



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 582 OF 2015

BETWEEN

MESHACH KING'AWI NYAMAICLAIMANT

VERSUS

RILEY SERVICES LIMITED RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

IRB Mbuya & Company Advocates for the Claimant

Obura Mbeche & Company Advocates for the Respondent

JUDGMENT

1. Through his Amended Statement of Claim, filed on 3rd August 2017, the Claimant states, he was employed by the Respondent as a Security Guard, from 26th May 2009. His last salary was Kshs. 12,235 monthly. He was summarily dismissed by the Respondent, through a letter dated 1st November 2016.

2. The Claimant avers that was unfair. The Respondent orchestrated sudden transfer of the Claimant from Mombasa. The Claimant asked for more time to enable him relocate to Kwale. The Respondent declined and ordered the Claimant to move to Kwale immediately. The Claimant sought more time as he is a family man, with School Children. The Respondent denied him more time. He states, the Respondent transferred the Claimant deliberately, in order to find an excuse to terminate Claimant's contract.

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

- a. Annual leave over a period of 5 years, 1 month at Kshs. 50,233.
- b. Leave allowance over the same period at Kshs. 2,000 annually, total Kshs. 10,000.
- c. 61 Public holidays worked from 2009 to 2015 at Kshs. 28,706.
- d. Overtime of 2008 hours for 3 years at Kshs. 276,307.
- e. Notice of 1 month at Kshs. 12,235.
- f. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 146,827.
- g. Any other suitable order.
- h. Costs.

i. Interest.

4. The Respondent filed its Statement of Response on 7th December 2018. It concedes to have employed the Claimant effective 26th May 2009. The Claimant was engaged on periodic contracts. His salary was Kshs. 12,235 monthly. The Respondent wrote to the Claimant on 31st August 2016, seeking to transfer him from Mombasa to Kwale Cooperative Bank ATM. Transfer was based on Claimant's long service and experience. He was required to report on or before 3rd September 2016. He wrote to the Respondent on 1st September 2016 asking for more time. He continued to resist transfer. He opted to go on leave. He had not reported as of 16th September 2016. He asked for extension up to January 2017. The Respondent granted him up to 26th September 2016. He declined transfer prompting the Respondent to issue letter to show cause. He responded on 27th September 2016. He was invited thereafter to a disciplinary hearing. He was presented with the charge, given an opportunity to defend, and a decision was made to dismiss him. He cleared with the Respondent and was paid his terminal dues. He received holiday pay as shown in the pay slips. The Respondent prays for dismissal of the Claim, with costs.

5. The Claimant gave evidence, as did Respondent's Regional Manager David Oduor Obiero, on 15th October 2019 when the hearing closed.

6. The Claimant adopted in his oral evidence, the contents of his Pleadings. He emphasized that he was given 2 days only to transfer. He sought extension to enable him relocate with his family to Kwale, from Mombasa. It is not true that the Claimant was paid for holiday work.

7. Cross-examined, the Claimant told the Court that he was called to Respondent's Office to explain his position on the transfer. He received the letter to show cause. He sought extension on 1st September 2016. He applied to go on annual leave. He was not allowed to go on annual leave. He asked for further extension on 16th September 2016. He was allowed extension to 26th September 2016. He did not report on this date. His Wife was not resident at Mombasa. His Children were. He was not paid for work performed on Public Holidays. He conceded that the pay slips showed this was paid. Pay slip for 2015 shows leave advance and leave allowance. He returned the uniform and cleared with the Respondent. He was paid nothing. He seeks overtime pay. He does not know how this was computed. He worked for 12 hours instead of 8 hours. Pay slip for 2015 shows, the Claimant received consolidated salary.

8. Redirected, the Claimant told the Court that other pay slips indicated overtime and leave at nil. He informed the Respondent he was not opposed to the transfer decision, but needed to understand the logistics.

9. David Oduor Obiero confirmed that the Claimant was employed by the Respondent, on the dates and in the position pleaded. He was dismissed for refusing transfer from Mombasa to Kwale County. He was twice granted extension of time to move to Kwale upon his request. He did not comply even after he was granted extension. He was taken through a disciplinary process and dismissed. He cleared with the Respondent. Cross-examined, the Witness told the Court he was not sure how extension on transfer of the Claimant, was communicated to him by the Respondent. Redirected, Obiero told the Court that the Claimant acknowledged receipt of the letter granting him extension.

