



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 584 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

STEPHEN MUKITE WASIKE.....CLAIMANT

VERSUS

PINKERTONS KENYA LIMITED.....RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 22nd March 2017, the Claimant sued the Respondent alleging that he was an employee of the Respondent from December 2014.
2. That Claimant's case is pleaded as follows:
3. That as an employee of the Respondent, the Claimant discharged his duties diligently and to the best of his abilities. It is averred that on 6th July 2016, he had been deployed at the Kenya Power and Lighting Company site at Rongai. That at about 3. am, he was accosted by masked armed robbers who attacked him with crude weapons and when he raised the alarm, the attackers boarded a waiting vehicle and drove off. That well-wishers who arrived at the scene rushed him to Wananchi Jamii Maternity and Nursing Home, Rongai for treatment before transferring to Mbagathi for further treatment.
4. He avers that the Respondent failed to provide a safe working environment since it did not provide head gear, quick alarm response, sufficient work force and a torch
5. That on account of the injuries sustained, a qualified medical doctor recommended that the Claimant be retired from employment as a night guard on medical grounds by a letter dated 15th September 2016.
6. It is further averred that by a letter dated 5th December 2016, the Respondent directed the Claimant to clear with the Respondent before his request could be granted.
7. That the Claimant cleared with the Human Resource Department of the Respondent on 13th December 2016 and was not given any documentation and was promised payment in three weeks' time but was not paid.
8. That the Claimant subsequently visited the Respondent's office on 17th January 2017, 20th and 30th January 2017 but was not paid. That the Respondent did not respond to several calls.
9. That the Respondent had been underpaying the Claimant and had not granted him leave or pay house allowance. The Claimant prays for
—
 - a) A declaration that the Claimant be and is hereby given an early retirement.
 - b) Payment of salary from the month of August 2016 till date.
 - c) Payment of house allowance
 - d) Payment in lieu of annual leave.

e) General damages

f) Costs of the suit.

10. The Respondent's memorandum of response dated 24th May 2021 was filed online more than four years later.
11. The Respondent admits that the Claimant was its employee from December 2014 but denies that he discharged his duties diligently. It also admits that on 6th July 2016, he was stationed at the Kenya Power and Lighting Company site at Rongai.
12. The Respondent denies that the Claimant was attacked by robbers on the night of 7th July 2016 or was treated.
13. It is averred that if the attack indeed took place (which has been denied), it was because of the Claimant's negligent in that he was either sleeping while at work, did not keep a proper look out, had not donned the protective gear provided by the Respondent or did not react in good time or was caught off guard or was not alert.
14. The Respondent denied the contents of paragraph 11 and avers that the Claimant stopped reporting to work from July 2016 and the Respondent treated the same as desertion.
15. That the Respondent pays its employees prescribed wages inclusive of house allowance.

