



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

AT NAKURU

CAUSE NO.65 OF 2018

PAUL MAINA GICHOHICLAIMANT

VERSUS

HATARI SECURITY GUARDS RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent for a period of 13 years and his last position was a manager earning ksh.37,100 per month. On 11th September, 2017 the claimant resigned from his employment due to harassment and frustrations at work. His wages were not being paid on time, was given unnecessary transfers and without an allowance.

The claim is for the payment of terminal dues being;

- a. Disturbance allowances for e transfers Ksh.15,000;
- b. Uniform refund Kshs. 4,400;
- c. Work on public holidays 6 x 13 years x 967 Ksh.100,533;
- d. Price for sniff dogs ksh.40,000;
- e. March arrears Ksh.5,200;
- f. July, arrears ksh.2,900;
- g. August arrears ksh.2,000;
- h. September arrears Ksh.27,100;
- i. October 10 days ksh.9,660;
- j. Severance pay for 13 years ksh.81,300;
- k. 3 pending leaves ksh.81,300; and
- l. Off days ksh.602,784.

The claim is also for certificate of service and costs of the suit.

The claimant testified that in September, 2004 he was employed by the respondent as a guard on day or night shift but in October, 2017 he resigned due to constant transfers. He had been assigned western region, then Nyanza and then to Rift Valley as a guard. He was then promoted to a manger and then moved to Western region then on 16th September, 2016 moved to Nairobi at the head office but was sent to Kikuyu PEC an area outside of Nairobi as supervisor in October, 2016.

In November, 2016 he was transferred to Sultan Hamud in Machakos until March, 2017 when he was moved to Kirinyaga and then Embu

where he stayed for 3 weeks when the respondent said the contract with the client had been terminated and had to return to Nairobi when he applied for his annual leave. His wages had not been paid and this led him to resign from his employment.

The claimant also testified that while he was at Sultan Hamud he suffered a wage deduction of ksh.5,200 which was done again in March at Ksh5,200 and when he questioned he was informed that the deduction would be refunded. His wages at the time was Ksh.27,000 per month.

In March to September, 2017 he was paid less and no reasons were given.

In September, 2017 the claimant issued notice to resign and applied for his annual leave which was allowed. No terminal dues were paid.

During the various transfers he was entitled to ksh.5,000 allowance but in some cases this was not paid.

He got his uniform but a refund of Ksh.4,400 is due. despite clearance this owes.

When the claimant issued notice of resignation he was not paid for the period. No off day was allocated and the defence that he employed ghost employees is without proof and only arose upon his resignation.

The defence is that the claims made are misguided and unfounded. The claimant was paid his wages according to the contract with the clients and since he was a manager he was his own supervisor working under his own terms and conditions. The claimant utilised all his leave days.

While the claimant was manager in Western and Nyanza region he employed ghost workers in April, 2013 to August, 2016. This was discovered after a staff audit revealed the existence of the same and upon an investigation report it was revealed that 6 of the 7 ghost workers benefited from a fraudulent scheme and the claimant defrauded the respondent Ksh.598,200 as salary returns for the ghost workers. This was reported to the police for further investigations on 9th number, 2017 at Kondele Police Station.

If there is any claims due to the claimant such should be paid less ksh.598,200 he defrauded the respondent.

The claims made should be dismissed and the claimant made to pay what he defrauded the respondent with costs.

Counter-claim

The counter-claim is that the claimant owes the respondent ksh.598,200 for employing ghost workers and was paid money through fraud the particulars of which are;

In February to August, 2016 he allegedly employed Alfred Juma and Rispar Kheveli at KESREF Kisumu and paid each Ksh.56,000;

January to August, 2016 he allegedly employed Patrick Kiprotich at Kalro, Koru and paid Ksh.64,000;

April to August, 2016 he allegedly employed Wesley Kiplagat at KALRO Kisii and paid ksh.32,000;

April 2013 to May, 2015 he allegedly employed Anthony Okumu at KERRA and paid Ksh52,000;

March to August, 2016 he allegedly employed Khisah Valeria at KESREF and paid ksh.48,000;

March to August, 2016 he allegedly employed Anthony Lokany at Kacheliba and paid ksh.43,200; and

May, 2014 to October, 2016 he allegedly employed Josphat Wasike as supervisor at Bungoma and paid Ksh.245,500.

Upon the discovery of these fraudulent activities, the respondent could only recover the same from salary returns and set off.

The counter-claim is that the respondent be awarded the sum of ksh.598,200 as counter-claimed and the claim be dismissed with costs.

There is no defence to the counter-claim.

