



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1671 OF 2014

NICODEMUS WAMBILIANGA MAKHANU.....CLAIMANT

- VERSUS -

LAVINGTON SECURITY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 25.09.2014 through Fatuma Mungoni & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the resignation was lawful as provided by the law.
- b) Terminal dues at one month salary of Kshs.14, 000.00 for each of 10 years of service Kshs.140, 000.00.
- c) Pay in lieu of untaken leave Kshs.97, 860.00.
- d) Interest on the above at court rates.
- e) Costs of the suit.
- f) Any other relief the Honourable Court will deem fit to grant.

The respondent's response to the claim was filed on 22.05.2017 through Masika & Koross Advocates. The respondent prayed that the claimant's suit against it be dismissed with costs to the respondent.

It is not in dispute that the respondent employed the claimant as a security guard effective 01.03.2004 and the claimant served in various stations.

It is also not in dispute that the claimant voluntarily resigned from employment on 28.02.2014. In the letter dated 28.02.2014 the claimant resigned on account of illness which had persisted for 3 months and he resigned to seek medication. He looked forward to receiving from the respondent his dues. The claimant received the certificate of service dated 07.07.2014 showing he worked for the respondent from March 2004 to February 2014 as a security guard.

The claimant's advocates issued the demand letter dated 08.08.2014 for unpaid terminal dues.

The only issue for determination is whether the claimant is entitled to the terminal dues as prayed for.

The claimant admitted that the respondent paid him a sum of Kshs.20, 930.00 which the claimant stated was not fair because he had served for 10 years. It was submitted that the claimant was a member of the NSSF but he was entitled to service pay for each year served under section 35(5) of the Employment Act, 2007. Further, it was submitted for the claimant that he was a member of NSSF but the remittances had not been consistent. It was submitted for the claimant that in such circumstances, the claimant should be paid service pay as was claimed for. The claimant cited **Elijah Kipkoros Tonui –Versus- Ngara Opticians T/A Bright Eyes Limited [2014]eKLR**, where Rika J stated thus, “**10. Basic membership to the National Security Fund or other schemes is not in itself a bar to an employee accessing service pay under Section 35(5). As the evidence in this Claim has shown, an employer could register an employee with the N.S.S.F, but fail to**

remit the monthly contributions, or remit irregularly. Secondly, the Court must look at the social security route that confers overall greater benefit on the employee...” In that case the contributions to NSSF had been remitted erratically over a period of 25 years of service.

For the respondent it was submitted that the claimant was a member of NSSF and section 35(6) of the Employment Act, 2007 operated to exempt the claimant from service pay as envisaged in section 35(5) of the Act.

The Court finds that there was no dispute that the claimant was a member of NSSF. Further there was no evidence before the Court to suggest that the contributions to NSSF had not been made or had been erratic. Thus the Court finds that the holding in **Elijah Kipkoros Tonui –Versus- Ngara Opticians T/A Bright Eyes Limited [2014]eKLR** has not been shown to apply in the present case. The prayer for service pay will therefore fail.

The Court further returns that the respondent filed leave application forms completed by the claimant. The claimant admitted signing the forms. In particular the leave form dated 15.10.2013 showed that the claimant had a nil balance of leave days. The Court returns that on a balance of probability, the respondent has established that the claimant took annual leave and the prayer for 10 months' pay in lieu of annual leave throughout the period of service will fail.

The claimant will succeed on the prayer that the resignation was lawful and on that account each party will bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties and the suit determined with orders that the resignation was lawful and each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 10th April, 2019.**

BYRAM ONGAYA

JUDGE