Evidence

16. The Claimant adopted the written statement. He testified that he was given uniform, shoes, hat, whistle and baton. That on 6th July 2016, he was guarding the Kenya Power and Lighting Company site and it was dark with no lights that he and a colleague were guarding the site.
17. That it was a huge compound with vehicles parked. That while he was patrolling between the vehicle, he was grabbed by masked men who demanded keys to the site. That they carried him and attempted to force him into a motor vehicle. That he was stabbed on the head and the neck was twisted.
18. That when he cried for help his colleague came and took him to Jamii Maternity and Nursing Home, Rongai where he was referred to Mbagathi Hospital where he was taken by the employer at 3.50 am, was treated and taken home by the employer and was to be taken back to Mbagathi the following morning but was not taken. That one Awole instructed him to go to Jamii Hospital Rongai. That he did not return to work thereafter due to his health.
19. He testified that he took the Doctor's letter to the Respondent on 15th September 2016 but obtained neither a response nor payment of dues.
20. On cross examination, the Claimant confirmed that the site he was guarding was open with parked vehicles and electric cables and had neither a gate nor fence. That after the attack, he was assisted by his colleague and two well-wishers. He confirmed that the suturing was done at the Jamii Hospital not Mbagathi and had no treatment notes from Mbagathi Hospital.
21. That the letter from Jamii Hospital dated 15th August 2016, had different visitation dates, had no Doctor's stamp or name. He confirmed that he had taken the letter to a Mr. Adua, an employee of the Respondent. That the note from Jamii Maternity and Nursing Home indicated that the Claimant was not medically fit to work.
22. The Claimant confirmed that he did not know who reported the attack to the employer. That he reported when he took the letters. That he used to pay NHIF and NSSF and did not pay for the services rendered at the Jamii Maternity and Nursing Home.
23. The Claimant alleged on re-examination that he was stitched at the Mbagathi Hospital but furnished no documentary evidence.
24. **RW1, MR. PATRCK WATUKA** testified that the alleged attack on 6th July 2016 was not reported by the Kenya Power and Lighting Company nor did the colleague who allegedly assisted the Claimant do so. He testified that the Kenya Power and Lighting Company Yard, the Claimant was guarding was a storage yard with motor vehicles, cables and transformers with a fence and gate.
25. He told the Court that when a guard was injured on duty, the report goes to the control room and after first aid, the guard is referred to a Dr. Mutuma at Zambezi Hospital for treatment and any follow up. That the Respondent's guards were given a whistle, boots, baton and uniform. Extra personal protective equipment was not issued to every guard.
26. He further testified that neither the letter from Jamii Hospital dated 15th September 2016 nor the receipts and medical notes had been presented to the company before the case was filed. That the Respondent had no incident report in its records.
27. He also testified that the Claimant did not clear as directed by the Respondent's letter dated 5th December 2016. That the Claimant did not report to work after 6th July 2016, that the Company deemed it desertion of duty. Finally, he told the Court that the request for early retirement was not normal.
28. On cross examination, the Witness confirmed that he had no documentary evidence that the Claimant was the Respondent's employee or

how much he used to earn including statutory deductions. That a walkie-talkie was assignment based and not individual to guards. He also confirmed that the Claimant's dispatch slip was not dated and he had no record of the Superiors' report for 7th July 2016.

29. That attempts to contact the Claimant through his telephone line was unsuccessful and the Respondent neither wrote to him nor his references as there was no postal address on record.

30. That the attack, injuries and treatment were brought to the Respondent's attention by the Claimant's Counsel's letter dated 1st December 2016 and the Respondent did not investigate the matter. That the Kenya Power and Lighting Company Yard had two guards. Finally, he confirmed that the Respondent had no record that the Claimant cleared with it.

Claimant's Submissions

31. The Claimant did not frame any issue for determination but submits that the medical report dated 12th September 2016 which gave a chronology of the Claimant's treatment at the Jamii Hospital, Rongai reveals that the Claimant was unable to seek and obtain the necessary medical attention due to financial constraints.

32. That the Claimant had demonstrated that he sustained serious injuries due to the negligence of the Respondent and the Respondent refused to pay the Claimant's salary and medical treatment in breach of the statutory duties and its conduct was reckless and inhumane.

33. On the quantum of general damages, the Claimant submits that he is entitled to Kshs.200,000. The decision in **Philip Musyoka Mutua v Mercy Ngina Syovo [2018] eKLR** and **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** are relied upon. In the former the Court awarded Kshs.120,000/- and Kshs.150,000/- in the latter.

34. On salary, the Claimant reliefs on Legal Notice No. 117 to urge a basic minimum wage of Kshs.12,221.10 exclusive of house allowance, being the unpaid salary for August 2016.

35. That is the absence of any documents from the Respondent, the Court should adopt the statutory minimum wage as provided by Legal Notice No. 117 dated 26th June 2016 making a sum total $(12,221.10 \times 12) = \text{Kshs.146,653.20}$.

36. That the Claimant is entitled to Kshs.48,884.40 as payment in lieu of leave.

37. Unpaid house allowance of 15% amounting to Kshs.38,496.15.

38. It is finally submitted that in the circumstances, the Claimant was entitled to Kshs.446,254.85.

Respondent's Submissions

39. The Respondent isolated seven issues for determination namely –

- (i) Attack by robbers as claimed;
- (ii) Whether the Claimant was injured in the course of his duties as alleged;
- (iii) Negligence of the Respondent;
- (iv) Respondent's knowledge of the Doctor's proposal for the Claimant's early retirement;
- (v) Entitlement to reliefs sought;
- (vi) Costs.

