



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 750 OF 2017

BETWEEN

BEN OBONYO OROS..... CLAIMANT

VERSUS

V.N.M CONSTRUCTION COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Thabit Wampy & Kitonga Advocates, for the Claimant

Wandai Matheka & Company Advocates, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 14th September 2017. He states, he was employed by the Respondent as a Security Officer, sometime in March 2010. He was assigned duty at a site in Umoja Nyali, in Mombasa, at a property known as G10. The property owner found the Claimant praying at 9.00 p.m. within the premises. He asked the Claimant to leave immediately, without giving the Claimant reason why he should leave. On 3rd March 2017, the Respondent terminated Claimant's contract. His last salary was Kshs. 12,000 monthly. He never took annual leave. He was not paid terminal dues. He prays the Court to grant Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 12,000.
- b. Public holiday pay at Kshs. 30,800.
- c. Annual leave at Kshs. 72,000.
- d. Damages for illegal termination at Kshs. 144,000.

Total... Kshs. 258,800.

- e. Costs and interest.

2. The Claimant, who initially acted in person, includes other alternative prayers in his Claim, which appear to replicate the prayers above. Those alternative prayers add nothing to the Claim and are hereby expunged from the record.

3. The Respondent filed its Statement of Response on 2nd November 2018. It is the position of the Respondent that, if at all the Claimant was employed by the Respondent, he was employed as a Casual Employee. He never worked for 1 month in continuity. There could be no termination of employment, as there was no employment in the first place. Other prayers are contested on the same ground- that there was no employment relationship. The Claimant at most, was in casual employment. He last reported to work on 3rd March 2017. The Respondent was not under obligation to ask about his whereabouts, after he failed to report, because he was in casual employment. The Court is asked to

dismiss the Claim with costs.

4. The Claimant gave evidence, and rested his case, on 17th July 2019. The Respondent called its Security Supervisor, Peter Ouma Ajulu, who gave evidence on 23rd October 2019, bringing the hearing to a close. The dispute was last mentioned on 10th December 2019, when Parties confirmed filing of their Submissions.

5. The Claimant stated he was employed in March of 2010, and worked in continuity. Even when he was taken ill, he would get a reliever, who the Claimant paid, from his own pocket. The Claimant's contract was terminated in January 2017. Jiteng, who was the Manager, found the Claimant worshipping. He terminated Claimant's contract. There was no notice, and no hearing. The Claimant initially worked at a site in Umoja Nyali for 3 years. Based on his good performance, he was taken by Jiteng to guard his residence for another 3 years. The Claimant reported the dispute to the Labour Office. The Respondent responded to letters written by the Labour Office, through its Advocate Mr. Matheka. It was agreed at the Labour Office that the Claimant would be paid terminal benefits totaled at Kshs. 86,000. He was paid nothing.

6. Cross-examined, the Claimant told the Court he was not issued a letter of employment by the Respondent, upon recruitment. Paragraph 2 of the Statement of Claim states termination was on 3rd March 2017. The Claimant has not given 2 different dates of termination. He was not in casual employment. He did not have any agreement concluded at the Labour Office showing he would be paid Kshs. 86,000. Redirected, the Claimant told the Court he is truthful, termination was on 3rd March 2017, and the records are with the Respondent.

7. Peter Ouma Ajulu stated that the Claimant was employed as a Security Guard. The Respondent does construction projects. It engages Employees for the duration of each project. The Claimant was given work to look after building material. The project came to an end. He was being paid Kshs. 400 weekly. He did not report again after the house the Respondent was renovating was complete, and occupied by its owner. His Claim has no merit.

8. Cross-examined, Ajulu said he saw the Claimant at work for at most, 4 months. Ajulu assigned duties. He had an attendance register. He did not have it in Court. The Respondent owns a construction yard, with construction material. A house was being renovated. The Claimant was guarding for the duration of renovation. He never worked at Respondent's yard. Ajulu paid Employees' salaries in cash. He did not have any documents to show payment. He followed up, to find out why the Claimant left. The house being renovated was complete and occupied. The Claimant informed Ajulu that the owner had taken occupation. The Claimant was paid salary for days worked. There are no documents to show this. Employees worked for 6 days in a week. On public holidays, there were relievers. Redirected, the Witness told the Court that the Claimant worked for about 3 months. It was not continuous. The yard is guarded by Employees of Texas Alarms. The house owner took possession of his house and employed his own Guard.

The Court Finds:-

9. The dispute was reported to the Labour Office by the Claimant on 6th January 2017. It is not likely that his contract was terminated on 3rd March 2017. Report to the Labour Office is documented to have taken place on 6th January 2017. Correspondence from the Labour Office on the subject comes before 3rd March 2017.

10. Parties presented their respective positions before the Labour Office. The Respondent was represented by its Advocate Mr. Matheka. This is made clear in the letter of the Labour Officer dated 16th February 2017, addressed to Vinaram Mulji, of V.N.M Construction Company, the Respondent herein.

11. It was agreed, as stated in the above letter, that the Claimant would be paid of 6 years' service at Kshs. 28,800; December 2016 wages at Kshs. 9,600; notice of termination at Kshs. 7,600; and 48 rest days at Kshs. 30,720 – total Kshs. 86,320. The amount was to be paid by 3rd March 2017, the date the Claimant seems to confuse for the date of termination.

12. The Respondent did not dispute the authenticity of the letter from the Labour Office. It was not disputed that Mr. Matheka was involved in the consultation at the Labour Office. Mr. Matheka was not availed as a Witness to discount allegations about his involvement. It is highly unlikely that the Labour Officer would go about recklessly mentioning an Advocate's name, if that Advocate was not involved in the meeting convened by the Labour Office. Vinaram Mulji, to whom the letter is addressed, similarly was not called to dispute the contents of the letter. Lastly the Respondent did not seek to cross-examine the Labour Officer, who authored the letter. It can only be concluded that the Labour Office investigated the facts and made conclusions contained in the letter of 16th February 2017. It would have saved the Court, the Parties and their Advocates time and other resources, if the agreement at the Labour Office was honoured.

13. The Court is satisfied that the Claimant worked for 6 years as indicated in the letter of the Labour Office; he was a regular Employee; he left in January 2017; and it was agreed he is paid a total of Kshs. 86,320, in terminal dues. He was not paid what was agreed.

IT IS ORDERED:-

a. The Respondent shall pay to the Claimant at total sum of Kshs. 86,320 in terminal benefits as agreed at the Labour Office, Mombasa County.

b. Interest allowed at 16% per annum from 16th February 2017, till payment is complete.

c. Costs to the Claimant.

Dated and delivered at Mombasa this 12th day of March 2020.

James Rika

Judge