



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 1713 OF 2015**

**PATRICK MOI ENWANI.....CLAIMANT**

**VERSUS**

**BLUE ROCK SECURITY SERVICES LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed this claim on 25<sup>th</sup> September 2015. This was through the Statement of Claim dated the same date. The claim is for terminal dues against the Respondent.
2. The Claimant avers that he was an employee of the Respondent until he resigned from employment sometime after resuming from leave that he took in February 2015. Although the Claimant does not give the exact date of his resignation, the fact of him having resigned is not disputed by the Respondent.
3. In its response to the Claimant's claim, the Respondent points out that the resignation happened on 2<sup>nd</sup> March 2015. As the fact of resignation is not contested, the court takes it that it happened on 2<sup>nd</sup> March 2015.
4. Although the Respondent filed a reply to the claim, it did not tender evidence in the cause. Only the Claimant gave evidence. The net effect of this development is that the claim was as a matter of law undefended. This position is fortified by the decision of this court in *Peyiai Nkoitoi v Aruba Mara Camp Safaris Ltd [2021] eKLR* in which the court observed that the failure to call evidence in support of pleadings by a party to a cause leaves such cause as undefended as the court cannot take the unsubstantiated pleadings as evidence in the matter.
5. In his pleadings, the Claimant prays for several reliefs. These include:-
  - a) Damages for wrongful termination at 12 months gross monthly pay totaling Ksh 170,400/=.
  - b) Salary for March 2015 of Ksh 14,200/=.
  - c) Accrued leave of Ksh 14,200/=.
  - d) Service pay for 3 years of service of Ksh 21,000/=.
  - e) Overtime pay for weekdays for 3 years of Ksh. 380,160/=.
  - f) Overtime pay for Saturdays of Ksh. 86,400/=.
  - g) Overtime pay for Sundays of Ksh. 187,200/=.
  - h) Overtime pay for public holidays of Ksh 34,320/=.
  - i) Service letter.

6. At the very commencement, it should be noted that this is not a suit for unlawful termination. The Claimant voluntarily resigned from duty. As a consequence, the court takes the view that the remedies provided for under section 49 of the Employment Act are not available to the Claimant as that section deals with remedies for wrongful and unfair termination. As a consequence, the claim for damages equivalent to

12 months of the Claimants' gross monthly pay cannot be countenanced.

7. During his testimony, the Claimant adopted his statement as his evidence in chief. He also relied on the list of documents he filed. In addition, although the Claimant did not furnish the court with his pay slip, he nonetheless referred to the pay slip appearing on the list of documents filed by the Respondent to explain the overtime pay entry of Ksh. 1877.78. In their submissions, the Claimant's lawyers alluded to the entries on the said pay slip to give a breakdown of the components of the Claimant's gross pay.

8. In his evidence, the Claimant stated that his NSSF dues were not paid for April, May, November and December 2012 and January, June, July, August, September, October, November 2013 and January, February and March 2014. However he did not provide records from the National Social Security Fund (NSSF) to support this claim.

9. Such evidence is not in the exclusive control of the employer and an employee would easily obtain it to fortify his claim. Therefore, the burden to prove that these remissions were not made lies with him in terms of sections 107, 108 and 109 of the Evidence Act. In the absence of statements from NSSF to support the assertion that the remittances were not made, the court finds it inappropriate to solely rely on the Claimant's word of mouth alone to allow the claim. Such evidence does not meet the standard of a preponderance of probabilities that the remittances were not made. As a result, this claim fails.

10. The Claimant also contended that he would work overtime sometimes up to 8.p.m before he would be relieved by another employee. He therefore claimed for overtime pay. However in his oral testimony, he conceded that he used to get a standard sum of Ksh. 1877.78 per month as overtime pay. He said this was paid on account of work undertaken on Sundays. It is noteworthy that in the statement of claim, the Claimant had claimed for Sunday overtime which he now says was covered by the standard overtime remittance of Ksh. 1877.78. I find the claim for overtime unsubstantiated. The Claimant does not give a satisfactory explanation to demonstrate that the standard overtime pay of Ksh 1877.78 appearing in his pay slip was to cover Sundays only. In any event, the pay slip does not say so.

