

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1030 OF 2014

DENNIS MOKOMBA NYANGACHA.....CLAIMANT

VERSUS

RILEY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 20th June 2014 and in the suit averred that he was employed by the Respondent as a guard from January 2009 till 30th November 2013 when he resigned vide a letter dated 14th October 2013. He averred that after his resignation he was not paid his dues as expected. He sought service at rate of Kshs. 11,836.80 for each month worked totalling Kshs. 59,184/-; house allowance for 60 months - Kshs. 180,000/-; leave allowance at rate of 11,836.80 for 5 years - Kshs. 59,184/-; travelling allowance at the rate of Kshs. 2,500/- - Kshs. 12,500/- all making a grand total of Kshs. 310,868/-. He averred that he was not given any terminal benefits and the non-payment of the dues was unjustified, unlawful, illegal and in breach of the contract of the employment contrary to the laws of Kenya and the rules of natural justice. He averred that he earned a salary of 11,836.80 as at the time of the resignation. He sought a certificate of service, costs of the suit and interest in addition to the Kshs. 310,868/- claimed.

2. The Respondent filed its defence on 6th August 2014 and averred that the Claimant was initially employed as a casual employee from 2nd March 2009 and later appointed on a fixed term contract the last of which was to last from 26th August 2011 to 25th August 2012. It was averred that the Claimant did not execute a contract for 2012-2013 but continued in service until 30th November 2013 after the resignation letter dated 14th October 2013 giving one month notice. The Respondent averred that it accepted the Claimant's resignation vide its letter of 28th October 2013 and a final dues payment prepared. The Respondent avers that the Claimant declined to collect the cheque aforesaid and that he was not entitled to service charge as pleaded or service pay since he was a contributor to NSSF. The Respondent averred that the Claimant was not entitled to leave allowance and travelling allowance as these were not entitlements in law. The Respondent thus urged the dismissal of the claim without costs.

3. The Claimant was led in his testimony by Mr. Omas on 28th May 2015 and stated that he was currently farming and that he had been employed by the Respondent as a guard. He testified that he was assigned to guard premises such as the University of Nairobi main campus and was initially on guard duties during the day. He stated that he resigned and received acknowledgement of his letter and that in the reply to his letter, the Respondent gave the last date of his service. He testified that he returned each item the company had issued to him but was not paid his dues. He stated that he never read the letter given to him to sign and that he was never allowed to go on leave and that he went back to the Respondent pursuing his dues a number of times. He stated that he was repeatedly told to return after a week for almost five months and that is when he decided to seek legal redress. He thus sought the payment of service for the years worked as well as house allowance in addition to the leave not taken plus costs.

4. In cross exam by Mr. Burugu, he testified that the clearance form exhibited before the Court showed that he left on 5th November 2013 when he cleared. He stated that he had not been shown the cheque dated 17th January 2014. He testified that he filed the suit on 20th June 2014 and the cheque is dated before he came to court. He stated that he worked for 5 years from 2009 till 2013.

5. In re-exam, he testified that he was never shown the cheque and he even had the contact of the person he was following up with. That marked the end of the Claimant's testimony.

6. The Respondent called Diana Lugada the HR Officer of the Respondent. She testified that she worked from August 2013 and knew that the Claimant was a guard at the Respondent. She stated that the Claimant left the employ of the Respondent in October 2013 after he tendered his resignation which was accepted by the Respondent. She stated that the Claimant reported to office on 5th November 2013 and was cleared. She testified that upon his clearance the company prepared his terminal dues but he did not report back and that the company received a demand letter in July 2014 while the cheque had been prepared in January 2014. She stated that house allowance was included as the Respondent paid a consolidated wage. She testified that the Claimant had a contract that had expired in August 2012 and that contract was not renewed. She stated that the Claimant continued as a casual as he did not have a contract for term employment and that the NSSF dues were paid. She testified that the company was willing to pay terminal dues as well as the certificate of service.

7. In cross-exam, she testified that she had worked for the Respondent since 2013 and that she was not there when the Claimant was employed. She stated that she did not know when the last contract was signed and that she thought that he reported to the office and signed. She testified that different employees have different contracts and there are term limits and permanent. She stated that the Claimant was employed first as casual then term contract renewable each year and that he received salary each month until his exit. She testified that the Claimant went on leave and when the final dues were calculated leave days were included. She stated that he did not ask for leave when he was in employment and that the employee was required to report to the office to collect dues from the paying cashier. She denied the assertion that the Claimant had been coming for his dues for 5 months and stated that the cheque was prepared in January 2014 and the Respondent did not hear of any complaint. She stated that the Claimant was to collect the cheque after he cleared as per procedure. She

testified that he was to collect the cheque and he failed to do so.

