



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 310 OF 2014**

**QUINTO OKIRU OMUKE**

**CLAIMANT**

**v**

**SECURITY SEVEN LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Claimant, acting on his own behalf sued the Respondent on 14 July 2014 alleging that the Respondent had refused to pay him terminal dues. He sought Kshs 90,000/- less what the Respondent had paid him. He also alleged in the pleadings that his employment was terminated due to shortage of work.
2. According to an affidavit of service sworn by Vincent Ochieng and filed in Court on 7 October 2014, the Respondent was served with Notice of Summons and Memorandum of Claim on 20 August 2014. A Response should therefore have been filed on or before 3 September 2014
3. The Respondent only filed Response on 7 May 2015, the date set for the hearing. When the Cause was called for hearing, the Respondent's counsel did not bother to inform Court or seek leave to have the Response admitted out of time. The Court consequently expunged the Response from the record.
4. It is therefore appropriate to observe that counsels should not casually handle their briefs and they should at all time make candid disclosures of facts within their knowledge as to timelines for filing documents and or seek appropriate directions for admission of documents not filed within time.
5. The Cause was heard on 7 May 2015 and the Respondent filed its submissions on 20 May 2015. The Claimant testified while the Respondent opted not to call any witnesses.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant's services were terminated or he left voluntarily, whether Claimant was underpaid and appropriate remedies/contractual or statutory entitlements due to the Claimant.*
7. But first the issue of when the employment relationship commenced. The Respondent issued the Claimant with a Certificate of Service but contended that the employment started in 2012.
8. The Court rejects the position urged by the Respondent that it engaged the Claimant in 2012, as the Certificate of Service it issued expressly stated that the Claimant served it from 1 November 2008 to 31 October 2013.

## **Termination or resignation**

9. In paragraph 5 of the Memorandum of Claim, the Claimant pleaded that his employment was terminated due to shortage of work. The Respondent denied the same and contended that the Claimant left employment on his own volition.

10. In his testimony, the Claimant stated that he was appointed by the Respondent in 2008 and deployed to Naivasha. On 6 September 2013, he was transferred to Nairobi to supervise an assignment there.

11. He stated that he reported to Nairobi on 12 September 2013 and was assigned to Ridgeways Mall and that on 31 October 2013 he was called and informed to stop the guards he was supervising from reporting to work because the assignment had been terminated. He was directed to report to the Respondent's head office.

12. At the head office he was informed that the assignment had been terminated and therefore he was to report daily waiting for a new assignment but he found it difficult to commute daily.

13. As a result, the Claimant stated he wrote to the Respondent on 4 November 2013 seeking his dues. On 8 November 2013 he reported to the Labour Office but the Respondent did not respond to any of the letters by the Labour office until 10 December 2013 when a representative of the Respondent attended a meeting and an agreement to pay him Kshs 90,000/- was reached. But he was paid only Kshs 33,400/-.

14. It is clear that the separation between the parties was because of the termination of an assignment (guarding contract) between the Respondent and a client.

15. The separation was not due to any *misconduct, poor performance or physical incapacity* on the part of the Claimant. The contract between the Claimant and Respondent was frustrated and was not capable of performance because of factors beyond the control of the parties.

16. This was therefore a case of redundancy and the Court finds that the termination was due to redundancy. The Claimant did not leave employment out of his own volition.

## **Whether Claimant was underpaid**

17. The Claimant pleaded that he was underpaid and cited Legal Notices Nos. 53 of 2003 and 197 of 2013.

18. However, he did not prove his wages at the material times or state the periods the underpayments occurred. He only disclosed the wage of Kshs 15,000/- when he was transferred to Nairobi.

19. The Court therefore cannot determine whether he was underpaid and by how much.

## **Appropriate remedies**

20. Some remedies in the employment relationship accrue out of contractual or statutory obligation (entitlement). The payment of severance pay arises out of a statutory requirement (see section 40 of the Employment Act, 2007).

## **Severance pay**

21. The Claimant did not seek severance pay in his pleadings. He is a layman not schooled in the law. But the issue of unfairness of termination of employment arose out of the pleadings and the Court considers that it was left for its determination.

22. The Court has found this was a case of redundancy.

23. The Court therefore finds that the Claimant was entitled to severance pay at the rate of 15 days pay for each completed year of service.

24. The Claimant was employed on 1 November 2008 and left on 31 October 2013. He served for 5 years and would be entitled to severance pay equivalent to 75 days pay.

25. The Court, using the formula of basic pay divided by 26 to get the daily rate multiplied by 75 days assesses the severance pay as Kshs 43,269/-.

#### ***October 2013 wages***

26. According to the Respondent's letter dated 21 January 2014, the Claimant was paid Kshs 15,000/- under this head.

#### ***Pay in lieu of Notice***

27. The parties agreed to Kshs 15,000/- as pay in lieu of notice. This was not factored in the dues paid to the Claimant and he is entitled to the same.

#### ***Annual leave***

28. The Claimant was paid Kshs 16,800/-.

#### ***Rest/off days***

29. The parties agreed Kshs 25,600/- under this head on account of 96 days. The Respondent did not pay the same and the Claimant is entitled to the same.

#### ***Public holidays***

30. The parties agreed to Kshs 8,000/- for 30 days. The Respondent did not pay the same.

#### ***Uniform refund***

31. The Claimant was refunded Kshs 3,600/-.

#### ***Refund of insurance***

32. On this head, the parties agreed Kshs 6,000/- which the Respondent did not pay.

#### **Conclusion and Orders**

33. The Court finds and holds that the Claimant's employment was terminated on account of redundancy and awards him and orders the Respondent to pay him

(a) 75 days severance pay	Kshs 43,269/-.
(b) 1 month pay in lieu of Notice	Kshs 15,000/-
(c) Rest/off days	Kshs 25,600/-
(d) Public holidays	Kshs 8,000/-
(e) Refund of insurance	Kshs 6,000/-

TOTAL

**Kshs 97,869/-**

