



**IN THE REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 527 OF 2017**

**OSOTA PAUL OSIEMO .....CLAIMANT**

**VERSUS**

**INTERSECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit against the Respondent claiming the following reliefs:

- (a) Unpaid leave for 6 years (2001-2006).....Kshs. 81,916.38/=
- (b) Unpaid offs for 6 years ..... Kshs. 151,230.44/=
- (c) Overtime (4 hours per day for 15 years)....Kshs. 126,630/=
- (d) Unpaid 40 holidays allowance.....Kshs. 12,000/=
- (e) Unpaid sick leave allowance for 5 months  
(July, August, September ,October  
and November .....Kshs. 41,090/=
- (f) Uniforms refund .....Kshs. 9,500/=
- (g) Service for 15 years worked.....Kshs. 2,621,324.16/=
- (h) Certificate of service
- (i) NSSF funds not remitted to the institution for 15 years.

2. The facts of the suit are that the Claimant was employed by the Respondent as a Security Guard in 1995 and worked continuously until 2016. His salary was Kshs. 13,652.73 per month and he served diligently and faithfully. He averred that after his resignation the Respondent failed to pay him his lawful terminal dues and after several demands, he brought this suit.

3. The Respondent filed its defence on 28.10.2019 admitting that it employed the Claimant but from 27.4.2002 until 1.3.016 when he resigned. It averred that the Claimant was working for 6 days in a week and rested one day; that he was working from 6 a.m. to 6 p.m.; that he also rested on all public holidays and if he worked, he was compensated by a rest day or paid in lieu; and that he was given annual leave or paid in lieu during the entire period of his employment.

4. It averred that it paid the Claimant the proper salary as required by the law and denied ever deducting Kshs. 9500 for his uniform. Again it averred that it contributed NSSF dues in favour of the Claimant through out his period of service and prepared a certificate of service but he failed to collect. It further averred that the Claimant did not handover his uniform and boots after the resignation. Finally it averred that some of the claims by the Claimant are time barred and prayed for the suit to be dismissed with costs.

## EVIDENCE

5. The Claimant testified as CW1 and reiterated he worked for the Respondent from February 2001 and worked continuously until 15.2.2016 when he resigned on medical grounds. His salary was Ksh. 13652 per month but after the resignation he was not paid his terminal dues.
6. On cross examination he contended that he was hospitalized for 5 months after undergoing an operation. He denied that the employer demanded that he be examined by a doctor of its choice.
7. He further contended that he never went for leave from 2001 to 2006 but from 2007 he was given permanent appointment and henceforth started going for his leave. He clarified that his claim for accrued leave is for 2001 to 2006. He further clarified that during the off days and leave days sought by the letters produced as exhibits, he was not paid salary and they were in respect of the period before 2007. He also clarified that the company policy then was that any off days or leave days taken were deducted from the salary.
8. He prayed for overtime pay for 4 hours worked daily for 15 years. However, he admitted that he was paid for overtime worked as per the monthly payslip but he did not know how it was calculated.
9. On re-examination he contended that he was deducted money for uniform on the understanding that he would be refunded upon returning the uniform after separation, therefore he sprayed for Kshs. 9500 for the uniform.
10. Mr. Isaac Okwieny, Respondent's Director testified as RW1. He admitted that the Claimant was employed by the Respondent but from 2002 to 2016 and contended that he went for all his annual leave.
11. He further stated that the Claimant was working 6 days a week from 6 a.m. to 6 p.m. and rested one day every week. He further stated that the Claimant was paid for any public holidays worked and the Respondent remitted NSSF for him during his service.
12. He contended that the Claimant never returned his uniform after his resignation. He contended further that the Respondent wrote to the Claimant severally seeking for evidence of his medical condition that led to his resignation but the Claimant failed to avail the same or go to the office for medical examination. Finally he contended that the Respondent did not refuse to issue the Claimant with Certificate of Service but it is him who failed to go for it.
13. On cross examination, RW1 admitted that the Claimant was not paid salary during the days he applied for unpaid leave. He maintained that the claimant was paid for the days he was off duty. He contended that no money was deducted from the Claimant for uniform and he also did not return the uniform after he resigned.
14. He stated that the Respondent has the policy of examining employees who wish to resign on medical grounds. On being shown Claimant's NSSF statement, issued on 22.10.2019, he admitted that it showed zero remittance to the NSSF from 2002 and thereafter some months without remittances. However he observed that the NSSF statement refers to employer called Fidelity Security Limited. Finally, he contended that the Claimant was never denied any leave after making his application.
15. No witness produced the NSSF statement for the Claimant but the Counsel agreed to file the same with their written submissions.

