



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2266 OF 2016

JAVAN OMULAMA KATURE.....CLAIMANT

VERSUS

THE MANAGING DIRECTOR PEMWE SECURITY SERVICES....RESPONDENT

JUDGEMENT

The claimant was on 4th January, 2000 employed by the respondent as a Night Guard. He was entered and paid based on the master roll and later he was paid through the bank. The claimant served diligently until 26th September, 2016 when he was wrongfully terminated from his employment without any written reasons, notice of being given a chance to argue his case. The claimant worked from 6pm to 6am and was not paid his terminal dues. There was a deduction of NSSF and NHIF from the claimant's wages but these were not submitted to the requisite statutory bodies and should be refunded.

2. The claim is that, despite the claimant serving the respondent he was summarily dismissed without regard to the law. He was not given a hearing and his terminal dues were not paid. The claim is for;

- a) Notice pay at kshs.12,221.10;
- b) Salary for September, 2016 Kshs.12,221.10;
- c) Underpayments Kshs.1,002,451.20;
- d) Service pay Kshs.97,768.00;
- e) Annual leave Kshs.136,876.30;
- f) Off duties Kshs.112,588.00;
- g) Overtime hours Kshs.2,196,480.00;
- h) Work on public holidays Kshs.84,441.50;
- i) Compensation;
- j) Certificate of service; and
- k) Costs

3. The claimant testified in support of his case. That upon employment by the respondent he was paid Kshs.6,000.00 per month which was an underpayment and the legal and gazetted amounts should be paid. There was no pay statement issued by the respondent.

4. In cross-examination, the claimant testified that he was employed by the respondent in 2000, he stopped in 2010 upon dismissal and in 2013 he reapplied and was employed again. His service for previous employment was not paid for. In September, 2016 he was called by the respondent to the office, he was not given any reasons but he handed over his duties as there had been an incident at the site he was guarding. The claimant was not told whether he had been moved to day shift or night shift. He has no letter of transfer and had not been given leave or off day. He did not return to work the next day as he had no dispatch letter. He is still keeping respondent's uniform.

5. The claimant also called his witness Mr Lincoln Otakwa who testified that he prepared the Memorandum of Claim for the claimant and he is an employee of the respondent after joining in December, 2016. The claimant had by this time left his employment with the respondent.

Defence

6. In defence, the respondent's case is that they employed the claimant on 14th November, 2013 but he absconded duty after he was assigned day guarding duties by the respondent. The claimant was a night guard at Esteel Construction Limited along Valley Road and was involved in theft of metal pieces. After the claimant admitted to the theft, he asked for forgiveness and was pardoned and advice to take up day duties at Muthangari Road but he refused and asserted that he had another day job elsewhere and he could not work on a day shift and thus left the respondent's employment. The claimant never report back on duty as directed.

7. The claimant absconded duty after committing gross acts of misconduct. The claims made should be dismissed with costs.

8. The respondent called John Mwendwa as a witness and who testified that upon the employment of the claimant a second time in 2013, he deserted duty after he admitted to stealing metal pieces at a client's site and when he was changed to from night duty to day shift he refused to attend claiming that he had another day job. He has never handed over his duties and uniforms back to the respondent. Despite repeated calls to him to attend work and or return the property of the respondent, he has refused to oblige.

9. The second witness for the respondent was Mr Richard Langat. He testified that he worked with the claimant at the Esteel Site as a day guard and the claimant would hand over to him in the morning but on various occasions the claimant would desert work and fail to do the handing over.

10. At the close of the hearing, each party filed written submissions.

Determination

11. The claimant admitted that he was employed by the respondent in 2000 to 2010 when he was dismissed. He was then employed in 2013 on a month he did not state and then following an incident on 26th September, 2016 he did not return to work as he was not clear as to whether he had been dismissed or not.

