



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 402 OF 2014

JACKTONE OCHIENG OGUTU CLAIMANT

VERSUS

INTERSECURITY SERVICES LORDSHIP RESPONDENT

Mr. Nyabena for the claimant

Mr. Burugu for respondent

JUDGMENT

1. Suit was brought vide a statement of claim on 17th March 2014 on seeking payment of various terminal benefits set out in the statement of claim.
2. The claimant seeks a declaration that the respondent violated the claimant's employment rights, privileges and benefits and award the claimed sum.
3. The claimant was employed by the respondent as a security guard on 19th November 2001 and worked continuously until the 31st December 2011 when the claimant by a letter dated 1st December 2011, gave the respondent a one month notice of retirement effective 1st January 2012.
4. It is the claimant's case that during the tenure of his employment, the respondent underpaid him, did not pay overtime for normal days worked, weekly rest days and public holidays. The details of the breaches and tabulation is set out in the body of the statement of claim under paragraphs 6, 7 and 8. The claimant further seeks payment in lieu of leave days not taken and travelling allowance under paragraph 9 and seeks payment of gratuity under paragraph 11 and refund of unauthorized deductions under paragraph 12 of the statement of claim.

Response

5. The respondent filed a memorandum of defence on 26th June 2014 in which the employment of the claimant is admitted. The respondent however denies having breached and / or violated any of the alleged contractual rights of the claimant or at all.
6. The respondent states that the claimant served the respondent until he voluntarily resigned from its service and was duly paid all his wages including for the notice period.
7. All the prayers set out in the statement of claim are denied by the respondent and puts the claimant to strict proof thereof.

Determination

8. The parties by consent, relied on the pleadings and documentation attached thereto and written submissions by the claimant. It is not in dispute that the claimant resigned from employment by a

letter dated 1st January 2012.

9. The claimant placed evidence before court by way of affidavit sworn by the claimant on 13th March 2014. In the said affidavit the claimant placed extensive evidence under paragraphs 5 (1 – h) regarding the specific claims he has made in the memorandum of claim namely underpayment of basic wages, failure to pay the correct rate of overtime in respect of normal days, weekly rest days and public holidays.
10. The claimant further adduced evidence that he was entitled to 26 days annual leave and was owed 302.5 days at the time he left work.
11. The claimant also sought Kshs.850 for each leave entitlement that he was denied.
12. The claimant also relies on Regulation 17 of the Regulation of wages (protective security services) order, 1998, annexed to the memorandum of claim and section 18(4) of the Employment Act, in claiming gratuity at the rate of eighteen (18) days for every completed year of service (10 years) in the
the sum of
Kshs.58,394.70

Furthermore, the claimant seeks refund of Kshs.8,220.00, unauthorized union deductions.

The claimant states that the respondent did not disclose these statutory entitlements to the claimant to the loss and detriment of the claimant.

13. That the respondent failed to respond to the letter of demand.
14. The claimant seeks Kshs.1,018,058.90 set out in the statement of claim and supported by the affidavit evidence aforesaid.
15. The respondent made bare denial of the specific claims and did not provide oral or affidavit evidence to rebut the specific claims.
16. The burden of proving the claims made falls on the claimant on a balance of probability.
17. It is the court's finding that each of the claims set out under paragraph 17.03 of the statement of claim with the exception of the leave travelling allowance has been proved on a balance of probability. The failure by the respondent to respond to each of the claims has helped the claimant in discharging the onus placed on him. The claimant admitted that he did not go on leave and therefore in terms of practice he is not entitled to payment of travelling allowance which is usually paid to facilitate an employee to travel for leave to his home place.
18. Accordingly, the court awards the claimant as against the respondent as follows;
 - a. Kshs.147,805.87 being salary underpayments;
 - b. Kshs.153,079.13 being unpaid overtime for normal days worked;
 - c. Kshs.474,851.76 being overtime not paid during rest days not taken;
 - d. Kshs.69,011.90 being overtime not paid during public holidays worked;
 - e. Kshs.98,135.54 in lieu of annual leave days not taken;
 - f. Kshs.58,394.70 being service gratuity calculated at 18 days salary for each completed year of service for ten (10) years;
 - g. Kshs.8,220.00 being unauthorized check-off union deductions;

total award is Kshs.1,009,558.00;

- h. the award is payable with interest at court rates from date of filing suit till payment in full;
- i. the respondent to pay the costs of the suit.

Dated and Delivered at Nairobi this 12th day of February, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE