

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSES NO. 378 OF 2018

CYRUS MUSILA MWALIMU.....CLAIMANT

- VERSUS -

SPEARS SHIP CONTRACTORS LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 07.06.2018 through M/S Otieno B.N. & Associates. The claimant's case is as follows. He was employed by the respondent in June 2004 at Kshs.5, 016.00 per month and reviewed to Kshs. 9, 600.00 per month. He states that he worked for the respondent for 13 years. His further case is that in February 2018 he was terminated without any prior notice nor afforded an audience to respond to the reasons underlying the termination. He claims terminal dues, pay in lieu of notice Kshs. 10, 954.70, leave allowance for 13 years Kshs. 99, 687.77, twelve months' compensation Kshs. 131, 456.40, and salary arrears due to underpayment per wage orders for 01.05.2004 to 30.04.2018 amounting to Kshs. 165, 385.19 making a sum of Kshs. 407, 484.06. The claimant prayed for Kshs. 407, 484.06 and costs plus interest of the suit.

The respondent filed the memorandum of response on 23.08.2018 through Buyuka Obonyo Advocates. The respondent stated that it never employed the claimant and it could not have terminated him as all the claims and prayers are unfounded. The claimant prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness was Michael Muyayi Mukanga (RW) the respondent's Operation's Manager. Despite opportunity to file final submissions, parties failed to do so.

The **1st and main issue** for determination is whether parties were in a contract of service. The claimant testified that he earned Kshs.2, 500.00 per week and admitted that the same contradicted his pleading that he was paid Kshs. 5, 016.00 then Kshs. 9, 600.00 per month. He disowned the pleading. He testified thus, **"My claim is really inconsistent. I do not know the basis of my claim. 2009 – 2008 claim states I earned Kshs. 9, 780.00. I do not understand the figures. I say I do not know at all; the claim is strange and incorrect. I do not know that computation. That the respondent employed me in 2018 as watchman is not true. It is false. I have exhibited 2018 Port Pass. I rely on my 3 documents exhibited, I, D, demand letter and Port Pass."** RW testified that per Port Pass dated 07.02.2018, the respondent employed the claimant as a security guard but he never reported on duty and he never worked as employed. Further, after he failed to report at work the respondent never followed up the issue.

The Court has considered the evidence and pleadings. The Court finds that the claimant has been unable to establish employment in 2004 as alleged and failed to establish the attached terms of service including the wages payable. In the circumstances the Court finds that the respondent employed the claimant in 2018 as a guard and he never worked at all. Special damages as prayed for must be pleaded and strictly proved. The Court finds that the claimant has failed to prove the special claims and further finds that he has failed to establish the unfair termination as the Court finds that he left immediately after the employment commenced and without working for the respondent at all. Parties failed to file final submissions and each will bear own costs of the suit.

In conclusion the suit is hereby dismissed with orders each party to bear own costs of the suit.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 19th November, 2021.

BYRAM ONGAYA

JUDGE