



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

CAUSE NUMBER 1493 OF 2013

DANIEL KIOKO PIUS.....CLAIMANT

VERSUS

ATHI RIVER STILL PLANT LIMITED.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 16th September, 2013 the claimant averred that he was employed by the respondent on 1st March, 2004 as a cook at a monthly salary of Kshs 4,500/= per month which was progressively increased and by the time of leaving employment, the claimant was earning Kshs 8,222 and a house allowance of Kshs 3,100 per month.
2. The claimant complained that during his employment he was never provided with weekly rest days. He further claimed that he was never paid for working during public holidays and further that he was granted annual leave for 21 days instead of 26 days as per the CBA. The claimant further pleaded that he was not paid for leave travelling allowance and further that gratuity
3. According to the claimant he worked diligently until 3rd April, 2014 when he tendered his resignation which was acknowledged by the respondent 7th April, 2014. He thereafter proceeded to hand over his uniform. On 27th June, 2014 he was issued with a cheque for Kshs 8,374 which represented uniform deposit, four days leave and 6 days worked. This payment according to the respondent was claimant's final dues.
4. According to the claimant, having worked for the respondent for fifteen years was entitled to service pay totaling to Kshs. 108,675/= which he sought judgement against the respondent in respect thereof.
5. The respondent in opposition to the claim, did not deny that the claimant was its employee. According to the respondent, the claimant was employed on 7th January, 1999 as a security guard until he voluntarily resigned on 6th May, 2014. According to the respondent, upon resignation the claimant's terminal dues were calculated in line with the provisions of the Employment Act and paid to the claimant. The respondent therefore did not owe the claimant any money. The respondent contended that the claimant was not entitled to service pay by dint of section 35(6)(d) of the employment Act since he was a member of the NSSF and that his contributions were upto date.
6. The claim herein seems to be essentially about whether the claimant being registered as a member of NSSF can still claim payment of service under section 35 of the Employment Act. Section 35(6) of the Employment Act excludes payment of service for employees who are members of a registered pension or

provident fund, gratuity or service pay scheme, NSSF or any other scheme established and operated by an employer whose terms are more favourable than those of service pay scheme established under the section.

7. The respondent in its memorandum of response exhibited as appendix 6, a copy of the claimant's NSSF card showing him as member number 11777491X. This was not disputed by the claimant. Since the only claim the claimant seemed to have had against the respondent was service pay, in the light of statutory provision cited above, the claim is unsustainable hence without merit. The claim is therefore dismissed with costs.

8. It is so ordered.

Dated at Nairobi this 22nd day of September, 2017

ABUODHA J. N.

JUDGE

Delivered this 22nd day of September, 2017

NDERI NDUMA

JUDGE

In the presence of:

.....for Claimant

.....for Respondent