Stephen Mwangi Kimani the director of operations with the respondent testified that the claimant was employed by the respondent in the year 2004 as a guard and then promoted as supervisor when he resigned in September, 2017.

The claimant was not transferred unnecessarily. For every transfer he was paid. The managers do not wear a uniform and the claimant suffered no costs for a uniform refund. On public holidays the claimant would be on off, as a manager he was required to regulate his off days.

The claimant was not authorised to purchase any sniff dogs as alleged and where he purchased them this was not brought to the attention of the respondent and such expense was not necessary as the respondent where it required dogs such would be sourced from a central point.

Mr kimani also testified that in the counter-claim, the claimant was found to be of gross misconduct. as manager in the western and Nyanza regions he was assigned duty to oversee and assign guards to cover areas of work and to vet them for employment. The claimant failed to recruit properly and alleged to have hired some but an audit revealed he had ghost workers with 7 guards being paid while they were not at

work. The claimant filed work returns and number of days for wages to be processed at the head office. These 7 guards were never deployed as alleged and the subject clients have since confirmed they never got allocated such guards.

The respondent made losses of ksh.598,200 as a result of the claimant's acts of fraud. This sum should be recovered from him.

Mr Kimani also testified that the claimant was transferred on several actions following client's complaints and to secure his employment he would be moved. The claimant would also be moved as a disciplinary measure and on the 3 occasions when he was paid, these related to the transfer occasioned by the respondent. when the claimant was moved to Kikuyu, this is part of Nairobi head office operations. While he was at Sultan Hamud this was on patrol not a action and later he was transferred to Embu when he opted to resign.

The claimant would be paid in lieu of taking annual leave on the years he did not take his leave days.

The certificate of service is available to the claimant and can be collected any time.

Mr Kimani also testified that the claimant was invited for disciplinary hearing and before this could be addressed he resigned from his employment. The matter of fraud has since been reported to the police.

Jerry Mulu Kathingo the general manager testified that the respondent conducted a staff audit after the claimant was moved from Western and Nyaza regions to Nairobi and replaced by Mr ndiema who discovered differences in wage payments. The schedules indicated names of people who were not at work at the stated stations. The claimant had employed them but they were not at work. The claimant was the manager and would file returns for payment of the workers on each site.

Mr Mulu testified that he conducted investigations.

The claimant had the discretion to take reliever guards for 4 days when the regular guards were on off in a given month. He would take 6 guards to relieve others as the allocated work stations.. however investigations revealed that the regular guard never took their off days and the respondent had paid ksh.598,200 without any reliever guards being employed and the regular guard not going on their off days.

Mr Mulu was not working directly with the claimant and had no reason to accuse him falsely and he relied on the evidence he secured from the field and this is the basis of the counter-claim.

As noted above, there is no defence to the counter-claim.

At the close of the hearing, both parties filed written submissions.

The claimant submitted that the respondent did not pay statutory dues to the NSSF and under section 35(5) he is entitled to service pay at 15 days for each year worked a total of 13.

As an employee of the respondent he had no capacity to employ and the alleged employment of 7 guards is without evidence. the claimant resigned on 11th September, 2017 and such claims had not come to his attention.

The claimant also submitted that he worked on his own terms and thus purchased sniffer dogs and there was no refund.

The counter-claim without proof should be dismissed and the claims made confirmed with payment of his terminal dues. he relied on the cases of **Aloiys Juma Ogola versus Pepco Kenya Limited [2014] eKLR** and **Jane Njeri Wanyoike & 23 others versus Pan Africa Insurance Company Limited & 2 others [2017] eKLR**.

The respondent submitted that the claimant is not entitled to the alleged disturbance allowance and uniform refunds as on the occasions he was paid a transfer allowance this was at the instance of the respondent and was not due and as a manager he was not required to wear or buy uniforms. The respondent followed its transfer policy and disturbance allowance could only be paid upon provision under the contract of employment.

On the claim for work during public holidays, the claimant as the manager was required to organise the taking of such time off. When there was such work the claimant was fully paid as held in **Patrick Lumumba Kimuyu versus Prime Fuels (K) Limited [2018] eKLR**.

The claim for the purchase of sniff dogs is without proof and not justified.

On the claims for wage arrears, the subject years for such claims is not set out. The claims for unpaid salary for 10 days in September, 2017 despite his resignation, the claimant was not at work for such time. Severance pay is not due as this was not a case of redundancy. The nature of alleged owing leave days is not set out. On the claims for off days' pay, the claimant as a manager was required to organise and taken such days off. He was entitled to a rest day each week.