11. But what is of most concern to the court is the fact that the Claimant had initially sought to avoid disclosing to the court that he was receiving some overtime pay until the court sought a clarification on the issue from him. This conduct on the part of the Claimant leaves the court with the impression that he was less than candid in his testimony. I would therefore hold that absent any other evidence to suggest that the monthly overtime pay of Ksh. 1877.78 did not cover all overtime entitlements by the Claimant, this amount covered the cumulative monthly overtime pay due to him for the period he worked with the Respondent. The claims for overtime are thus declined.

12. The Claimant also asked for compensation for public holidays worked. However, no particulars of the days allegedly worked were given either in the pleadings or the evidence tendered. In the absence of cogent evidence in this regard, the court declines the prayer.

13. The Claimant had also claimed for pay in lieu of leave. However, in his oral testimony he owned up to having taken his annual leave. This claim therefore does fail.

14. There is also a claim for salary for March 2015. However, the evidence available shows that the claimant resigned on 2<sup>nd</sup> March 2015. To ask for salary for March 2015 is to suggest that he ought to have been paid for the period he did not render service to the Respondent.

15. In strict sense, if the provisions of sections 35 and 36 of the Employment Act were to be enforced, the Claimant ought to have given the Respondent one month's notice of intention to resign or paid the employer an amount equivalent to salary for one month in lieu of such notice. There is no evidence tendered by the Claimant that he issued the Respondent with a notice of intention to resign in terms of sections 35 and 36 of the Act. The claim for salary for March 2015 is therefore declined.

16. In their submissions the Claimant's Advocates asked that the Claimant's case be allowed as presented as there was no evidence by the Respondent to controvert that of the Claimant. While the court agrees with the view expressed in *Peyiai Nkoitoi v Aruba Mara Camp Safaris Ltd* above regarding the position of uncontroverted evidence, this is not to be understood to mean that the failure to call evidence by the Respondent relieves the Claimant of the obligation to prove his/her case.

17. As I have observed earlier on in this judgment, this cause is not one of unlawful termination and or dismissal. It is an ordinary cause by a party that has voluntarily resigned seeking to recover his terminal dues. In my view therefore, the terminal dues to be claimed by such employee are governed by the provisions of section 35 (5) and (6) of the Employment Act which provides as follows:-

5. *An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.*

6. *This section shall not apply where an employee is a member of—*

*(a) A registered pension or provident fund scheme under the Retirement Benefits Act.*

*(b) A gratuity or service pay scheme established under a collective agreement;*

*(c) Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and*

*(d) The National Social Security Fund.*

18. Therefore, main claim due to the Claimant is one of service pay. Indeed, this together with gratuity where an employee was not a member of a gratuity or pension scheme is what is provided for under section 35 of the Employment Act.

19. By his own evidence, the Claimant had worked for the Respondent for approximately three years between 2012 and 2015. He therefore asked for gratuity of Ksh. 21,000/=. This works to about Ksh. 7000/= for every year worked which is in line with the conventional computations of service pay at the rate of salary for 15 days for every year worked. This limb of the claim is consequently allowed. This amount shall attract interest from the date of the award till payment in full.

20. The court also orders that the Respondent issues the Claimant with a Certificate of Service.

21. The Claimant is also awarded costs of the case.

**22. Summary of the award:-**

**a) The prayers for salary for March 2015, damages equivalent to 12 months gross pay, pay in lieu of leave, overtime and unpaid NSSF dues are disallowed.**

**b) The Claim for service pay is allowed at Ksh 21,000/= with interest at court rates from the date of the award till payment in full.**

**c) The Respondent to issue the Claimant with a Certificate of Service.**

**d) Costs are awarded to the Claimant.**

**Dated, signed and delivered on the 13<sup>th</sup> day of September, 2021**

**B O M MANANI**

**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.**

**B O M MANANI**

**JUDGE**