



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 298 OF 2013

ANDREW OBONYO..... 1ST CLAIMANT

MOSES NYARIKI..... 2ND CLAIMANT

VERSUS

CORNERSTONE SECURITIES SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants filed their memorandum of claim on 7th March 2013 seeking resolution of an issue they framed as the failure by the Respondent to pay terminal full benefits to the Claimants.
2. The Claimants averred that they were employed by the Respondent and due to unfavorable working conditions including non-payment of salaries they opted to resign. On resignation the Respondent refused to pay the terminal dues. The 1st Claimant sought severance pay for his services from December 2003 till 31st December 2012 Kshs. 54,000/-, leave pay for 4 years Kshs. 48,000/-, house allowance for the 9 years Kshs. 194,400/-, overtime Kshs. 400,000/-. The 2nd Respondent sought severance pay for the 3 years of service from 2009 till 2012 Kshs. 18,000/-, pay for off days Kshs. 62,000/-, annual leave for 3 years Kshs. 36,000/-, house allowance Kshs. 64,000/-, overtime 349,920/-. The Claimants also sought payment of costs of the suit.
3. The Respondent filed a Statement of Response on 3rd April 2013. In it the Respondent averred that the Claimants resigned but denied that they resigned due to poor working conditions. The Respondent denied indebtedness to the Claimants on account of unpaid terminal dues. The Respondent averred that statutory deductions made were remitted to the respective bodies.
4. The Respondent filed a witness statement and bundle of documents on 6th August 2014. The bundle of documents contained letters of application for employment, the contracts, the letters of resignation and documents showing kit issuance, test results of the Claimants. The Respondent also attached the leave application forms for the 2nd Claimant.
5. The Claimants testified on 3rd June 2014 and 5th November 2014. The Claimants testified that they worked for the Respondent and resigned due to non payment of salary. The 1st Claimant testified that he was never given any leave. The 2nd Claimant testified that he went on off days but there was no leave taken. He conceded in cross examination that he took days off and the balance of leave days was payable.

6. The Respondent called Basil Tonto who relied on his written statement. The statement was to the effect that the Respondent merged with Senaca EA Limited and that the Claimants were engaged by the Respondent and later by the new company Senaca EA limited. He stated that the 1st Claimant received his dues from the Respondent and did not raise any issue and that he went for his leave regularly. Regarding the 2nd Claimant he stated that the Claimant went on leave regularly and was paid when on leave. He stated the dues were paid on time and the terminal dues were accordingly paid.
7. In cross examination he stated that he was employed as a guard and later promoted to controller and subsequently as personnel officer and personnel manager. He stated that as a guard the hours were from 6.00 to 6.00. He confirmed he had nothing to show the Claimants acknowledged the payment of dues. He did not have any document to show the 1st Claimant went on leave or the working hours for the Claimants. Regarding the 2nd Claimant he testified that he did not have leave documents for leave taken in 2004, 2010 and 2011.
8. Parties filed written submissions. The Respondent filed written submissions on 28th November 2014 while the Claimants filed their written submissions on 12th February 2015. The Respondent submitted that the Claimants were not entitled to severance pay as they had not been declared redundant but had both resigned from employment. The 2nd Claimant resigned to attend to personal matters. The Respondent submitted that the Claimants were paid a consolidated salary. The Respondent submitted that all claims before 2011 were time barred in terms of Section 90 of the Employment Act. The Claims on overtime were not particularized and relying on the case of **Francis Muchee Nthiga v David N. Waweru [2014] eKLR** these were special damages which had to be specifically pleaded and proved. On hours of work, the Respondent submitted that the contracts of service provided for 12 hours a day and this was the agreement of parties and relied on the case of **Esther Wanjiku Nderitu v African Quest Safaris Limited [2014] eKLR**. The Respondent submitted that claim for off days was also a special damages claim which requires particulars and proof. The Respondent cited the case of **Behan & Okero Advocates v National Bank of Kenya Limited [2007] eKLR** that the Claimants cannot be allowed to approbate and reprobate.
9. The Claimants in their submissions submitted that the Claimants had proved their claims and were entitled to the sums sought. The Claimant stated that there was no proof that what was paid was a consolidated salary and therefore the Claimants were entitled to house allowance.
10. The Claimants claim was for unpaid dues. The Respondent asserted that all dues were paid and the Claimants acknowledged receipt. The Claimants had a burden to discharge in respect of their claims. I am in agreement that the claims relating to the period prior between 2008 and 2010 are limited by the Employment Act Section 90. The period between 2006 and 2008 is limited under the provisions of Section 4(1) of the Limitation of Actions Act. Having said that, the 1st Claimant made out a case on non payment of his dues in relation to his leave days. The Respondent did not attach any document showing that he went on leave in the 4 years claimed. In the premises I would award him Kshs. 36,000/- under this head. The Claimants claimed house allowance. House allowance is payable as provided for in law. The 1st Claimant sought house allowance for the years of service. The salary given to the Claimants was not a consolidated one. In the premises I hold he was entitled to house allowance of Kshs. 64,000/-.
11. The Claimants would have been entitled to overtime for 4 hours a day for each day worked in the period between 2007 and 2012 but their claim lacks the particulars necessary for the award. They each did not specify how many days involved overtime work.
12. For the 2nd Claimant he would succeed in obtaining payment for leave not taken in 2010 and 2011. The claim for leave in 2004 is time barred. The leave dues the 2nd Claimant would be entitled to are Kshs. 24,000/-. The 2nd Claimant sought house allowance and except for one

instance where a consolidated salary of Kshs. 5500 was paid to the 2nd Claimant, his other contracts had no indication of house allowance. He would be entitled to house allowance of Kshs. 129,600/- for the 6 years.

13. The severance pay is payable only in respect of redundancies. The Claimants both resigned and therefore are not entitled to this payment.

14. In the final analysis I enter judgment for the Claimants as follows:-

For 1st Claimant

- i. Kshs. 36,000/- for leave days not taken
- ii. Kshs. 64,000/- for house allowance.

For 2nd Claimant

- i. Kshs. 24,000/- for leave days not taken
- ii. Kshs. 129,600/- for house allowance.

The Claimants will also have costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of March 2015

Nzioki wa Makau

JUDGE