



**Wekesa v Total Security Surveillance Ltd (Cause 627 of 2014)  
[2023] KEELRC 1104 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1104 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 627 OF 2014  
DN NDERITU, J  
MAY 4, 2023**

**BETWEEN**  
**CHRISTOPHER JUMA WEKESA ..... CLAIMANT**  
**AND**  
**TOTAL SECURITY SURVEILLANCE LTD ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In an amended Statement of claim dated 3<sup>rd</sup> May, 2018 and filed in court on 18<sup>th</sup> February, 2022 through Chepkwony & Co Advocates the Claimant Prays for: -
  - a. Underpayment of wages.....Kshs.251,330.00
  - b. Leave pay.....Kshs. 19,433.07
  - c. Unremitted NSSF dues.....Kshs. 14,800.00
  - d. Overtime pay.....Kshs.397,488.00Total.....Kshs.683,051.07
2. Together with the Statement of claim was filed a verifying affidavit, statement by the Claimant, and a bundle of documents in support of the claim.
3. On 9<sup>th</sup> March, 2022 the Respondent filed an Amended response to the claim through Kale Maina & Bundotich Advocates praying that the Claimant’s cause be dismissed with costs for want of merits.
4. The Claimant filed a reply to the amended response to the claim insisting that his claim is merited and reiterated the contents of the Amended Memorandum of claim.



5. This cause came up in court for hearing on 30<sup>th</sup> May, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on the same day when Patricia Kinyanjui (RW1) testified and the Respondent's case was closed.
6. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant filed her written submissions on 19<sup>th</sup> July, 2022 while Counsel for the Respondent filed on 19<sup>th</sup> September, 2022.

## **II. Claimant's Case**

7. The Claimant's case is expressed in the amended Memorandum of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, Mrs Morande, and the same is summed up as hereunder.
8. In his Amended Memorandum of claim, the Claimant pleaded that he was engaged by the Respondent as a security guard for the period from 16<sup>th</sup> April, 2006 to 13<sup>th</sup> December, 2013.
9. He alleges that he was unfairly and unlawfully terminated without notice or payment of terminal dues. He alleges that he was underpaid throughout the employment period and that he was not paid for overtime worked. The purported particulars of the underpayments, leave pay, and overtime pay are listed in paragraph 9 of the Amended Memorandum of claim.
10. In cross-examination, the Claimant admitted that he was not terminated by the Respondent but he resigned as per the letter dated 7<sup>th</sup> December, 2013 and indicated his reason for resignation as ill health. He stated that as at the time of resignation his gross salary was Kshs.10,000/=. He insisted that he did not go on leave for the entire period of employment. He alleged that he worked from 6am to 5pm or at times up to 9pm without pay for the extra hours worked beyond the normal eight hours. However, he admitted that he went on leave in 2009 and 2010 but not in the other years.
11. It is on the basis of the foregoing, that the Claimant is seeking that judgment be entered in his favour as prayed in the Amended Memorandum of claim as reproduced above. The submissions by his Counsel shall be considered in the succeeding parts of this judgment.

## **III. Respondent's Case**

12. The Respondent's case is contained in the amended response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel, Miss Ikonge, as summarized hereunder.
13. RW1, the human resource manager of the Respondent, adopted her statement on record and testified that the Claimant was employed as a security guard and rose through the ranks to become a supervisor.
14. She testified that the Claimant voluntarily resigned and that he was neither terminated nor declared redundant. She testified that the Claimant was not underpaid and that he was not owed any money in leave or overtime pay. She insisted that the Claimant's pay was based on Government's pay guidelines as contained in various legal notices.
15. She testified that the Claimant took leave in 2009 and 2010 and produced leave sheets for the two years as exhibits. Although she insisted that the Claimant was on annual contracts she only availed contracts for 2006, 2007, and 2008. She insisted that the Claimant worked from 6am to 4pm as a day guard and later as a supervisor, and in the later position the Claimant had no schedule and did not sign the daily work attendance sheets.



16. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by Counsel for the Respondent shall be considered in the succeeding parts of this judgment alongside those of the Counsel for the Claimant.

#### **IV. Issues For Determination**

17. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by Counsel for both parties and the court identifies the following issues for determination –
- a. Was the Claimant unfairly and unlawfully terminated or declared redundant by the Respondent or did he resign voluntarily?
  - b. Is the Claimant entitled to the reliefs sought in the claim?
  - c. Who meets the costs in this cause?

#### **V. Termination Or Resignation?**

18. The evidence on record and upon admission by the Claimant is that he resigned from the employment of the Respondent vide a letter dated 7<sup>th</sup> December, 2013 with immediate effect. This evidence is at variance with the allegations in the Amended Memorandum of claim wherein the Claimant pleaded that he was unfairly and unlawfully terminated and or declared redundant. No explanation and or clarification has been made by the Claimant and or his Counsel either in the evidence tendered and or the written submissions filed.
19. That departure only goes to portray the Claimant as uncertain and or not willing to come out forthrightly. This court has no difficulties in making a declaration that the Claimant voluntarily resigned from his employment with the Respondent as per the letter of resignation alluded to above wherein he cited his reason for resignation as ill health. The issue of unfair and unlawful termination does not arise.
20. As was held in *Edwin Bett Kipchumba v National Bank of Kenya Limited* (2018) eKLR voluntary resignation of an employee is a unilateral act by such an employee for which, unless for some good legal reason such as duress, coercion, threats etc, the employer should not be blamed.
21. As at the time of resignation the Claimant was serving as a supervisor under a contract commencing on 2<sup>nd</sup> June, 2013 to run for 52 weeks (one year). He was on a monthly gross consolidated salary of Kshs.10,000/=.
22. The evidence on record is that prior to the above contract the Claimant had worked for the Respondent under similar one-year contracts albeit on different terms. It is therefore not true, as alleged by the Claimant that he worked for the Respondent continuously for the period from 2006 to 2013.