## SUBMISSIONS

16. The Claimant submitted that he is entitled to sick leave allowance for July, August, September, October and November 2010 because he underwent an operation and remained on sick leave until December 2010 when he resumed work. He contended that the claim is not opposed and computed the allowance as Kshs.  $8218 \times 5 =$  Ksh. 41,090 based on his salary scale in 2010. He relied on section 30 of the Employment Act which provides for the formula of salary payment during sick leave.
17. The Claimant further submitted that he is entitled to accrued leave and off days for 6 years between 2001 and 2006 assessed at Kshs. 81,916.38 and 151,230.44 respectively. He further contended that he worked 150 public holidays but he was paid for 110 days leaving 40 days outstanding equaling to Kshs. 28000 based on a daily rate of Kshs. 700. He further submitted that he is entitled to overtime pay at the rate of 4 hours per day from 2003 to February 2016 equaling to Ksh. 126, 630.
18. He further submitted that he is entitled to Kshs. 9500 being refund of uniform levy which was deducted from his salary. He contended that his resignation could not be accepted by the employer before returning his uniform.
19. He also contended that he is entitled to service pay at the rate of 15 days pay for every year of service totaling to Kshs. 1118,148.625. Related to the foregoing in the claim for refund of unremitted NSSF deduction for 35 months plus 13 months balances, he contended that RW1 admitted that the employer failed to remit NSSF deductions for the Claimants in some months. He referred to NSSF statement annexed to his submissions for emphasis.
20. To fortify his submission, the Claimant relied on **Joseph Gor Athiambo v Azilion Kenya Ltd [2018]eKLR.**
21. The Respondent submitted that the reliefs sought by the Claimant should not be granted because they lack particulars and the basis or evidence upon which they are grounded. It relied on **Kenya Power & Lighting Company Ltd v County Government of Nairobi and Another [2017]eKLR and the Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014]eKLR** where the courts held that parties are bound by their pleadings and any evidence that is at variance with the averments of the pleadings must be disregarded.

22. The Respondent further submitted that NSSF statement filed by the Claimant with his written submission should be disregarded because it had no opportunity to cross-examine the Claimant on the same.

23. As regards the claim for leave for 2001 – 2006, the Respondent submitted that it lacks particulars and evidence to show how the sum of Kshs. 151,230.44 was arrived at. It further submitted that the claim is time barred and without merits.

24. As regards the claim for sick leave allowances, the Respondent submitted that the Claimants contract of employment produced as exhibit did not provide for payment of the same. It further submitted that there is no statutory provision that entitles the Claimant to the said allowance and observed that the Claimant has not indicated the year and how Kshs. 41090 was arrived at.

25. It further contended that the law only provides for 7 days sick leave with full pay and thereafter 7 days sick leave with half pay within every period of 12 months. It submitted that it paid the Claimant his salary as provided by the law through out his employment period.

26. The Respondent further submitted that the pays lips produced do not show that any uniform levy was deducted from Claimants salary. It further submitted that the claim for service must fail because the Claimant was a registered member of NSSF and it made contributions to the fund in his favour. It contended that under section 35(6) of the Employment Act the Claimant is disqualified from claiming service pay because he is a beneficiary of the NSSF.

