



**Musinya v Gratom Babz Security Limited (Cause 477 of 2018)
[2023] KEELRC 2643 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 477 OF 2018
MN NDUMA, J
OCTOBER 26, 2023**

BETWEEN

JASTINE YAPESA MUSINYA CLAIMANT

AND

GRATOM BABZ SECURITY LIMITED RESPONDENT

JUDGMENT

1. The suit was filed on 6/10/2018 by the claimant against the respondent seeking payment of terminal benefits including:-
 - (a) Service pay for 7 years – Kshs.21,000
 - (b) In lieu of leave days for 7 years – Kshs.33,950
 - (c) Arrear salary for 183 days worked - Kshs.421,273.
 - (d) Refund of unremitted NSSF for 30 months – Kshs.12,000.
 - (e) Underpayment in violation of the minimum wage requirement for 84 months – Kshs.447,720
 - (f) Unpaid house allowance at 15% of the salary – Kshs.75,600.
Total Claim: Kshs.632,543.
 - (g) Interest and costs.
2. The claimant (C.W.1) relied on a witness statement filed on 6/4/2018 in which he stated that he was employed by the respondent in July, 2011 as a Security Guard. That he signed a contract of employment but was not given a copy. That his monthly salary was Kshs.6,000 which was not increased for the entire period he worked for the respondent. That he never went on leave for the entire period and used to work all days including Sundays and Public holidays amounting to 183 days. That he



- could not sustain himself and family anymore and so he resigned by a letter dated 21/6/2017. The claimant gave the respondent one month notice of termination according to the handwritten letter before Court.
3. The claimant stated that he had served the respondent for a period of seven years. The claimant requested to be paid service pay for the period served.
 4. The claimant stated that the respondent did not remit National Social Security Fund (NSSF) deductions for a period of 30 months and that his salary was below the prescribed minimum wage and sought to be paid the difference.
 5. That he was not paid service pay. That he had returned company property upon resignation. That his demands to be paid have been ignored by the respondent.
 6. The claimant provided NSSF statement dated 17/11/2015 which shows that deductions were only remitted for the years 2015 and 2016 in the sum of Kshs.7,800 while the claimant worked for the respondent. The years 2011, 2012, 2013 and 2014 are not covered in the statement.
 7. R.W.1 Swaibu Wekulo testified for the respondent and relied on a witness statement filed on 12/7/2022 as his evidence in Chief. He also produced exhibits marked '1' to '4' dated 27/6/2019.
 8. R.W.1 told the Court that the claimant was paid Kshs.6,000 per month as a Security Guard. That he was granted 4 off days in a month and all his NSSF dues were remitted. R.W.1 said he started working for the respondent on 21/1/2011. That he was a Security Supervisor. That he knew the claimant and he worked for the respondent until the date he resigned voluntarily. R.W.1 said that the claimant was paid all terminal benefits upon his resignation. R.W.1 stated that he did not have check in and off records for the claimant though they were at the office. R.W.1 said that he did not have the records for payment of terminal benefits but the claimant was paid all salary for days worked and other terminal benefits including uniform refund, and SACCO contributions.
 9. The parties filed written submissions in which the claimant restated his claims as set out in the memorandum of claim and in his oral testimony. The claimant said he was never paid service pay; in lieu of leave days not taken; for off days not given including weekends and public holidays and refund for NSSF dues for the years 2011, 2012, 2013 and 2014.
 10. The claimant stated that in July, 2011, guard/watchman in Kikuyu area, Kiambu County, was to be paid a minimum wage of Kshs.11,330 but the claimant was paid Kshs.6,000 until he resigned. The claimant seeks payment of Kshs.5,330 for every month worked being 84 months in the sum of 477,720.
 11. That the claimant be awarded as prayed.
 12. The respondent submitted that the claimant voluntarily resigned from employment. That the claimant was not entitled to payment of service pay in terms of section 35(5) and (6) of the [Employment Act](#), 2007 because the respondent remitted NSSF on his behalf.
 13. That the claimant was released on all weekends and public holidays since the company had replacement guards. That the claimant had no complaint against the company until when he resigned from employment. That the prescribed minimum wage of a watchman was Kshsh.5,844 whereas the respondent paid the claimant Kshs.6,000 which was within the prescribed minimum wage. That the claimant did not complain about his salary until when he resigned voluntarily
 14. That the claimant was paid consolidated salary of Kshs.6,000. The minimum wage was Kshs.5,844. The claim for house allowance is therefore not warranted. That the claimant is not owed any terminal benefits therefore. That the suit be dismissed.



Determination

15. This suit was filed on 6/4/2018. The claimant is seeking payment of service pay in the sum of Kshs.21,000. Service charge for security guards is paid in terms of the security service terms and conditions of service which provide for payment of 18 days salary for each completed year of service. The claimant had worked for the respondent for a period of 7 years. The claimant though is entitled to more service pay than he has claimed is bound by his own pleadings. The service charge is payable whether or not the employee has NSSF paid for by the employer or not. The Court therefore awards the claimant Kshs.7,000 service charge as claimed.
16. With regard to untaken leave days, R.W.1 did not counter the evidence by the claimant that he was not given annual leave for a period of seven (7) years. R.W.1 mistook this claim to be in respect of off days given to the claimant which is not the case. The claimant has proved that he is entitled to payment in lieu of leave days not taken for a period of three (3) years in the sum of Kshs.6,000 x (3) – Kshs.18,000. The rest of the claims are statute barred having arisen more than three years to the date the suit was filed.
17. R.W.1 stated that the claimant was granted 4 off days per month and he did not work during public holidays. The claimant did not prove that he was made to work during public holidays and that he was not granted off days. This claim has no merit and it is dismissed.

National Social Security Fund (NSSF)

18. The statement of NSSF produced by the claimant shows gaps of 30 months claimed by the claimant. The Court awards the claimant a refund of Kshs.12,000 being unremitted NSSF by the respondent on his behalf.

Underpayment

19. The Court has perused the Regulation of Wages (General Amendment) Order 2015, prescribing minimum wage for watchmen for all other areas not within Nairobi, Mombasa and Kisumu and other municipalities for the period 2015 relied upon by the claimant and is satisfied that the basic wage for a watchman at the time was Kshs.5,844. The claimant did not adduce any other Wage Order for the period he served and makes a general allegation that he was entitled to a minimum wage of Kshs.11,330.00 The Respondent has asserted that the minimum wage applicable to the claimant was Kshs.5,844. The claimant has failed to prove that he was underpaid for the period he was employed by the respondent.
20. The claim for underpayment for a period of 84 months has not been sufficiently proved and is dismissed. The claim for unpaid leave allowance has similarly not been proved and is also dismissed.
21. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
 - (a) Kshs.21,000 service pay.
 - (b) Kshs.18,000 in lieu of 3 years untaken annual leave.
 - (c) Kshs.12,000 refund of unremitted NSSF.
Total Award – Kshs.41,000
 - (d) Interest at Court rates from date of filing suit till payment in full.
 - (e) Costs of the suit.
22. For the avoidance of doubt, all other claims sought by the claimant are dismissed for want of proof.



DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 26TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