#### **VI. Reliefs**

23. Having held that the Claimant voluntarily resigned from the employment of the Respondent this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
24. Section 90 of the *Employment Act* provides as follows -
90. Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default



complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

25. This cause was commenced by way of a Memorandum of claim dated 1<sup>st</sup> December, 2013 but filed in court on 2<sup>nd</sup> December, 2014. Counting backwards, only claims within three years from the date of commencement of this cause should be considered by this court as that is what the above cited section of the law provides for. This goes back to 1<sup>st</sup> December, 2011. Therefore, any claim or action that arose prior to this date cannot be compensated under this cause.
26. Prayer (1) is for underpayment of wages for the period from 1<sup>st</sup> May, 2006 and 31<sup>st</sup> December, 2013. For avoidance of doubts, any claim preceding 1<sup>st</sup> December, 2011 shall not be considered as this shall offend the law cited above. Going by a letter dated 25<sup>th</sup> January, 2010 which was produced by the Respondent as an exhibit, that comes closest to 1<sup>st</sup> December, 2011, the gross salary of the Claimant as per that letter was Kshs.7,167/=. Legal Notice No. 98 of 8<sup>th</sup> June, 2010 indicates that the highest salary payable to a day guard, in any part of this country, was Kshs. 6,743/=. This implies that the Claimant was actually overpaid. Legal Notice No. 197 which came into operation from 1<sup>st</sup> May, 2013 indicates that the highest wage payable to the category of the Claimant, in any part of Kenya, was Kshs.9,780.95 yet the Claimant was on a consolidated monthly gross wage of Kshs. 10,000/=. This again indicates that the Claimant was overpaid. The foregoing Legal Notices were produced as exhibits by the Respondent but none were produced by the Claimant to dislodge the same.
27. In the view of the foregoing, this court has not detected any underpayments as alleged by the Claimant and prayer (1) is hence dismissed.
28. Prayer (2) is for leave pay for the period from 2006 to 2010. This claim is evidently statutorily barred under Section 90 of the *Employment Act* and the same is dismissed accordingly.
29. The reasoning in the foregoing paragraph applies to prayer (3) as well. I also add that statutory deductions made from the wages of an employee do not belong to the employee once the deduction is made. They are due and payable to the intended institution or public body, may it be NSSF, NHIF, HELB, KRA, etc. An employee who alleges that deductions were made and not remitted must of essence report to the concerned body or agency so that the said body may pursue the employer for remittance of the amounts in question.
30. Prayer (4) is for overtime dues, or pay for 84 months covering unspecified period in the sum of Kshs.397,488/=. The number of months cover a period of about seven years. This claim is clearly statutorily time-barred. A party who files a claim in court has a duty to plead with specificity that which he is seeking from the court. How can this court determine what overtime the Claimant is seeking for the period from 1<sup>st</sup> December, 2011 to 3<sup>rd</sup> December, 2013? As noted in the foregoing paragraphs this is the period for which this court can grant a prayer based on the law of limitation. A specific pleading allows the opposite party to defend the allegation or claim. Lack of specificity denies the other party a chance to fully defend a generalized claim lacking in particulars.
31. As much as it is the Respondent who is the custodian of employment records, it is the duty of a Claimant to plead with specificity to enable and allow the Respondent to avail the necessary documents in court for a specific period or purpose in contest. An employee who fails to carry out that duty cannot later complain that the employer has failed to produce documents or records in court. The submissions by Counsel for the Claimant have also failed to shed light or clarify this claim. The overall burden of proving a cause does not shift at any point. The Claimant has not pleaded as to how many hours he worked overtime for the period that would otherwise be awarded by this court running for three years from 2<sup>nd</sup> December, 2011 to 13<sup>th</sup> December, 2013 when he resigned. Had the Claimant pleaded



the foregoing the Respondent would have been under obligation to avail records in accordance with Sections 10 and 74 of the *Employment Act*.

32. For the foregoing reasons, the claim for overtime pay is devoid of merits and the same is denied.

#### **IV. Costs**

33. The Claimant may have genuinely believed that he had a case against the Respondent. However, he has failed to prove his cause as required by the law. He was acting through Counsel who presumably believed that the Claimant had a good case. In the interest of justice each party is ordered to meet own costs.

#### **V. Disposal**

40. In final disposal of this cause, this court issues the following orders: -

- a) A declaration be and is hereby issued that Claimant voluntarily resigned from the employment of the Respondent.
- b) The entire cause is dismissed for want of merits.
- c) Each party shall meet own costs.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 4<sup>TH</sup> DAY OF MAY, 2023**

.....

**DAVID NDERITU**

**JUDGE**

