



**Momanyi v Factory Guards (MSA) Limited & another (Cause
367 of 2017) [2023] KEELRC 1730 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1730 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 367 OF 2017
M MBARÚ, J
JUNE 29, 2023**

BETWEEN

ZABLON MATARA MOMANYI CLAIMANT

AND

FACTORY GUARDS (MSA) LIMITED 1ST RESPONDENT

SECURITY GROUP AFRICA 2ND RESPONDENT

JUDGMENT

1. In the year 2008 the respondents employed the claimant as a security guard earning Ksh.487 per day and paid monthly and the claim is that on 15 September 2015 the respondents terminated his employment on medical grounds which was unfair. The claim is also that on 21 October 2015 the claimant returned all properties of the respondent and was issued with a clearance form but he was not paid his terminal dues and claim the following;
 - a. Accrued annual leave of 28 days for 8 years Kshs. 163,632;
 - b. Accrued public holidays of 5 days for 8 years Kshs. 29,220;
 - c. House allowances for 8 years Kshs. 405,184;
 - d. Overtime of 4 hours per days for 8 years Kshs. 280,512;
 - e. Severance pay for 8 years Kshs. 100,976;
 - f. 3 months' notice pay;
 - g. Certificate of service; and
 - h. Compensation for unfair termination of employment.



2. The claimant testified that the respondents terminated his employment on medical grounds after he had taken 120 days' sick off and he kept the respondents updated on his condition. The issue related to mental health which could not allow him to attend work. The respondent issued him with notice terminating employment with a condition that if his health improved, he could be recalled back to work but the claimant declined such offer and opted to resign.
3. The claimant testified that on 18 September 2015 he decided to resign meaning he no longer was interested with employment by the respondent due to health problems and he never went back to work until he filed suit seeking payment of his terminal dues.
4. The claimant went through clearance and was paid Kshs. 100,000 which went to a wrong account. While in employment, he had been paid his wages before through Equity Bank but his terminal dues were sent to Cooperative Bank through an account he had given earlier on. The claimant had asked to be paid Kshs. 466,864 but the respondents paid less.
5. In response, the respondents' case is that both are one and the same company and had employed the claimant and his claims are without merit and should be dismissed with costs. Employment was not terminated on 15 September 2015 as alleged save it was on medical grounds. The respondents found it necessary to terminate employment after the claimant suffered from mental illness for more than 100 days and upon follow up with his family members, it was agreed, that he respondents should issue him with notice terminating employment on condition that if his mental health improved, he was at liberty to resume duty but the claimant opted to resign on 18 September 2015.
6. Upon clearance, the respondent paid the claimant his terminal dues all at Kshs. 466,846 and it was proposed that the same be paid in instalments of Kshs. 100,000 and the first was effected on 9 December 2016. The claimant disputed these proposals to pay in instalment leading to stoppage of the payments. There was no unfair termination of employment as alleged, the respondents were in constant communication with the claimant's family and after being away from work for over 100 days, it was found necessary to terminate employment on medical grounds.
7. In evidence, the respondent called Patrick Kilonzo the human resource officer who testified that based on work records the claimant was retired on medical grounds following various reviews on his mental challenges but when he was issued with notice he opted to resign. His terminal dues were tabulated and a payment plan put in place but the claimant challenged the total payment leading to the instant suit. a sum of Kshs. 100,000 was paid through the bank.
8. Part of the work records filed by the respondent are the medical records of the claimant disclosing his medical status. Whereas the defence is that the claimant was retired on medical grounds and which fact he testified to, medical records should remain confidential and secured and the claimant's Counsel ought to have applied for the protection of the claimant in these proceedings and also the data filed to be secured. Part of the right to dignity and integrity of the person protected under Article 28 of the Constitution of Kenya is to ensure no one is exposed in the nature the claimant has been and particularly the details in his medical records.
9. While other rights under the Bill of Rights may be restricted, human dignity is absolute; it is said to be "inviolable". Dignity is, hence, not only shielded from constitutional amendment, but also from legislative incursion. Disclosure of medical records with regard to ones health is part of that dignity of the person and should remain protected.
10. On the record, upon the claimant being issued with notice terminating his employment on medical grounds, it was with a provision that he could return once his health improved. In return, the claimant requested to resign. Was this based on his informed and free choice?



11. What comes out clearly is that the claimant returned to the shop floor and went through the clearance process and his terminal dues were tabulated;
House allowance for 7 year and 11 months Ksh.113,937;
Accrued leave 2007 to 2015 Ksh.66,301.80;
Service for 7 years x 15 days Ksh.49,350;
Basic total Ksh.813,462.40;
Over time Ksh.462,013;
Public holidays Ksh..65,800;
Total dueKksh.1,570.864.20
Less statutory deductions 1,104,018;
Total pay Ksh.466,846.20.
12. Of the total sum due at Ksh.466,846.20 the respondent's case is that the claimant was paid Ksh.100,000 through Cooperative Bank but there is no record filed to confirm such payment to the claimant. The claimant having undergone through clearance he should have been paid his terminal dues without the need to force him to file suit as herein done. Since the year 2015 when the respondent took the unilateral decision to terminate his employment on medical grounds, the respondent has held onto the terminal dues for over 8 years. It is not sufficient that the respondents consulted with the claimant's family members and whereupon there was agreement to issue the claimant with notice to retire him. His supported decision making by a person appointed by him or a person well aware of his interests ought and should have been called and named as the one who explained to the claimant on his circumstances. Alternatively, where the claimant was able to undertake clearance and had some moments when he could make his own decisions based on the medical reports on his health, reason demanded that the respondents identify these and allow the claimant to appreciate the notice and the offer to resume duty once he was well and able to work.
13. On the claims made, accrued annual leave is due at the statutory rate of 21 days per year and the tabulation by the respondent under the filed record is the applicable rate.
14. On the claim for house allowance, this is tabulated and correctly allocated by the respondent based on the wages paid each year.
15. The record of overtime due and owing is the record of the employer. This cannot be disputed and is well applied.
16. The claim for work on public holidays should not be general and unless the employee have the proper record, the record of the employer who ought to keep the same should be applied as being true.
17. On the claim of severance pay, such does not arise in a case of retirement on medical grounds. Service pay for 7 year is allocated and this in most cases is gratuitous. The record of the respondent is taken as correct.
18. The claim for notice pay at 3 months is without justification. The claimant was issued with notice and opted to resign.
19. Accordingly, on the claims made, the respondent properly tabulated terminal dues all at Ksh. 466,846.20 which shall be paid within 30 days after which the same shall be paid with interest from 15 September 2015 until paid in full. Each party shall bear own costs.



DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

.....and

