



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1785 OF 2016

BETWEEN

PAUL OTIENO OKETCH.....CLAIMANT

VERSUS

INTER SECURITY SERVICES LTD.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Paul Munpla & Company Advocates for the Claimant

Anthony Burugu & Company Advocates for the Respondent

JUDGMENT

1. The Claimant lodged his Claim on 2nd September 2016. He states, he was employed by the Respondent as a Guard, in February 2001 until 31st March 2015, when the Respondent summarily dismissed him.
2. He states, he was not heard, and was not given reason to justify termination.
3. He earned a monthly salary of Kshs. 10,658 as of the date of termination.
4. He prays for the following orders against the Respondent: -
 - a. Declaration that dismissal was unlawful.
 - b. General damages for unlawful dismissal.
 - c. 3 months' salary in lieu of notice.
 - d. Certificate of Service.
 - e. Costs.
5. The Respondent filed its Statement of Response on 25th October 2016. Its position is that the Claimant deserted employment on 13th May 2015. He was engaged in an act of gross misconduct, which warranted summary dismissal. The Respondent states, it employed the Claimant on 23rd February 2002. He was not employed in 2001. His Claim has no merit. The Respondent contends further, that the Claimant has not specified his prayers. No amounts are pleaded. The Respondent prays the Court to dismiss the Claim with costs.
6. The Claimant, and Respondent's Director Isaack Okwiny, gave evidence on 29th October 2021. The Cause was last mentioned on 30th November 2021, when the Parties confirmed filing and exchange of Closing Submissions.

7. The Claimant adopted his Witness Statement, Supplementary Witness Statement and Documents on record, in his evidence. He did not leave employment on 13th March 2015, but on 31st March 2015. His contract was terminated by the Respondent.

8. Cross-examined, he held date of employment was in 2001. He conceded a letter referenced 'temporary casual employment,' dated 23rd February 2002 indicates this to be the date of employment. The muster roll for March 2015, indicates the Claimant was present until 13th March 2015. He was not at work in April 2015. He worked over the weekends without overtime pay. Pay slips of January 2012 and January 2015 show overtime was paid. This item was captured in other pay slips, until the Claimant left. He did not notice that overtime had been paid. He did not have any document to support annual leave claim. He could not confirm the authenticity of the muster roll. He did not have support for notice of 3 months. Redirected, he told the Court that pay slips were introduced in 2002. He was employed in 2001. He never saw the muster roll while in employment.

9. Okwiny adopted his Witness Statement and Documents filed by the Respondent as his evidence. Cross-examined, he told the Court that the Claimant deserted on 13th March 2015. The Respondent was entitled to summarily dismiss him. He disappeared and could not be reached on phone. Okwiny next saw the Claimant working in the neighbourhood. Okwiny did not have attendance register. Employees had an opportunity to scrutinize the muster roll. The Claimant did not sign the muster roll. All Employees went on annual leave. Okwiny did not have documents showing this. The Claimant worked over 14 years. The Respondent did not issue him Certificate of Service. Redirected, Okwiny emphasized that the Claimant deserted.

The Court Finds: -

10. The Claimant was employed by the Respondent as a Guard. He states he was employed in 2001, while the Respondent states he was employed on 23rd February 2002.

11. The Court does not think the difference on the date of employment, advanced by the Parties, is material to the Claim. There is no prayer for service. In terms of assessing the level of compensation for unfair termination, if any is granted, the difference in the length of service advanced by the Parties is not significant. The Court does not think it is therefore useful, to make a determination on the date of employment. It is sufficient to conclude that the Claimant was employed as a Guard, on or about the year 2001-2002.

12. There was contested evidence about overtime. The Claimant does not pray for overtime pay, in his Pleadings or Submissions, so again it is difficult to understand why Parties spent considerable time haggling on overtime.

13. The muster roll, which the Court is persuaded is an authentic employment record, shows the Claimant left employment on 13th March 2015. He did not work until 31st March 2015.

14. There is also no evidence that he was dismissed by the Respondent on 31st March 2015. He deserted. He left of his own volition, on 13th March 2015.

15. On the whole the Claimant came out as an unreliable witness. He testified that he was not paid overtime. He has not pleaded overtime. Pay slips show overtime paid. He testified he did not notice that overtime was paid, in his pay slips. His Claim was from the onset poorly pleaded. His evidence was haltingly adduced, and not persuasive at all. There were no specific figures pleaded. He attempted to put figures to his generalized Statement of Claim, through the Closing Submissions. Closing Submissions are not Pleadings. The figures should have been clear from the Statement of Claim. If the Respondent wished to contest the figures, it could only do so through its Statement of Response, and on giving evidence. Figures are factual matters, to be canvassed at the trial. The Claimant pleads 3 months' salary in lieu of notice. It is not based on his contract or law.

16. The Respondent shall issue the Claimant his Certificate of Service.

17. No order on the costs.

IT IS ORDERED: -

a. The Claim is declined save for the prayer for Certificate of Service.

b. No order on costs.

Dated, signed and released to the Parties electronically, at Nairobi under the Ministry of Health and Judiciary Covid-19 Guidelines, this **10th day of March 2022.**

James Rika

Judge