



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 399 OF 2014

FIDELIS MWANYUMBACLAIMANT

VERSUS

TOTAL SECURITY SURVEILLANCERESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for payment of employment benefits by an employee who voluntarily resigned from his services. The respondent however denies liability and avers that the matter was settled by a written agreement executed by the parties before the County Labour Officer. The defence has therefore raised objection that the court lacks jurisdiction to entertain this suit and prayed for the suit to be dismissed.

2. The suit was heard on 4/11/2014 and 1/12/2014 when the claimant testified as CW1 and the respondent called Patricia Kinyanjui as RW1. After the hearing the parties filed written submissions. In the course of the proceedings the counsel for the parties agreed to treat this suit as test suit for purposes of determining liability in Cause No. 319 of 2014 and 383 of 2014 which involved related facts.

CLAIMANTS CASE

3. CW1 was employed by the respondent on 8/3/2005 as Security guard worked upto 26/8/2013. His contract of employment was verbal and he was never issued with any payslips. He used to work overtime and never went for any annual leave during his 9 years of service although he was entitled to 26 days leave per year. He registered with the NSSF in 2010. During his service he used to be deducted a refundable ksh.300 per month for uniform.

4. CW1 fell into trouble with his employer after joining a trade union on 8/5/2013. His union is Kenya National Private Security workers Union. The respondent told CW1 to sign resignation so as to be given a new contract under the union. He resigned by letter dated 26/8/2013 (exh.1) but he was not paid his accrued dues upto the date of resignation. CW1 lodged a complaint with the labour officer seeking to recover his terminal dues in respect of annual leave outstanding, overtime worked, refund of uniform levy, certificate of service, service gratuity and holidays worked. He was represented by his union in the case before the labour officer where a Memorandum of Agreement was signed between the union and the respondent. CW1 was not present when the said Agreement was signed and the union did not explain to him the details of

the agreement. Thereafter he was paid ksh.41750 vide cheque but with no particulars for the said sum.

5. CW1 prayed for leave earned in his 9 years service at the rate of 26 days per year. He also prayed for service pay for the period served before joining NSSF in 2010. He further prayed for refund of uniform levy at the rate of ksh.300 per month for 9 years being Ksh.32400.

6. On cross examination by the defence counsel, CW1 admitted that he resigned from employment and applied for his dues. Later he instructed his union to pursue his dues from the labour office where the union and the respondent signed a settlement agreement but CW1 never signed on the agreement. The agreement was in full settlement. CW1 however maintained that he was entitled to service gratuity for 9 years served between March 2005 and August 2013.

DEFENCE CASE

7. RW1 is the HR Manager for the respondent for 3 years now. In August 2013 she received several resignation letters from about 5 security guards including CW1. The resignation letter for CW1 was dated 26/8/2013 and like the other guard who resigned he requested for his accrued dues. Before the dues were paid, RW1 was summoned to the Labour office Mombasa where she met the claimant's union official. The parties reached settlement, and the signed agreement dated 13/11/2013. Thereafter RW1 calculated the dues and issued cheques to each claimant through the labour office. She admitted that CW1 was not present in the meeting at the labour office and he never signed the settlement agreement. CW1 however received his cheque without any complaint being cheque No. 7664 for ksh.41750.

8. RW1 explained that the ksh.41750 was for 4 years leave and uniform levy refund of ksh.3950 less ksh.200 for cleaning the returned uniform. She produced leave records (exh.d5a – d and exh.d. 6 a-c) to show that CW1 had taken 4 years leave before. According to RW1, the claims by the resigning guards including CW1 were all settled at the labour office and no further claim should be entertained because the settlement agreement stated that all the disputes were fully settled. In addition to the foregoing CW1 like other guards were members of the NSSF and as such they are disqualified from claiming service pay.

9. On cross examination by the claimant's counsel, RW1 admitted that the settlement agreement talked about payment of gratuity and did not mention leave or uniform deductions. According RW1 gratuity meant everything the employer pays to the employee on separation. She contended that CW1 was employed in August 2005 and just like other guards he was earning gross salary ksh.9000 as at August 2013 when he resigned. She maintained that CW1 like all the other guards was being issued with payslips. She further maintained that NSSF contribution for the guards were being remitted but she was surprised to see NSSF statement showing that from 2008 to May 2010 NSSF contribution for Cleophas (claimant in cause No. 383 of 2014) was never remitted. She maintained that all guards went for their annual leave. She explained that refundable uniform levy of ksh.300 per month was only deducted for 13 months and not through outones period of service. According to RW1 the computer system would not allow continued deductions of the refundable uniform levy after the 13th month. She concluded by admitting that she never paid any gratuity to the claimant and the other guards but only leave days and uniform levy.

ANALYSIS AND DETERMINATION

10. After carefully going though the pleadings and considering the evidence and the submissions, it is a fact that CW1 was employed by the respondent as a security guard from Mid 2005 until he resigned on 26/8/2013 alongside other guards. It is also a fact that CW1 and his colleagues requested for their terminal dues and when nothing was paid they lodged a complaint with the labour officer Mombasa. There is no dispute that the union and the respondent signed settlement agreement before the labour office stating that the dispute was to be marked as fully settled upon payment of gratuity to claimants by the respondent. It has been admitted by RW1

that CW1 and his colleagues were never paid gratuity but leave days earned and a refund of uniform levy for 13 months less ksh.200 for cleaning the returned uniform. The issues for determination are therefore whether the court lacks jurisdiction to entertain the suit in view of the settlement signed before the labour office and whether the reliefs sought in the suit should be granted.