27. Finally, the Respondent submitted that the Claimant is free to go for his Certificate of Service.

### **ISSUES FOR DETERMINATION**

28. There is no dispute that the Claimant was employed by the Respondent for many years until he resigned on 16.2.2016. The only issue for determination is whether he is entitled to the reliefs sought.

### **LEAVE FOR 2001 – 2006**

29. The Claimant admitted in evidence that he only got permanent appointment in 2007. I have considered his letters of appointment dated 14.2.2001 and 27.4.2002 and noted that the Claimant was then serving under 3 months (90) days seasonal contracts. That position subsisted until 2007 when he got permanent employment. It follows that each seasonal contract was independent from each other and any claim for accrued leave in respect of the 3 months contract ought to have been made before it became time barred.

30. From 2006 to 2017 when the suit was filed is over 10 years. Consequently, the claim for leave accruals for the period before 2007 is obviously time barred under section 90 of the current Employment Act and section 4 of the Limitation of Actions Act which was applicable to the Claimant before the new Act came into force in 2008. The said provisions sets Limitation period at 3 years and 6 years respectively, accordingly, the claim for accrued leave for 2001 – 2006 is dismissed for being time barred.

### **UNPAID OFFS FOR 6 YEARS**

31. The claim for unpaid offs lacks particulars and evidence. It is also for the period before 2007, therefore it is dismissed for being incompetent, time barred and without merit.

### **UNIFORM REFUND**

32. Again this claim fails for lack of particulars and evidence in support. The Claimant did not prove using payslips or any other manner that uniform levy was deducted from his salary or otherwise deposited.

### **OVERTIME PAY FOR 15 YEARS**

33. There is no dispute that the Claimant was working for 12 hours per day being from 6 a.m. to 6 p.m. which means he used to work extra time. Under the Private Protective Security Regulations a watchman is supposed to work for 60 hours per week equaling to 10 hours per day. It therefore means that the Claimant was working 2 extra hours per day. However the Claimant has exaggerated the said claim because he did not factor the days he was on annual leave, sick leave or off days. Consequently, it is dismissed for lack of particulars and evidence.

### **PUBLIC HOLIDAY ALLOWANCE**

34. The claim for the said 40 public holidays worked is also dismissed for lack of particulars and evidence.

### **SERVICE PAY**

35. I have considered the NSSF statement filed by the Claimant with the consent of the Respondent and found that it reflects a few months with zero remittances or less remittances than the required amount of Kshs. 400. The said omission in my view represents a minimal default, which can be corrected by an order that the Respondent makes remittances for the few months reflected as zero or less than Kshs. 400 remittances in the NSSF Statement.

36. The said correction is only in respect of the period from 2007 because any claim under the previous fixed term contracts is time barred. Consequently, because the Respondent has regularly remitted NSSF dues for the Claimant from 2007 when he became a permanent employee, I dismiss the claim for service pay. Under section 35(6) of the Employment Act, the Claimants being a beneficiary of NSSF is

disqualified from claiming service pay.

37. For the same reasons the claim for unremitted NSSF deductions is declined and instead I order the Respondent to rectify the default by remitting the unremitted deductions of the period from 2007 when the Claimant became a permanent employee within 30 days of this judgment.

#### **UNPAID SICK LEAVE ALLOWANCES FOR 5 MONTHS**

38. The claim for unpaid sick leave allowances for 5 months lacks particulars and evidence. It does not state the year when the claim accrued and the Claimant has not produced any evidence or cited any law which entitled him to a sick leave allowance. Consequently, that claim is also dismissed.

39. In the end, I find and hold that the Claimant is not entitled to any reliefs sought except the Certificate of Service of which the Respondent blamed the Claimant for not collecting it from its office. For the reasons set out above, the suit stands dismissed with no costs.

**Dated, signed and delivered at Nairobi this 15th day of April, 2021**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**