



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 360 OF 2011

(Before Hon. Justice Mathews N. Nduma)

JOHN WESONGA ONONO.....CLAIMANT

VERSUS

RILEY SERVICES LIMITED..... RESPONDENT

J U D G M E N T

1. The Claimant filed this suit on 11th March, 2011 and later amended Memorandum of Claim on 14th May, 2014 seeking compensation for alleged unlawful and unfair summary dismissal and payment of terminal benefits set out under paragraph 6 of the Amended Memorandum of Claim to wit:-

- a) Payment in lieu of notice Kshs.8,000.
- b) Accrued annual leave for four years Kshs.32,000.
- c) Severance Pay Kshs.16,275.
- d) Unfair deductions for 4 years Kshs.4,080.
- e) Salary arrears for November 2008 - 5,485.50.
- f) Overtime for 99 hours Kshs.146,160.
- g) House Rent for 4 years Kshs.39,456 and
- h) Unfair refund for 4 years @ 5,485 per year.

Facts of the Claim

2. The Claimant was employed by the Respondent as a Security Guard on 25th September, 2003 at a monthly salary of Kshs.5,540 which was later increased to Kshs.8,000.

3. The Claimant worked continuously for the Respondent until November, 2008 when he stopped working due to medical condition. The Claimant tendered a letter of resignation to the Respondent dated 9th December, 2008. The letter not written in elegant English is to the effect that the Claimant had been advised by his doctor to resign on account of ill health. The Claimant stated he could not work any longer and thanked the Respondent for having him for the years he had served.

4. The letter of resignation is endorsed at the bottom by an officer of the Respondent on 11th December, 2008 indicating that the said officer had no objection to have the Claimant retired on medical grounds.

5. This letter was produced by the Respondent and is annexure '1a' to the Memorandum of Response.

6. The Claimant testified under oath and told the court that at the time he resigned from employment his monthly salary was Kshs.10,473.0. That he suffered from chest pains hence the decision was made on advice by the doctor. That the Respondent told him to go home and come back when he was well. The Claimant stated that he never absconded from work at all.

7. The Claimant supported all the Claims set out in the amended Memorandum of Claim with regard to leave, overtime, severance pay, house rent, arrear salary, uniform deductions and refund.
8. The Claimant stated that he worked in the night from 10 pm until 8 am in the morning. The Claimant was supposed to work 52 hours a week. The Claimant claims the extra hours worked per night shift for four years totaling 99 hours. He said he did not go on leave for 4 years; was not paid house allowance at all; was deducted uniform fees which was not refunded. The Claimant seeks compensation for being dismissed without payment of terminal benefits.
9. The Claimant was subjected to close cross examination. He insisted on the particulars of claim and denied that he faked sickness upon attaining 5 years because he knew he could then get terminal benefits. The Claimant denied having received any letter from the Medical Board.
10. The Claimant stated that items shown in a pay slip for November 2008 were not paid to him.
11. The Claimant prays to be awarded accordingly.

Amended Response

12. The Respondent filed Amended Memorandum of Response in which is admitted that the Claimant initially earned Kshs.5,553 per month which was later increased to Kshs.8,000.
13. The Respondent averred that on 25th October, 2008 the Claimant was absent from work without permission until 9th December, 2008 when he reported on duty and tendered his resignation. The Claimant cited ill health for the resignation.
14. On 9th December, 2008 the Respondent referred the matter to the Medical Board of Kenya and requested the Board to examine the Claimant to establish if he should be retired on medical grounds.
15. The Claimant never presented himself before the Board for examination despite Respondent giving details to the Board on how to reach the Claimant for examination.
16. The Respondent states that the Claimant deserted work and therefore not entitled to the claims sought in the Memorandum of Claim.
17. Respondent states that severance pay is payable only on event of declaration of redundancy in terms of the Employment Act, and the Regulation of Wages (Protective Security) order 1998.
18. The claim for leave is denied on basis that same is not supported by evidence.
19. Respondent states that the Claimant was paid for overtime worked every month and produced pay slip for February, 2008 marked 'App. 5' to illustrate this.
20. The Respondent also relies on App. 5 to show that the Claimant was paid basic salary and house allowance monthly.
21. Respondent states that uniform refund of Kshs.10,971 was only payable upon termination and the Claimant's employment was not terminated but he absconded work.
22. The claim for compensation is denied since the Claimant absconded work.
23. The Respondent prays that the suit be dismissed with costs.
24. The Respondent called RW 1 Jonathan Musomba, Director Operations and Administration. He testified in support of all the averments contained in the Amended Memorandum of Response. He produced exhibits attached to the response and prayed that the suit has no merit and it be dismissed with costs. RW 1 confirmed that the Claimant resigned from employment upon absconding from work for a period of 1 ½ months. RW 1 stated that the Claimant brought a document from a doctor claiming to have been treated at Kasim Medical Services. RW 1 said that the Claimant had no certificate of incapacity and could therefore not be retired on medical grounds. The Claimant did not avail himself for examination by the medical board and so the Respondent could not pay him terminal benefits, RW 1 testified further.
25. RW 1 stated further that an employee had to work for at least 5 years to get gratuity provided under the Regulation of Wages (Security Services) 1998. RW 1 testified that the Claimant had served the Respondent from 13th September, 2003 to 9th October, 2008, a period of over 5 years.
26. RW 1 stated that the Claimant was not paid service gratuity. RW 1 stated that other claims made by the Claimant have not been proved and same be dismissed.