Jurisdiction

11. The respondent had cited Judicial precedents by courts of concurrent jurisdiction to demonstrate that when an employee signs a discharge to release his employer from further claims, he remains forever *estopped* from raising fresh claims. This court agrees with that view save to add that this court has the jurisdiction to review such settlement in case it appears to be ambiguous, incomplete oppressive, unfair or in breach of the law or public policy. The philosophical foundation of the labour law is to protect the human dignity and outlaw servitude.

12. In the present case, the settlement agreement between the respondent and union stated as follows:

“This is to confirm that the above mentioned parties have met in this labour office and discussed the matter lodged by the union and workers regarding termination of the workers services . It has been agreed as follows

(a) that the management will pay gratuity to all the listed nine(9) complainants.

(b) that the management will re-engage any of them who desire to be re-employed.

(c) that the payment will be done by 27th November 2013 through Bankers cheques addressed to the county Labour officer Mombasa County.

(d) that payment of the agreed items will mark full and final settlement of this matter”.

Rika J considered the foregoing settlement agreement in ELRC CAUSE NO. 392 OF 2014NURU MUKWANJA WAWIRE vs TOTAL SECURITY SURVEILLANCE LTD when the defence raised a Preliminary Objection to the courts jurisdiction in the face of the said settlement agreement. Although Rika J. struck out the suit for another reason, he was of the view that the court had jurisdiction to entertain the suit under Section 47(3) and (4) of the Employment Act. This court agrees with Rika J because the said provisions of the statute is to the effect that the right of an employee to lodge a complaint to the labour office is in addition to his right to sue before this court.

The foregoing means that if for any good cause the employee is not satisfied with the outcome of the proceedings before the labour office, he has the liberty to approach this court. In that regard, the claimant herein and in the other suits cited moved to the court to seek payment of their dues. According to the evidence on record, the particulars of the payments done by the respondent to the claimants were never shown. They were also not founded on the agreement or contract of employment signed by the parties. After the agreement the respondent unilaterally calculated the dues payable which included leave days for 4 years plus 13 months uniform levy. The claimant had all the right to bring this suit to demand his terminal dues as per the law and especially the gratuity agreed upon by the parties before the Labour officer. To that extent this court is of a different opinion from that of Rika J. in the NURU MUKWANJA WAWIRE CASE.

13. The reason for the foregoing view is that the agreement signed by the parties was incomplete and incapable of being executed by the parties without further proceedings to ascertain the exact amount of due for payment. Secondly the agreement was manifestly unfair because it gave the respondent the sole right to determine the amount payable to the claimants. As a result, RW1 unilaterally paid for leave earned in 4 years and uniform levy for 13 months only. There was no clear basis for such calculation and as such the court will proceed to review the alleged

settlement on the basis of the laws and the correct salary payable to CW1. Consequently the answer to the first issue for determination is that the court has jurisdiction to entertain this suit notwithstanding the settlement agreement by the parties herein dated 13/11/2013.

RELIEFS

14. The leave records produced by the defence shows that CW1 went for his annual leave between 2006 and 2009 but he did not go for his leave between 2010 and 2013 which is a period of 4 years. RW1 alleged that the cheque for ksh.41750 to the CW1 included payment for the 4 years leave. CW1 said that his salary was ksh.12000 per month while RW1 insisted that all her Security guards including CW1 were earning ksh.9000 as at August 2013. No written contract was produced by the respondent and as such the burden was upon the respondent to disprove the salary of ksh.12000 verbally alleged by the claimant. In this case RW1 did not adduce any evidence to rebut CW1's alleged salary of ksh.12000. In any event, the minimum salary for a security guard in August 2013 was ksh. 14118 according to the General Wage Order for that year. This court therefore agrees with the claimant that his salary was ksh.12000 per month. In view of the foregoing his pay for the 4 years leave was $26/30 \text{ days} \times 4 \times 12000 = 41600$.

15. As regards the refundable uniform levy, the respondent did not produce any written contract to prove that the said levy was only deductible for 13 months. There was no evidence adduced to demonstrate that the respondent's policy was for deductions of uniform levy for 13 months nor was any evidence produced to demonstrate that the computer payment system could not allow the deductions of the refundable uniform levy after the 13 months. Consequently, the evidence by CW1 that he was deducted the uniform levy for all his period of service is acceptable. The RW1 appears to be unaware of the manner in which her branch office in Mombasa was operating. It is possible that the respondent's policies and the labour laws were not being followed at the Mombasa branch. The reason for the foregoing observation is the way RW1 appeared confident that NSSF deductions were remitted for all the staff only to be surprised to note that for many years the same was not being remitted at the said branch. Consequently the court awards the claimant refund of his uniform levy at the rate of ksh.300 per month for 8 years served being ksh.28800.

16. Lastly the court declines to award the claimant service gratuity for the 8 years served between 2005 and 2013 under Regulation 17 of the Regulation of Wages (Protective Security Services) Order 1998. The said provision entitles any employee in the sector who has worked continuously for one employer for 5 years to gratuity at the rate of 15 days per year of service. The foregoing benefit however is not available to employee who terminates his employment for any reason other than ill-health or retirement age according to Regulation 17(2) above.

DISPOSITION

17. For the reasons stated above, judgment is entered for the claimant in the sum of ksh.28650 being the net of ksh.70,400 less ksh.41750 paid through the labour office. The claimant will also get half costs of the suit. This judgment shall apply to ELRC 319 of 2014 and 383 of 2014 on the issue of liability.

Dated signed and delivered this 17th April 2014.

O. N. Makau

Judge