It was submitted that on 1st December 2010 the Claimant again expressed the interest to be employed permanently and the Respondent gave him a contract dated 1st December 2010. However on 1st January 2011 the Claimant became negligent in the performance of his duties and started absconding duty, reporting to work in a drunken stupor and failing to obey rules and regulations governing his conduct as an employee of the Respondent, which actions were detrimental to the Respondent's operations and interests.

The Respondent submitted that it warned the claimant several times and attempted to advise the Claimant but he failed to change. That on 7th April 2011 the Claimant's supervisor reported to the Human Resource Officer about the Claimant's negligence through a letter of even date. Upon the report being made the Claimant deserted duty and did not respond to calls made by the Respondent and letters written by the Respondent. That the Claimant also refused to appear for disciplinary hearings organised by the Respondent. That on 12th April 2011 the Respondent summarily dismissed the Claimant.

It is the Respondent's submission that section 44(4) (b) of the Employment Act permits an employer to summarily dismiss an employee if without leave or lawful cause the employee absents himself from work. It is submitted that the Claimant was the master of his misfortune and should not benefit from the same.

The Respondent prayed that the case be dismissed with costs.

### **Determination**

I have considered the pleadings and written submissions filed by the parties together with documents attached thereto. It is not in dispute that there was an employment relationship between the Claimant and the Respondent between August/September 2006 and 12th April 2011. It is also not in dispute that the Claimant was dismissed from employment on 12th April 2011. The issues arising for determination are the following:

1. Whether or not the Claimant was employed as a casual employee;
2. Whether the summary dismissal of the Claimant was fair; and,
3. Whether the Claimant is entitled to the prayers sought.

### **Casual Employment**

The Claimant's employment spanned the period covered by the repealed Employment Act(1977) and the current Employment Act (2007). Both Acts define a casual employee as:

*a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;*

It is the Claimant's case that he was in continuous employment of the Respondent from August 2006 to April 2011. The Respondent admits that the Claimant was in its employment for the same period albeit from September, 2006 but on and off, on casual terms.

From a plain reading of the definition of casual employee in the Employment Act, the Claimant could not

have been on casual employment for that long. Section 37 of the Act provides for conversion of casual employment to term contract as follows:

**37. Conversion of casual employment to term contract**

*(1) Notwithstanding any provisions of this Act, where a casual employee—*

*(a) works for a period or a number of continuous working days which*

*amount in the aggregate to the equivalent of not less than one*

*month; or*

*(b) performs work which cannot reasonably be expected to be*

*completed within a period, or a number of working days amounting*

*in the aggregate to the equivalent of three months or more,*

*the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.*

*(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.*

*(3) An employee whose contract of service has been converted in*

*accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.*

*(4) Notwithstanding any provisions of this Act, in any dispute before the*

*Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.*

*(5) A casual employee who is aggrieved by the treatment of his employer*

*under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.*

The Respondent's own evidence on record also contradicts its averments. The contract of employment dated 1st October 2010 provides for payment of a salary **per month** in the sum of Kshs. 5000. The contract is for a renewable term of 3 months. That contract is not a casual engagement as averred by the Respondent.

I therefore find and hold that the Claimant was not a casual employee.

## Summary Dismissal

Section 44 of the Employment Act provides for the circumstances when an employer may summarily dismiss an employee for gross misconduct. Among the grounds for dismissal is absenteeism.

In the letter of summary dismissal of the Claimant by the Respondent it is alleged that the Claimant did not report for duty from 2nd April 2011 and did not make efforts to inform the Respondent of his whereabouts or sign a letter of resignation. The letter then states:

*"Being absent without permission is a very serious offence liable to summary dismissal under the Employment Act (2007) Section 44 Subsection 4(a). Your actions (sic) are hereby assumed that you have vacated office as from 11th April 2011.*

*This therefore serves to inform you that you have been summarily dismissed from the service of this company on account of gross misconduct and vacation of office."*

The Respondent submitted that it tried to get in touch with the Claimant and called him for a disciplinary hearing which he failed to attend. This is not reflected in the letter reporting the Claimant's absence dated 7th April 2011 and the letter of dismissal dated 12th April 2011. When was the Claimant contacted and when was the hearing scheduled for? What is borne by the letter is that a report of absence was made by the Kisumu regional office to the head office in Nairobi and as soon as the letter was received a letter of dismissal was written to the Claimant. It is not even clear whether the letter to the Claimant was properly addressed and whether he received the letter which he has denied.