The respondent also submitted that the counter-claims made are not disputed, there is a report to the police in this regard and should be allowed with an award of ksh.598,200 with costs.

The claimant signed from his employment with the respondent vide notice dated 11th September, 2017. He gave his reason as that he had suffered frustrations of hitch he was not happy, he had suffered late wage payments and the constant transfers from time to time and hence he

could not continue with work under such conditions.

The resignation notice was to take effect on 10th October, 2017.

The claimant had also written letter dated 7th September, 2017 to the effect that he had taken his leave from 11th August, to 5th September, 2017 and was not paid his August wages.

On 15th September, 2017 the claimant applied for 21 leave days as noted above. The application was approved. He was to resume work on 10th October, 2017. This was to therefore coincide with the end of the notice period to terminate employment.

Earlier on 11th August, 2017 the claimant applied for 21 days of leave running from 15th July, to 7th August, 2017 to resume work on 5th September, 2017 and this was approved.

Effectively from 15th July, 2017 to 10th October, 2017 the claimant had a total 42 days of annual leave. From the transfer from Sultan Hamud to Kirinyaga/Embu he enjoyed his annual leave.

Again on 10th July, 2017 the claimant applied for 21 leave days running from 11th July to 7th August, 2017.

Total leave days from July to October, 2017 were 63 days. These were approved.

On 12th June, 2017 the claimant applied for 21 days of annual leave running from 13th to 10th July, 2017. These was approval.

On 12th May, 2017 the claimant applied for 21 days of annual leave running from 17th May to 12th June, 2017. There was approval.

Cumulatively, the claimant applied for a total of 105 leave days. For some reason(s), the one approving such leave days would not the total number of leave days outstanding. Effectively for the period of 12th May to 10th October, 2017 the claimant was annual leave.

Such time is over and above what is contemplated under section 28(2) of the Employment Act, 2007. See also **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR**.

With regard to the claimant's claims that he was frustrated at work hence his resignation, there is no specific remedy sought in this regard. He resigned over the given reasons but does not seek therefrom.

What is thus due is the Certificate of Service under the provisions of section 51 of the Employment Act, 2007.

On the claims for disturbance allowances for 3 transfers, such is not a matter addressed in the law and can only be awarded where there is a private treaty, agreement or a term of the employment contract. Where the claimant was transferred due to operational reasons, he was paid his wages and there were no separate terms and conditions addressing such movements, such is addressed.

The claimant has made general claims with regard to work over public holidays, off duties, wage arrears from March, July, August, September, and 10 days in October without setting out which years were covered. Section 47(5) of the Employment Act, 2007 requires an employee to set out the unfair and wrongful conduct of the employer complained of for the employer to be able to discharge its burden of giving reasons to justify the same.

Where there are general claims made, this denies the employer material for which to offer a reply. See **Cavine Ouma Were versus Pioneer Plumbers Limited [2020] eKLR**.

With regard to claims for severance pay, as correctly submitted by the respondent, such a claim relates to the application of section 40 of the Employment Act, 2007 with regard to a redundancy. The claimant resigned from his employment and his claim did not stand out as one covered under section 40 of the Act for him to claim severance pay.

In submissions the claimant urged his claims for service pay under the provisions of section 35(5) of the Employment Act, 2007 but he pleaded for severance pay and not service pay. He cannot change his pleadings at the submissions stage. This would be to ambush the respondent and deny it a reply therefrom.

With regard to claim for the purchase of sniff dogs, the claimant as manager in Western and Nyanza region, where he made such a purchase for and on the benefit of the respondent, ordinary practice is to make a requisition and or make a claim therefrom instantly as to why would he finance the operations of his employer? This does not stand out as a reasonable and necessary expense to be undertaken by an employee without the approval and payment of the employer.

Even where the claimant had the capacity to purchase the subject sniff dogs, there is no record of such animals or the purchase documents attached to his claims or submitted with the employer, the respondent.

The claims made therefore are without merit and are hereby dismissed.

As set out above, there is no reply to the counter-claim. The same relates to the conduct of the claimant while in the service of the

respondent. following an audit he was found to have engaged in fraudulent activities to the loss of the employer and before the investigations could complete he resigned from his employment. The matters of fraud have since been reported to the police.

The respondent thus had a genuine and reasonable cause for the claim made against the claimant, upon filing suit, the respondent replied to the same and made a counter-claim and without a response or any effort for the claimant to extricate himself from the fraudulent claims the counter-claim for the payment of ksh.598,200 is due.

Accordingly, the claimant' claim is hereby dismissed. Judgement is hereby entered for the respondent for the counter-claim of Ksh.598,200 to be paid with costs.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of: