



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2037 OF 2017

ROBERT MONG'ARE BOUNDI..... CLAIMANT

-VERSUS-

INTERSECURITY SERVICES LIMITED..RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 11.10.2017 through Maari Nyaberi & Associates. The claimant prayed for judgment against the respondent for:

- a. Leave allowance for 13 years worked Kshs.176, 806.00.
- b. Holiday unpaid allowance for 13 years worked Kshs.26, 133.00.
- c. Overtime 47 hours unpaid allowances at Kshs.423.00 = Kshs.19, 881.00.
- d. Service for 13 years worked Kshs.88, 403.00.
- e. NSSF Fund not remitted to the institution.
- f. Uniform refund Kshs.9, 500.00.
- g. Certificate of service.

The claimant's case is as follows. He was employed by the respondent as a guard on 01.09.2002. He worked until 31.12.2016 and the last monthly salary was Kshs.11, 057.00. While in employment he was given one day off on weekly basis but which was unpaid. He worked for 13 years as a casual employee and for some months NSSF was not remitted. As at the time of resignation he had accumulated 47 hours of overtime. On 22.11.2016 he served the respondent the notice of early retirement effective 31.12.2016. The letter stated the reason for early retirement thus, **"The reason being that I'm retiring from the company is that, I'm the only son in the family who is being depended in everything. Beside my own family my wife had been suffering with various diseases and there for so long. This is the reason which is forcing me to work up to 31st December 2016 notice of one month duration. Therefore I request the management to arrange to pay my terminal benefits which is my rightful entitlement."**

The memorandum of response was filed on 28.10.2019 through Muli & Company Advocates. The respondent admitted that it employed the claimant on 04.09.2002 as a security guard for a term of 90 days. The claimant served a notice of early retirement dated 22.11.2016 to retire effective 31.12.2016. The respondent's case is that it paid the claimant all the terminal dues. Further the claimant took annual leave or was paid in lieu of the annual leave. He rested during public holidays or he was paid whenever he worked. He worked from 6.00am to 6.00pm as was agreed and in accordance with applicable law. NSSF was remitted and there was no agreement that further service pay would apply. The uniform was provided at no expense as the claimant was never deducted to pay for the uniform. The certificate of service was ready and available for the claimant to collect but he had not done so. The respondent therefore prayed that the claimant's suit be dismissed with costs.

The Court has considered the pleadings, the evidence and the submissions filed for the parties and makes findings as follows.

1. There is no dispute that parties were in a contract of service and the claimant retired voluntarily from the respondent's

employment. Thus, the claimant is thereby precluded from alleging unfair termination.

2. The claimant confirmed that the payslips he exhibited showed that house allowance was paid as well as overtime and he had a rest day per week. He was also a member of NSSF. He had no NSSF statement to show that the NSSF had not been remitted as deducted. Accordingly the Court returns that the claimant's prayers with respect to overtime, NSSF and pay on holidays will collapse. Further, being a member of the NSSF, he is exempted from service pay under section 35 of the Employment Act, 2007. The prayer will also fail. The claim for pay in lieu of annual leave will equally fail because the claimant testified that he used to ask for leave and it used to be granted. His payslips do not confirm his allegations that whenever he took annual leave, he was not paid. The alleged deduction whenever he took leave remains not established.

3. The claimant has failed to prove that parties agreed on annual leave allowance and the prayer will fail as unjustified.

4. The claimant testified that whenever he worked on public holidays he would be paid and the prayer will equally fail. In any event, the 47 hours as claimed were not specifically particularised and the claimant's contradictory evidence cannot be trusted that he was paid for work on holidays and then again he claims as alleged.

5. The claimant testified that he had no issue on uniform and the claim in that regard is surrendered accordingly.

6. The respondent has confirmed the certificate of service has been ready and the Court returns that the claimant is at liberty to collect it.

In conclusion judgment is hereby entered for the respondent against the claimant for:

- a. Dismissal of the suit as unjustified.
- b. The claimant to pay the respondent's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 19th December, 2019**.

BYRAM ONGAYA

JUDGE