



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 39 OF 2018

(Before D. K. N. Marete)

ZABLON ONKEO OBANDE.....CLAIMANT

VERSUS

MTARAGON SOCIETY.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 10th May, 2018. The issue in dispute is herein cited as;

Termination of the claimant's services and failure by the Respondent to pay terminal benefits to the claimant.

The respondent has not filed any response or at all despite service.

The claimant's case is that on or about 15th August, 2008, he was employed by the respondent as a security guard at a monthly salary of Kshs.4,500.00. He served with loyalty and diligence until the 1st April, 2017 when he resigned. The respondent however failed to pay his terminal dues as follows;

1. *Leave Pay* $(6,278/30 \times 21 \times 9) = \text{Kshs.}39,556.44$

2. *Service Pay* $(6,278/30 \times 15 \times 9) = \text{Kshs.}28,254.6$

3. *Underpayment*

(May 2013 – April 2015)

$(5,606-4,500) \times 23 \text{ Months} = \text{Kshs.}25,438.00$

(May 2015 – April 2017)

$(6,278-4,500) \times 23 \text{ months} = \text{Kshs.}40,912.4$

4. *Salary arrears*

(April 2010 – April 2017)

$(4,500 \times 72 \text{ months}) = \text{Kshs.}324,000$

The claimant's further claims that during his term of employment which was oral, his salary and leave allowance were never paid. He now claims the same.

He prays as follows;

i) *The sum of Kshs.458,161.44 as particularized in paragraph 5 of the claim.*

ii) *Cost of this suit.*

iii) *Interest in (i) and (ii) above.*

iv) *Any other relief as the Court may deem just.*

This matter came to court variously until 17th July, 2018 when the claimant prayed and sought a determination on the basis of the pleadings and documentary evidence presented to court.

The issues for determination therefore are;

1. Whether the claim is sustainable in view of the evidence adduced by the claimant?
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of this claim?

The 1st issue for determination is whether the claim is sustainable in view of the evidence adduced by the claimant. The claimant in support of the claim annexes his witness statement and two other witness statements by Tadeous Ondiek Omwanga and Richard Kipng'eno Langat, his colleagues and co-workers at the respondent's work place. These apparently also have the same claims against the respondent. He also annexes a demand letter from Kituo Cha Sheria and other long hand written once bearing his signature.

It is curious why the respondent fails to respond to the claim despite service on three occasions. This however is left all open. A story for another day.

This claim is however lacking in several senses of the word. The claimant has not adduced any evidence in support of the various issues made in the claim. Whereas this court appreciates the predicament of employees in laying down elaborate claims against employers due to their positions in the work place and whereas courts should at all times be on the lookout for such loop holes and as far as is possible pull these matters in favour of the hapless employees, this may not be the case here. This is because the claim is bare of any supporting evidence and therefore not sustainable. It must fail. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. The circumstances of this case dictate a case of no relief for him.

Whatever the circumstances of the matter, litigants must be warned that proof is a critical element and requirement of the law. Parties must adduce evidence in support of their respective cases however deprived they may be by the environment and circumstances of the case. This is cardinal and is clearly enunciated at sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya. It is unfortunate that this was not pursued in this case and therefore this outcome.

Section 47 (5) of the Employment Act, 2007 is explicit on the issue of burden of proof in employment cases. This is as follows;

47 (5) "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"

This incorporates the degree of proof expected even in the circumstances of this case. There would not be exception whatsoever.

I am therefore inclined to dismiss the claim with orders that parties bear their costs of the claim.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Claimant in person.
2. No appearance for the respondent.