The Court Finds:-

10. The Claimant was employed by the Respondent as a Security Guard between 2009 and 2016. His last salary was paid at the rate of Kshs. 12, 235 monthly. He was lastly based at the City of Mombasa.

11. He was advised by the Respondent, through a letter dated 31st August 2016, that the Respondent was restructuring its business. In carrying out the exercise, it had been found necessary to move the Claimant to Cooperative Bank ATM premises at Kwale. He was at the time guarding Electricity House Mombasa. He was expected to report to Kwale by 3rd September 2016.

12. He wrote to the Respondent on 1st September 2016 stating he did not have objection to transfer. He asked for more time so that *"I may arrange for logistics."* He assured the Respondent he did not have objection, and just needed to be advised on logistics. He reiterated that, *"I have no objection, I can even move right now."*

13. The Respondent extended the reporting time to 26th September 2016. The Claimant did not move. He was issued a letter to show cause which he replied to on 27th September 2016. He said he had not refused to sign a new contract or move to Kwale, as alleged by the Respondent. He asked for transfer to be deferred, alleging that the decision was being negotiated. He was subsequently taken through a disciplinary hearing and a decision made to summarily dismiss him.

14. The Court does not see any reason to fault the Respondent, in its decision to dismiss the Claimant. He does not seem to have been willing to transfer, even after being granted more time, to report to his new station, on different occasions. He did not have to report with his Wife and Children in tow. He ought to have travelled to Kwale, and present his credentials to his new Office. He could relocate after reporting. He just refused to move, and delayed transfer, justifying his intransigence on alleged ongoing negotiation to defer transfer. There is no evidence of any negotiation with the Respondent to reverse transfer. It was unreasonable and insubordinate of the Claimant to repeatedly stall his transfer.

15. Even after the letter to show cause issued, the Claimant did not rethink his stance. He quite clearly left the Respondent without an alternative. He acted in a manner which justified summary dismissal. His initial contract, which appears to have been replicated in subsequent contracts, and in keeping with an Employer's prerogative on Employee's transfer, states that the Claimant undertook to work in any Branch or Station of the Respondent, within the Republic of Kenya, depending on work availability, and as may be required of the Claimant from time to time. The Claimant breached a fundamental term of his contract of employment. In doing so he was also, engaged in an act of gross misconduct, under Section 44 [4] of the Employment Act, namely, insubordination.

16. Termination was demonstrably fair in substance as in procedure, meeting the minimum standards of fairness under Sections 41, 43 and 45 of the Employment Act 2007.

17. The prayers for notice and compensation are declined.

18. The pay slips exhibited by the Respondent repeatedly indicate annual leave pay as nil. Payment was made for a few select months in 2015. Before this the trend was nil, under the column stated to comprise 'leave advance.' The Respondent has not provided the Court with employment records, showing when the Claimant took his annual leave, or was paid in lieu thereof. **The Court shall accede to the prayer for annual leave, for the period 2009 to 2014 – a period of 5 years at the rate of the statutory minimum of 26 days annually, under the Regulation of Wages [Protective Security Services] Order, 1998 at Kshs. 61,165.**

19. The Claimant has not shown that he is entitled to overtime and holiday pay. He was not even able to say, upon cross-examination, how he arrived at the figure claimed as overtime pay. He was not clear on his tabulation under these heads. The pay slips show some payments under the items, which the Claimant did not attempt to account for, in his tabulation. His mode of computation appears not to conform to the mode set out in the Wage Order cited above. Holiday pay, like normal overtime, is based on an hourly rate. How does $61/26 \times \text{Kshs. } 12,235$, pleaded by the Claimant, meet the hourly formula stipulated in the Wage Orders? Similarly, the prayer for leave traveling allowance of Kshs. 2,000 per year, is not hinged on the Wage Order, Contract or CBA disclosed to the Court by the Claimant. These prayers are declined.

IT IS ORDERED: -

a. The Respondent shall pay to the Claimant annual leave at Kshs. 61,165 in full and final settlement.

b. No order on the costs and interest.

Dated and delivered at Mombasa this 14th day of October, 2020

James Rika

Judge