12. On this evidence, there was a break in his employment with the respondent. The first part being from 2000 to 2010 and the second part being 2013 to September, 2016. The two periods cannot form part of the same claim. Matters leading to termination of employment ending in 2010 ought to have been addressed in terms of section 90 of the Employment Act, 2007. All employment and labour relations claims not before the court within 3 years from the time such arose, such are time barred. In this case, the claims arising out of the first period of employment shall not be considered by application of section 90 of the Act.

13. The second part of the claimant's employment by the respondent is that of 2013 to 26th September, 2016. The claimant testified that while he was a night guard at Esteel Construction Limited, an incident arose, the client complained that some items were getting lost and or stolen and thus the claimant was called by the respondent to the office to address the same. On the next day he did not return to work as he was not clear as to whether he had been transferred or dispatched to another site. In his testimony and cross-examination, The claimant was clear that he did not have a letter of dispatch to another site, he had no letter of transfer and that he still held his uniform. He however did not report back to work.

14. The evidence by the respondent is thus correct and true that the claimant left work on 26th November, 2016 under instructions to report to a day shift at Muthangari road and that he failed to report on the grounds that he had another day job. Where indeed the claimant had no letter of transfer, was not on an off and he accepts that there was an incident at the site he was working at as night guard, such required to be addressed by the employer and this led to change. The transfer to day duties was not taken well as the claimant had another day job. He required night duties with the respondent so as to serve another employer during the day.

15. On the above basis, where the claimant failed, refused and or neglected to attend work as directed and effort to have him return to work failed to yield fruit, he effected deserted duty. The fact that the claimant still hold the uniform issue dot him by the respondent confirms that he was never terminated from his employment and when he left work on 14th November, 2016 he was under clear instructions to report on Muthangari road on day duties. He did not attend.

16. Such is conduct that warrant summary dismissal. Such is conduct amounting to gross misconduct as defined under section 44 of the Employment Act, 2007. The claimant effectively terminated his own employment through his conduct when he failed to attend work as directed by the employer. He cannot claim wrongful termination.

Remedies

17. As noted above, the claims made under the employment ending in 2010 at time barred.

18. On the grounds that the claimant frustrated his own employment, he cannot claim notice pay. He ought to pay the respondent for failure to attend work and failure to issue notice before desertion. Section 35 of the Employment Act, 2007 requires one (1) months' notice of payment in lieu thereof. The salary claimed for September, 2016 is thus not due. such went with desertion and failure to issue notice thereof.

19. The claim for underpayments, leave, hours of work and public holidays worked are compounded under time barred claims and not set out for the period under consideration. there being no clarity, the court shall not award.

20. Service pay is claimed on the grounds that the respondent deducted NSSF and NHIF dues and these should be paid back to the claimant. The claimant testified that he is registered with NSSF and NHIF as a member. Where there were deduction in this regard by the respondent, these are statutory dues owing to the statutory bodies thereof and not monies owed to the claimant. He cannot claim service pay where he is registered with NSSF and NHIF.

21. Compensation is not due in a case where the claimant was the author of his own termination of employment. To compensate his conduct would be an affront on justice and would be contrary to the rule of law and what is expected of a civilised society such as ours.

22. Before conclusion, I must add that, many litigants file claims before this court in person. Such claims should be based on actual events in employment and labour relations. Suits should not be imaginary. Fictitious, A fabrication Or a test of the tides. Claims before the court should not be made through third parties not allowed audience before the court as such person's only articulate cases with ulterior motives to swindle innocent employers. Where there are community activists keen to help indigent litigants seeking to file claims with the court, the Rules of the Court permit applications for pauper matters and on

good grounds and based on the merits of each case, the court can direct as appropriate. Otherwise, where there are fictitious claims, such come out and end up a waste of good judicial time. Parties should refrain from such claims at all costs.

Save for the issuance of a Certificate of Service in accordance with section 51 of the Employment Act, 2007 which should issue to the claimant, the claim is hereby dismissed. No orders to costs.

Delivered in open court at Nairobi this 28th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor: Court Assistants

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