



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 170 OF 2018

BETWEEN

MWANZA KADHERE MBINDU.....CLAIMANT

VERSUS

DELFI SECURITY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

B.W. Kenzi & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 27th March 2018. He avers, he was employed by the Respondent as a Security Guard on 17th November 2011, earning a salary of Kshs. 6,000 monthly. He resigned on 1st July 2017 due to poor pay and poor work environment. He claims he was not paid terminal benefits. He did not go on annual leave; he was underpaid; he was denied gratuity; and denied service pay.

2. He prays for Judgment against the Respondent for:-

- a. Annual leave over a period of 5 years at Kshs. 49,350.
- b. Underpayment of salary for 6 years at Kshs. 263,890.
- c. Service pay at Kshs. 42,300.
- d. Gratuity at 18 days' salary for 6 years at Kshs. 50,760.

Total...Kshs. 406,300.

e. Costs.

f. Interest.

g. Any other suitable relief.

3. The Respondent filed its Statement of Response on 6th April 2019. Its position is that it did not employ the Claimant permanently. He was

paid for the period worked. He worked intermittently on contracts not more than 3 months for any period. He was fully paid under all his contracts. The Claim is time-barred under Section 90 of the Employment Act. Further, the Respondent states that the Claimant, has presented the Claim fraudulently with the intention of extorting money from the Respondent. The Respondent prays the Court to dismiss the Claim with costs.

4. The Claimant gave evidence and rested his case on 12th November 2019. He adopted his Statements of Claim and Witness in his oral evidence. He was paid a monthly salary of Kshs. 6,000. He resigned because this salary was underpaid. He did not go on annual leave. He seeks gratuity as well as service pay.

5. The Respondent failed to present its evidence and hearing was closed on 12th November 2019.

6. Parties confirmed filing of Submissions at the last appearance in Court on 20th February 2020.

The Court Finds:-

7. The Respondent has not given evidence, and did not cross-examine the Claimant, having failed to attend Court on the hearing date.

8. The Claimant has established that he was employed by the Respondent a Security Guard, for 6 years. He was issued 3 month-contracts which were invariably renewed. There is nothing to doubt the Claimant's evidence that he worked in continuity for 6 years.

9. He was paid Kshs. 6,000 per month. He was not clear in which locality he worked. He did not disclose where the site he guarded was based. Is it Mombasa, Kilifi, or some rural outpost? The minimum wage is not the same in all areas. He did not supply the Court with various legal notices he relies on, to support his prayer for underpayment. He ought to have established through specific legal notices, what his salary ought to have been, in whichever locality he worked. The Court is not able to agree with his prayer for underpayment of salary, without the benefit of the relevant legal notices.

10. The Respondent has not supplied Claimant's annual leave records, to discount his oral evidence on unutilized leave over a period of 5 years. ***He is granted the minimum 21 days of annual leave, for 5 years, at the rate of Kshs. 230 per day, amounting to Kshs. 24,230 as annual leave pay.***

11. He was a security Guard, covered under the Regulation of Wages [Protective Security Services] Order, 1998. Regulation 17[1] of this Order grants Guards who have worked for over 5 years, gratuity of 18 days' salary for every completed year of service. The Claimant merits gratuity, having worked for the Respondent for 6 years. The submission by the Respondent, that gratuity is given at the discretion of the Employer, is not correct in a situation where there is an express provision of the law or contract, availing the benefit. **The Claimant is granted gratuity under this Regulation, at Kshs. 24,923.**

12. Having been paid gratuity under the law, it is not proper for the Claimant to expect service pay under another provision of the law. His years of service have been recognized and rewarded under the applicable Wages Order, and should not be doubly recognized and rewarded, under Section 35 [5] of the Employment Act.

13. Costs to the Claimant.

14. Interest allowed at the discretion of the Court, under Rules 29 of the E&LRC [Procedure] Rules 2016, at the rate of 16% per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a. The Respondent shall pay to the Claimant annual leave at Kshs. 24,230 and gratuity at Kshs. 24,923 – total Kshs. 49,153.

b. Costs to the Claimant.

c. Interest allowed at the rate of 16% per annum from the date of Judgment, till payment is complete.

Dated and delivered at Mombasa this 26th day of March 2020.

James Rika

Judge