



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 426 OF 2014

ERICKSON OUMA.....CLAIMANT

VS

PERFECT SCAN (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Security guard on 14.1.2008 and rose in the ranks to become a Supervisor. He voluntarily resigned on 20.3.2014 after serving a resignation notice dated 15.2.2014. He now brings this suit claiming accrued terminal dues plus certificate of service.
2. The respondent admits that she employed the claimant from January 2008 until 18.3.2014 when she dismissed him summarily for gross misconduct. She therefore denies that the claimant resigned from his employment as alleged in the suit. She further denies the dues sought in the suit and avers that the same was used to set off the loss occasioned by the claimant's misconduct.
3. The suit was heard on 18.11.2015 when the claimant testified as Cw1 but the respondent called no witnesses. Thereafter both parties filed written submissions.

Summary of claimant case

4. Cw1 told the court that he was employed by the respondent on 14.1.2008 as a security guard and on 14.12.2009 he was promoted to be a supervisor. That on 15.2.2014 he served a resignation notice which was to take effect from 20.3.2014. That by then his salary had been increased to kshs. 11500 per month. That on 8.3.2014, one Serella Vyas, the Director of the respondent gave him a letter to sign which he refused to sign because it was meant to have Cw1 admit that he was a casual employee for the respondent. That when Cw1 refused to sign the letter, the Director chased him away and Cw1 reported the matter to his trade union.
5. On 13.3.2014, Cw1 and his union officials held a meeting with the respondent's representatives one Beatrice and Mdamba where it was agreed that Cw1 should serve through his notice period which was to end on 18.3.2014 and officially clear with the company. That Cw1 completed his notice period and cleared with the company and the Director offered to pay him kshs 20,000/= as his terminal dues. Cw1 however declined the offer and instructed his lawyer to serve a demand notice followed by this suit.
6. Cw1 denied that he was dismissed for gross misconduct. He contended that the termination of the respondent's contract with Bliss Hotel was caused by the respondent when she failed to provide her guards with adequate metal detectors and reflector uniform. He denied receipt of the show

cause letter dated 8.2.2014 and observed that the letter was backdated because it addressed him on matters for March 2014. He denied any involvement in the deployment of guards and maintained that such was not part of his duties.

7. He prayed for service pay although he admitted that he used to contribute to NSSF. He prayed for bicycle allowance, refund of uniform levy plus salary for March 2014. He contended that during the notice period he was assigned duties at the respondents' premises at Reef Hotel in Nyali the records of which were in the respondents' custody.

Analysis and Determination

8. There is no dispute that the parties herein were in employment contract from 14.11.2008 to 19.3.2014. The issues for determination are:
 - a. Whether the termination was through resignation or unlawful dismissal.
 - b. Whether the claimant is entitled to the reliefs sought.

Resignation versus lawful dismissal

9. The evidence by the claimant was never rebutted because the respondent called no witnesses. Consequently the allegation that the claimant was dismissed for gross misconduct is dismissed for want of evidence. The Court therefore finds that the claimant voluntarily resigned from his employment on 19.3.2014 when his notice dated 15.2.2014 took effect. The receipt of such resignation notice was admitted by the respondent in paragraph 8 of her defence.

Relief

10. In view of the foregoing that the claimant voluntarily resigned, the court declines to declare that the termination was unlawful. The court will however award him kshs. 24,150/= being leave for 3 years immediately before filing the suit. The reason for not granting leave accruals for the rest of the service period is because of the three bar erected by section 90 of the Employment Act which limit causes of action based on employment contracts to 3 years only. He is also awarded refund of ksh 1,200/= being refund of welfare deductions for 2 years at the rate of ksh 50 per month. He is further awarded kshs 4,200/= being refund of uniform levy deducted for 2 years at the rate of ksh 100 per month. He is also awarded ksh 9,600/= being accrued bicycle allowances for 2 years at the rate of ksh 400 per month.
11. However the claim for service pay is dismissed because Cw1 admitted on oath that his employer contributed NSSF for him during his service and as such he is disqualified from claiming service under section 35 (6) of the Employment Act. In addition he is disqualified from claiming service gratuity under Rule 17 of the Regulations of Wages (Protective Security Services) order 1998 which provides as follows:

***“An employee who ... terminates his services for any
reason other than certified ill-health or retirement age
shall not be entitled to a gratuity.”***

12. The prayer for certificate of service is granted as prayed because it is a right given to every employee under section 51 of the Employment Act.
13. For the reasons highlighted above judgment is entered for the claimant by awarding him **kshs. 39,150/=**, Certificate of service, costs and interest.

Signed, dated and delivered at Mombasa this 12th day of February, 2016.

ONESMUS MAKAU

JUDGE