



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 953 OF 2015

JAVAN NYANGWESO OTUNDO.....CLAIMANT

-VERSUS

RILEY SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 31st July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 08.06.2015 through Namada and Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's summary dismissal from employment was unlawful and unfair.
- b) A declaration the claimant is entitled to payment of his terminal dues and compensatory damages amounting to Kshs.797, 746.00 plus interest from the date of filing the suit till full payment and comprising:
 - i. Notice pay 1 month Kshs.11, 896.00.
 - ii. Unpaid overtime for 5 years served Kshs.540, 000.00.
 - iii. Pay for public holidays worked Kshs.43, 618.00.
 - iv. Leave due and not taken and paid for the 5 years Kshs.59, 480.00.
 - v. 12 months' gross pay in compensation Kshs. 11, 896.00 x 12 making Kshs.142, 752.00.
- c) Costs of the suit plus interest thereon.

The statement of response was filed on 04.04.2017 through Macharia, Burugu and Company Advocates. The respondent's case was that the claimant's suit be dismissed with costs.

The claimant's case is that he was employed by the respondent as a security guard on 26.04.2009 and he worked until 17.11.2014 when the respondent's human resource manager asked him to leave as dismissed upon a false allegation that the claimant had absconded duty – an allegation the claimant denies and states that he had been given permission to be absent.

The respondent's case is that the respondent employed the claimant on a one year fixed term contract expiring on 25.09.2014. At lapse of that term he was sent on end of contract leave from 26.09.2014 and paid annual leave. He was recalled to start a fresh one year contract from 26.10.2014 but he was yet to sign a new contract. On 13.11.2014 the claimant failed to turn up for work and later came back on 17.11.2014 without having informed any person at the respondent's establishment. It was mandatory that the claimant notifies about his absence but he failed to do so. The claimant was asked to explain his absence from 13.11.2014 to 16.11.2014 and he produced sick-sheets showing 4 days' sick-off. He offered no explanation for failure to notify the respondent about his predicament. He was told he'd go for a refresher course to remind him about the rules and regulations. He then disappeared from work and resurfaced on 27.01.2015 and phone calls to his cell-phone had not been going through. He handed in an undated letter from his trade union on retirement on medical grounds asking to be allowed to retire. The respondent accepted the request and the claimant cleared with the respondent and, he was to collect his final dues subsequently. The claimant had refused to collect his final dues and the respondent urged that the claimant's case be dismissed with costs.

First, there is no dispute that the parties were in a contract of service.

Second, the claimant admitted that he became sick while in the respondent's employment. The claimant wrote the letter to retire on medical grounds and he admitted as much. He testified that he had not been paid 17 days worked because his last day at work was on 17.11.2014. The Court finds that there is no reason to doubt the respondent's account as pleaded and supported by the respondent's evidence (as given by respondent's witness (RW) one Jonathan Musomba) on the circumstances leading to the claimant's dismissal. The claimant signed clearance and left the employment by choice. The evidence was that he never asked for light duties. The Court returns that the claimant voluntarily wrote to retire on medical grounds and the respondent accepted the same. The contract of service was terminated by that mutual agreement and the allegations of unfair termination were unfounded and, the Court finds accordingly.

Second, the claimant testified that at the end of every one year contract he was paid in lieu of annual leave or given annual leave. He also confirmed that he took leave in September 2014 and was also paid leave advance of Kshs. 9, 093.00. The respondent filed documents to confirm that the claimant was indeed given annual leave. The Court returns that the claims and prayer for pay in lieu of annual leave will fail.

Third, the claimant testified that he took offs and he admitted he had not specified the holidays he had worked. Thus, the Court returns that the claims on pay for weekly rest days and for holidays will fail.

Fourth, the Court returns that the claimant admitted that he served on annual fixed term contracts. The first 4 sets of the contracts were performed and closed. The claims for overtime with respect to the 4 contracts will fail as the injury was of a continuing nature and the cause of action was time barred as the 12 months under section 90 of the Employment Act, 2007 had lapsed. Is the claimant entitled to 4 hours of overtime in the last year of service (the 5th annual contract)? The parties are in agreement that the claimant worked the 4 extra hours as claimed. The respondent submits that the Court should follow KUDHEIHA Workers –Versus- Charles Waithaka Goko T/A Apple Bees Pub and Restaurant [2013]eKLR, where Rika J held that claimants of overtime must make a greater effort in directing the mind of the Court to a mathematically defensible, legally justifiable, and factually credible system of overtime pay. In so far as the claimant in the present case has not particularised the days worked and then the amount due the Court considers that the prayer will fail. The claimant admitted he took offs and he admitted in his evidence that he had not particularised holidays worked. He also admitted taking offs and leave in 2014. The Court will decline to grant overtime on the basis of the holding by Rika J and the claim will fail. While making that finding the Court returns that the claimant has not established a prevailing grievance about the claimed overtime while the contract of service subsisted so that the claim was a speculative afterthought. Further the agreed salary as was paid was not in dispute and the Court takes it that the parties agreed upon the hours of work and the applicable pay which was honoured throughout the service.

Fifth, the respondent will pay salary for 14 days worked in November 2014 as submitted for the respondent. In that consideration, the each party will pay own costs of the suit.

In conclusion the suit is hereby determined with orders each party to bear own costs of the suit; and the respondent to pay the claimant salary for 14 days worked in November 2014; and to pay by 15.09.2019 failing interest to run at Court rates from the date of filing the suit.

Signed, dated and delivered in court at Nairobi this Wednesday 31st July, 2019.

BYRAM ONGAYA

JUDGE