8. Parties were to file submissions and it is apparent from the record that this was done. However, it seems that the matter went into hiatus until 15th March 2017 when it was directed to this Court for mention by Justice Mbaru. It is regretted that the matter has delayed since completion.

9. The Claimant filed his submissions on 17th June 2015 and in the said submissions stated that he was employed by the Respondent as a guard from March 2009 till 30th November 2013 when he resigned from the employment of the Respondent. He submitted that he made follow up on the terminal dues for several months after his resignation and was not given any benefits. The Claimant submitted that the dues were unjustifiably delayed resulting in enormous loss and suffering for the Claimant. The Claimant thus sought payment of Kshs. 310,868/- being the service charge, house allowance, unpaid leave and travelling allowance. He also sought his certificate of service as well as costs of the suit. To his submissions were attached the cases of **George M. Kiraguri v. Next Generation Communications Limited [2014] eKLR** and the case of **David Njuguna Mungai v. Registered Trustees of Sisters of Mercy t/a Mater Hospital [2015] eKLR**.

10. The Respondent filed submissions on 6th July 2015 and in their submissions stated that the case was a simple one without much detail or complex facts. It was submitted that the Claimant's case was that after his resignation, the Respondent refused to pay his terminal dues despite several visits which the Respondent submitted were alleged visits. The Respondent's case on the other hand was that the Claimant's dues were prepared by January 2014 after he had worked till October 2013 and that he declined to collect the same. The Respondent submitted that it was ready to pay the sum of Kshs. 47,042.40 which it deemed as due to the Claimant. The Respondent calculated the dues as days worked, uniform refund, leave pay for 54 months less PAYE making a total of 47,042.40. The Respondent submitted that the exaggerated sums sought did not fall due as there is no service charge due nor is there any payment due under service pay since the Claimant was a contributor to the NSSF scheme. The Respondent submitted that the Claimant had a consolidated pay and therefore the house allowance claim did not lie. The Respondent submitted that the leave pay for the Claimant was calculated on the basis of 4 years 8 months and not the 5 years the Claimant applied. The Respondent submitted that there was no travelling allowance due to the Claimant as he never travelled for leave. The Respondent submitted that the Claimant had just thrown authorities to the Court without any argument as to how they apply to the case. It was submitted that the rights breached in employment must be pursued within three years of breach and within one year for continuing breaches. The Respondent thus submitted that even if by chance the Claimant was entitled to the exaggerated claims, the claim must be truncated to 3 years for the continuing breaches such as overtime and house allowance. The Respondent submitted that the suit was an abuse of the court process and should be dismissed with costs but the Respondent would pay Kshs. 47,042/- plus issue a certificate of service in any event.

11. The facts that are undisputed are that the Claimant was employed by the Respondent as a guard in 2009 and was in employ until he resigned in October 2013. The Respondent asserts it prepared his terminal dues. On his part, the Claimant asserts that he was not paid his dues (a fact) and that the Respondent was liable for a sum of 310,868/- made up of service charge, house allowance, unpaid leave and travelling allowance. From the payslip exhibited, it is clear that the sum paid was inclusive of house allowance. It therefore follows that the pay made was all inclusive and the claim for house allowance cannot lie. Under Section 35(5) of the Employment Act, there is a payment that can fall due known as service pay. However, Section 35(6)(d) exempts employees for whom there is deduction of NSSF dues. It is clear from the record before the Court that the Claimant was a beneficiary of NSSF remittances and therefore excluded from service pay provisions of the law. There is no service charge under the Employment Act. There was no leave taken and it would be stretching the parameters of relief the Court may grant to seek the payment as of right. It is payable when an employee proceeds on leave. In any event, the contracts the Claimant signed made no provision for leave travelling allowance or the travelling allowance claimed. Not disputed is the fact that the Claimant was not granted leave for 4 years and 8 months of service. He was entitled to 21 days for each year worked which would equate to 98 days of leave for the period. The computation by the Respondent therefore seems to accord with the dues the Claimant would be entitled to. The claim was unmerited and as urged by the Respondent the suit was one fit for dismissal but with no order as to costs. However, the Claimant is entitled to receive the payment of Kshs. 47,042.40. No reason was given for the non-collection of the cheque and it was unnecessary for the case to come to litigation. It should have been compromised at the earliest opportunity and its relentless pursuit was an unnecessary waste of the judicial time. The advocates in the case will not get any fees for the matter.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of September 2017

Nzioki wa Makau

JUDGE