What is clear from the two letters however is that no attempt was made to find out from the Claimant why he was not at work. He was thus dismissed without a hearing as provided in section 41. The section provides as follows:

### **41. Notification and hearing before termination on grounds of misconduct**

*(1) Subject to section 42(1), an employer shall, before terminating the*

*employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

Section 44(4) provides that it is justifiable ground for dismissal if an employee

*"(a) without leave or other lawful cause, an employee absents himself*

*from the place appointed for the performance of his work;"*

The Respondent did not make any attempt to find out if there was "lawful cause" for the Claimant's absence from duty. The Claimant himself avers that he asked for a salary increase but was told to go

away if he did not want to work. Section 46(h) of the Act provides that the filing of a complaint against an employer is not a valid ground for dismissal of an employee. The section provides as follows:

**46. Reasons for termination or discipline**

*The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—*

*(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or...*

The Respondent did not deny that the Claimant had demanded a salary increase as alleged in the submissions filed on behalf of the Claimant.

For the foregoing reasons I find that the Claimant's summary dismissal was without valid reason and without compliance with fair procedure as provided in the Act. The summary dismissal was therefore unfair and I find and declare accordingly.

**Remedies**

The Claimant prayed for the following: notice, house allowance, underpayments, unpaid overtime, annual leave and gratuity. The Claimant filed copies of wages orders for 2006 and 2009 reflecting minimum wages payable during the period.

The Respondent did not deny that the Claimant was paid Kshs. 5000 throughout his employment from 2006 to 2011.

Since all remedies are based on the salary, the court has to first establish what the Claimant's minimum wage should have been over the years. The Minimum wage for a day guard in 2006 was kshs. 5195 while that for a night guard was Kshs. 5796.

In 2009, the minimum wage for a day guard was 6130 while for night guard it was 6839. In 2010 the minimum wage was Kshs. 6743 and Kshs. 7523 respectively for day and night watchman.

Having worked both day and night shifts the Claimant was entitled to be paid the higher wage of night watchman. His final salary should therefore have been Kshs. 7523 excluding 15% house allowance. His gross salary was therefore Kshs. 8651.45.

I award the Claimant **Kshs. 8651.45** on account of pay in lieu of notice. He is also entitled to house allowance and underpayments which I will combine by working out underpayments based on the consolidated wage (basic plus house allowance). The underpayments are as follows:

August 2006 to April 2009 (5796-5000) Kshs. 796x33months	=26268.00
May 2009 to April 2010 (6839-5000) Kshs. 1839x12months	=22068.00
May 2010 to March 2011(8651.45-5000) 3651.45x11	=40165.95
<b>Total Underpayments</b>	<b>=114769.95</b>

The Claimant is further entitled to overtime as he worked 12 hours a day for 6 days making 72 hours per week as opposed to 52 maximum hours per week provided for in the Regulation of Wages (Protective Security Services) Order which was applicable. He thus worked for an extra 20 hours per week which I will award him for only 12 months as this is a continuing injury. Overtime is worked out at 1.5 times the hourly rate. The hourly rate formula in the Order is monthly salary divided by 225 hours. In the Claimants case it is  $8651.45/225 \times 20(\text{hours}) \times 52(\text{weeks})$ . This works out to **Kshs. 39989.00**

The Claimant is also entitled to annual leave of 26 working days per year as provided in the Protective Security Order for 4 years 8 months or 121.33 days being **Kshs.34,990**.

Gratuity is provided for at 18 days per year worked only for employees who had worked for a minimum of 5 years. The Claimant had not worked for 5 years and is not entitled to gratuity.

Orders accordingly.

**Dated and signed and delivered this 22nd day of September , 2017**

**MAUREEN ONYANGO**

**JUDGE**



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