40. As regards the alleged attack, it is submitted that whereas the Respondent admitted that the Claimant was its employee on 6th July 2016, it denied knowledge of any attack at the Kenya Power and Lighting Company Yard, Rongai. Although there were two guards on that day none reported the alleged attack. That although the Claimant alleged that he was treated at Mbagathi Hospital, documentary evidence showed that suturing was conducted at Wananchi Jamii Maternity and Nursing Hospital, including removal of stitches.

41. That the documents from Mbagathi do not reveal any stab wound on the Head. The Court is urged to disregard the Claimant's contradictory evidence.

42. As regard knowledge of the attack, RW1 testified that the Respondent learnt of the attack from the Claimant's Counsel's demand letter dated 31st October 2016 responded to on 5th December 2016 and attempts to reach the Claimant fell through. Moreover, the Claimant admitted on cross examination that he did not notify the Respondent about the attack. The Respondent submits if the alleged attack ever occurred, which was denied, it was a risk attendant to the job and the Claimant should have been more alert.

43. On whether the Respondent had exposed the Claimant to danger by its negligence, it is submitted that RW1 confirmed that the Respondent had given the Claimant a baton, whistle to use in the event of an attack and had thus taken due care to provide a safe working

environment which was fenced and had a gate

44. As to whether the Respondent was aware of the Doctor's proposal for early retirement to the Claimant, it is submitted that although the Claimant alleged that he had delivered the report to the Respondent, the copy had no endorsement of receipt of the original. The Respondent was therefore not aware of the report until the memorandum of claim was served on it.

45. It is submitted that the letter dated 15th September 2016 does not request for retirement but that the Claimant be terminated.

46. In addition, the qualifications of the signatory are unclear, illegible and had a single name. It is thus unclear who signed the letter and his/her designation at the Hospital and whether the signatory was qualified to make such a far-reaching recommendation.

47. That the letter does not indicate the degree of incapacity of the Claimant and was not addressed to the Respondent.

48. It is submitted that the Claimant could not insist on retirement since he had absconded duty.

49. As regards the reliefs sought, it is submitted that it is trite law that special damages must not only be pleaded but proved, yet the Claimant attached no figures to the prayers and led no evidence to establish the same. That the Claimant did not work in August 2016 but is seeking payment of salary. That the claim had no legal basis. The decision in **Monica Sang v Habib Bank Limited [2019] eKLR** is relied upon in support of the submission.

50. On house allowance, the Claimant admitted on cross examination that he was paid a consolidated salary.

51. On leave, the Claimant did not specify the number of days or for which period having worked for about one year and seven months.

52. The Court is urged to dismiss all claims not specifically proved in Court. The decision in **Monica Sang v Habib Bank Limited (supra)** is relied upon as authority for unspecified special damages.

53. On general damages, it is submitted that the Claimant did not specify why he sought the damages, though Section 49 of the Employment Act provides for the remedy of compensation of up to the equivalent of 12 months' salary for unfair termination. However, it is submitted that the Claimant was not terminated but absconded duty and the prayer should be dismissed.

54. On costs, it is submitted that they follow the cause and since the claim is unproven, the same should be dismissed.

Determination

55. I have considered the pleadings, evidence on record and the submissions. The issues for determination are: -

- a) Whether the Claimant was attacked by armed and masked people at the Kenya Power and Lighting Company Yard in Rongai;
- b) Whether the Claimant is entitled to early retirement;
- c) Whether the Claimant is entitled to the reliefs sought.

56. This is a suit in a class of its own. Although it was common ground that the Claimant was an employee of the Respondent on 6th July 2016, neither of the parties produced any documentation on the contract of employment. The Claimant disclosed neither his salary nor other entitlements or how he worked. In addition, the Claimant claimed unspecified sums of money under various heads.

57. In a tit-for-tat approach, the Respondent produced not a single document on the relationship between the parties and even filed its response to the memorandum of claim in May 2021 more than four years after the suit was filed.