Determination

27. The issues to determination are as follows:-

(i) Can an employer reject resignation of an employee on grounds of illness on the basis of lack of a certificate of disability from the Medical Board?

(ii) Is the Claimant entitled to payment of service gratuity upon tender of resignation after 5 years pursuant to the Regulation of Wages (Security Services) order, 1998.

(iii) Has the Claimant proved other terminal benefits claimed in the Memorandum of Claim?

Issue i

28. A contract of employment whether written or oral is entered to freely and voluntarily by an employee, with his /her employer. The employee is free to tender resignation from such employment for any reason or no reason given at all. The logic behind this is that a contract of employment is not one of servitude and no employer may force an employee to remain in employment.

29. However, any such resignation is subject only to the terms contained in the contract of employment between the parties and to any employment law applicable to the particular employment contract.

30. The Respondent did not terminate the employment of the Claimant at all and so the issue of absconding work does not arise. The court is satisfied that the Claimant had every right to resign from employment on account of ill health and no condition precedent is permissible to impede the wish of the employee.

31. The only issue for determination is what terminal benefits if at all were payable to the Claimant upon the voluntary resignation from service. This leads us to the 2nd issue.

Issue ii

32. In terms of the Regulation of Wages (Security Services) order 1998, a security guard is entitled to payment of service gratuity calculated at 18 days salary for each completed year of service upon termination of service. The only disqualifier to an employee from this benefit, is service of less than five (5) years and summary dismissal. None of these disqualifiers are applicable to the Claimant. RW 1 confirmed that the Claimant served the Respondent from 13th September, 2003 to 9th October, 2008, a period of over 5 years. The claimant is entitled and is awarded 18 days salary for 5 years calculated on the monthly salary of Kshs.8,000, which is not in dispute in the sum of Kshs.24,000.

Issue iii

33. The next issue for determination is whether the Claimant has proved entitlement of other terminal dues claimed. The court makes a finding on each of these items as follows:-

a.Notice

34. The Claimant is not entitled to payment in lieu of notice having voluntarily resigned from the employment of the Respondent.

b.Annual Leave

35. The Claimant testified that he was not granted annual leave for a period of four years. The Respondent did not produce any records to rebut this credible evidence by the Claimant. The claimant is awarded in lieu of three years leave in the sum of Kshs.24,000. The fourth year claim is statute barred.

c.Severance Pay

36. The Claimant is entitled to gratuity and not severance pay. This claim is misconceived and is dismissed.

d. Salary Arrear for November, 2008

36. The Claimant was not paid salary for November 2008, upon tendering his resignation. He is awarded Kshs.5,485.50 for days served.

e. Overtime

37. The Claimant testified that he worked from 10 pm in the night to 8 am in the morning. He was only supposed to do 52 hours in a week. He claims 4 hours overtime in respect of each day served. This is calculated to be 99 hours. Respondent rebutted this evidence by stating that overtime was paid at the end of every month. However no pay slips were produced to support this allegation by the Respondent. The pay slip marked 'App.5' for November 2008, only shows payment of basic salary and house allowance but not overtime. The Claimant has proved that he worked overtime but was not paid. The claim will be limited to three year period. The Claimant is awarded in respect of 75 hours in the sum of Kshs.109,620.

f. House Rent

38. The Claimant was paid house allowance. He was not entitled to payment of house rent. This claim is dismissed.

h. Uniform Refund for 4 Years @ 5,485 per Year

39. The claim by the Respondent that this was only due upon termination and not resignation has no basis in Law. The claim is allowed in the sum of Kshs.10,971 as set out in the Amended Memorandum of Claim.

40. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent in the sum of Kshs.179,561.50. This is payable with interest at court rates from date of filing suit till payment in full.

41. The Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 18th day of January, 2019

Maureen Onyango

Judge

Appearances

Mr. Nyabena for Claimant

Mr. Masese for Respondent

Daniel Ngumbi – Court Clerk