



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1763 OF 2016

PETER MUHANJI.....CLAIMANT

VERSUS

CORNERSTONE SECURITY SERVICE LIMITED.....RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 31st August, 2016. Summons was served, the respondent failed to enter appearance or file defence. Being satisfied that the respondent was dully served and Affidavit of Service filed to this effect b Bernard Musyoka, the claimant was allocated a hearing date.

The claimant was employed by the respondent and issued with a contract of employment on 26th July, 2011. The claimant held the position of Security Guard at a salary of Kshs.8, 000.00 per month.

The respondent company then changed name to Seneca for a year then reverted back. The claimant was based a NCCK site and in August, 2015 he was taken to a different site to November, 2015.

The claimant testified that he had worked throughout and felt tired. He asked for an off. His colleague at Huruma was bereaved and the claimant was told to relieve him and when he returned he asked for an off. The operations manager told the claimant at 5pm to report to work but he had no fair, he had taken his uniforms for cleaning, he was tired and had not eaten and noting all these challenges, he was not able to walk to work. The claimant protested but the supervisor did not take heed. The request to have Kshs.200.00 to enable him report to work was not addressed.

After the claimant had finished his off days, he called his supervisor but did not return his calls. He realised that he had effectively been dismissed. He asked for his pay and terminal dues but nothing was paid to him.

The claim is for;

Notice pay of kshs.8, 000.00;

Loss of income and overtime Kshs.100, 000.00;

September/October off days' pay Kshs.2, 218.00;

Underpayments Kshs.2, 218.00;

Working on holidays Kshs.42, 650.00;

NSSF Kshs.11, 200.00;

NHIF Kshs.1, 200.00; and

Compensation.

The claimant was clear in his evidence to the extent that, on 19th November, 2015 he had taken his off days but was recalled back to relieve a colleague who was bereaved. The claimant had taken the off days due to the fact of being tired, he was hungry, had no fair to travel to work and when the supervisor failed to address his concerns, he opted to continue with his off days and report back to work once through.

Section 44(4) of the Employment Act, 2007 allows an employer to summarily dismiss an employee who fails to heed to lawful and proper instructions at work. Where the claimant had taken off days and was recalled back to work due to his colleague being bereaved such a find to be a fair and reasonable cause for the respondent to issue the recall. Even where the claimant as not able to report back on the same day he was recalled, a reasonable employee in his circumstances would have made great effort to report the next day.

What the claimant did was to seat back, take all his off days and which he failed to tabulate for the court assessment. This is not what a reasonable employee is expected to do in the circumstances. Where the claimant had no food, his uniform cleaned or was tired, having taken the days off or the night, he ought to have addressed work demands the following day or night. To fail to attend is absconding duty. Such is a good reason for summary dismissal.

Where the claimant failed to attend work despite being directed to do so, he frustrated his own employment. Notice pay is not due. Loss of income does not arise as well.

The basis for the claim for underpayment is not established. The claimant was unrepresented in court. I take it this claim for underpayment is premised on the basic wage and wage orders with regard to the minimum wage payable to a security guard for the period of 2011 to 2015. Where the claimant last earned kshs.8, 000.00 in 2015, within such time, the consolidated minimum wage in 2015 was Kshs.9, 572.00 per month. This is the applicable wage in the computation of his dues. However, it is not clarified as to what period the claim for 2,218.00 underpayment is based upon.

The claim for salaries unpaid for September, and October and of days off where employment was terminated in November, 2016 is due. The sum of Kshs.2, 218.00 is payable to the claimant.

The claim for work during public holidays for 4 years is not tabulated as to how this arose. Had the claimant left his employment procedurally, this should have been addressed in that context. With the claimant frustrating his own employment, having failed to tabulate and explain how the claim for work during public holidays running for 4 years arose, and the claim is declined.

Claim for NSSF and NHIF dues is not payable to the claimant directly. Where the respondent failed to pay for the statutory deductions from the wages paid to the claimant, service pay is due. At a salary of Kshs.9, 572.00 per month service payable is kshs.19, 144.00.

Judgement is hereby entered for the claimant for unpaid salary at kshs.2,218.00 and Kshs.19, 144.00 service pay. No orders to costs.

Delivered in open court at Nairobi this 30th day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants - David Muturi & Nancy Bor

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