58. In a nutshell, this case turns on the mantra that he who alleges must prove encapsulated by Section 107 of the Evidence Act which provides that –

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

59. As to whether the Claimant was attacked at the Kenya Power and Light Company (KPLC) Yard, Rongai, the Claimant testified that the Yard was an open dark place with neither a fence nor gate. That only motor vehicles were parked at the site. That he was grabbed while on patrol between the motor vehicles at the yard and injured on the head and was assisted by the colleague when he cried for help. In his statement, the Claimant states that three masked men approached him and assaulted him.

60. In the oral testimony he stated that he was assisted by his colleague but on cross examination he testified that he was assisted by three

people who responded to his cries for help. Similarly, in the written statement the attackers ran away but in the oral evidence they drove off in a waiting motor vehicle.

61. In his oral evidence the Claimant told the Court that he was taken to the Mbagathi Hospital by his employer but the written statement makes no reference, to the employer's involvement in anyway on 6th July 2016 or thereafter.

62. RW1 testified that the Kenya Power and Lighting Company site at Rongai was storage yard with motor vehicles, cables and transformers and was fenced with a gate.

63. It is doubtful that the Kenya Power and Lighting Company Limited could park motor vehicles and store cables and transformers in an open dark place guarded by two men who barely see each other.

64. On reporting of the attack to the employer, the Claimant's statement is reticent on this fact. He admitted in Court that he did not even know who reported the attack to the Company, assuming it was. If neither the Claimant nor the unnamed colleague or well-wishers reported the attack to the Respondent, who did and when?

65. RW1 testified that the attack was never reported to the Company in the hand over notes or by the Supervisor or the Client (Kenya Power and Lighting Company). With no evidence that the attack was actually reported to the Respondent, it is not implausible that the Respondent was unaware of the attack. The Claimant's statement makes no reference of any visit to Mbagathi Hospital after reference by Wananchi Jamii Maternity and Nursing Home on 6th July 2021.

66. For unexplained reason the attack was never reported to the police yet Jamii Hospital is close to Rongai Police Station.

67. A copy of a document issued by Wananchi Jamii Maternity and Nursing Home dated 15th August 2016 show that the Claimant was attended on 6th July 2016. It states that he had been hit by a gang of thieves at "*Kenya Power and Lighting Company House*" and treatment included suturing and prescription and referred for further management.

68. On 12th July 2016, the stitches were removed. On 5th July 2016, the Hospital administered a small dressing presumably on the healing wound and on 25th July 2016 he was given tablets. The document has no signature other than the Hospital stamp and the name Kevin whose designation is unclear.

69. A copy of a second document dated 15th August 2016 but written by another person at the same Hospital states that the Claimant was treated for neck pains and cough. He visited the Hospital on 21st August 2016 with chest pains and vomiting blood and was advised to seek medical attention but did not and was given tablets.

70. That on 29th August 2016 he had the same complaint and advised to seek x-ray but did not and was given tablets and referred for further management.

71. The form is stamped 12th September 2016. The rest of the stamp is illegible to the Court.

72. Third, a prescription from Mbagathi Hospital dated 6th July 2016 states that the diagnosis is assault and drugs are prescribed.

73. A second documents from the Mbagathi Hospital is a Radiology Request/Report form for Skull and Chest X-Ray. The brief clinical summary is headache and chest pains on account of assault.

74. There is no evidence that the request was seen through and the Claimant received any treatment at Mbagathi. The report page is blank. It appears that the Request/Report Form was never presented to the Radiologist for the X-ray to be performed. This explains the blank report page.

75. Intriguingly, the two documents from Mbagathi dated 6th July 2016 mention the term assault, headache and chest pains. They make no reference to any wound or deep cut on the scalp yet they were obtained on the day of the alleged attack.

76. Finally, the letter dated 15th September 2016 from Jamii Hospital which recommends early termination is a curious one. First it does not purport to be written by a doctor who had previously examined/treated the patient. It has neither the Doctor's name nor stamp.

77. Second, it is not signed by a doctor. The stamp is illegible but for the name Ann. It does not purport to be a doctor's report.

78. Third, the recommendation is not based on anything medically verifiable. It is not supported by a medical report on the Claimant's degree of incapacity to work and is not written to the Respondent or its doctor to initiate the necessary processes.

79. Finally, the letter lacks the necessary professional input.

80. In the Court's view, the document lacks credibility and has no evidential value.

81. In sum, none of the two reports and letter from Jamii Hospital purport to have been authored by the Doctor who attended to the Claimant and all were sought after the visitations. Relatedly, the documents are not in agreement with the documents from Mbagathi Hospital.

82. Apart from the documents from Jamii and Mbagathi Hospitals, it is unclear why the Claimant or the unnamed colleague did not report the attack to his employer or the police.

83. The Respondent confirmed that not even its client the Kenya Power and Lighting Company reported the alleged attack. In addition, the Respondent testified that it had a specific doctor and Hospital to whom it referred its guards for treatment and follow up. In the circumstances, the Respondent's evidence remains uncontroverted.

84. For the above reasons, the Court is satisfied that the Claimant has not on a balance of probabilities established that he was attacked at the workplace on 6th July 2016.

85. As regards early retirement, the Claimant's Advocate wrote to the Respondent on 31st October 2016 demanding that this Claimant be accorded early retirement. The demand letter makes no reference to the treatment the Claimant had received but adverts to the Doctor's determination that the Claimant was medically unfit to continue working but does not appear to have attached the letter from Jamii Hospital.

86. Typically, it is employers who often initiate the discharge employees on medical grounds but not vice versa as is the case here, where an employee is not applying but demanding early retirement

87. In its response dated 5th December 2016, the Respondent state that the Claimant was supposed to have reported to the Company to record a statement on the incident referred to in his Counsel's letter but had not availed himself and had to clear with the Company for payment and was requested to do so.

88. Although the Claimant testified that the employer took him to Mbagathi at 3.50 am and later took home, neither he nor the unnamed colleague who assisted him called the employer. Moreover, this oral testimony is at variance with the written statement which makes no reference to the employer's involvement.

89. The Respondent's letter dated 5th December 2016 is clear that the Respondent was not opposed to the request for early retirement on medical grounds but demanded that the Claimant clears with the Human Resource Department. There is no evidence on record that the Claimant returned the Company's items.

90. Voluntary early retirement is typically consensual since it is a bilateral discharge of an unexecuted contract and could take the form of agreement under seal, novation or accord and satisfaction. It can neither be demanded by an employee nor can it be imposed on employees by the employer.

91. In **Kenya Plantation & Agricultural Workers Union v Bamburi Cement Limited & another [2015] eKLR** a voluntary early retirement had been made by the Respondent. In the word of Rika J. –

“The VER is an offer. It does not create rights and obligations until accepted. It only becomes a contract giving rights and obligations, on being accepted. There is no breach... VER is not termination ...”

92. In the instant case, the Claimant sought an early discharge of the contract of employment on medical grounds and the Respondent appeared agreeable.

Reliefs

(a) Declaration that the Claimant be and is hereby given an early retirement

93. Having found that the Claimant herein is seeking an early discharge on medical grounds, a declaration that he be given an early retirement would create an obligation on the part of the Respondent yet the arrangement is supposed to be consensual. The claim for a declaration is **declined**.

94. The Court is in agreement with the Respondent's submissions that special damages must not only be pleaded but must be proved.

(b) Salary for the month of August 2016

95. Having found that the Claimant did not report the alleged attack to the employer or the police and led no evidence that the Respondent was aware of his absence from the work place and had authorised the same, the Claimant had no authority for his absence. Finally, the Claimant led no evidence that he had been granted any sick off. The claim is **declined**.

(c) Payment of house allowance

96. The Claimant adduced no evidence on his salary entitlement per month. It is unclear whether the undisclosed pay was inclusive of house allowance. In addition, no specific sum was pleaded or proved and **none is awarded**.

(d) Payment in lieu of annual leave

97. The Claimant led no evidence to prove his leave entitlement under the contract of employment with the Respondent and no specific sum was pleaded and for what period having served for about one year and seven months. The claim is **disallowed**.

(e) General damages

It is unclear what this claim constitutes. It is an amorphous claim. Having found that the Claimant did not discharge the burden of proof on the alleged attack on 6th July 2016, the claim is **disallowed**.

98. In the final analysis, the Respondent is directed to compute and pay the Claimant's terminal dues for the one year and seven months worked within 60 days from the date of this judgment.

99. For the avoidance of doubt, the sum due is subject to statutory deductions.

100. Parties to bear their own costs.

101. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE