



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 504 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th October, 2015)

NOMWEL NYAKUNDI GEKONECLAIMANT

VERSUS

RILEY SERVICES LIMITED RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 11/4/2013 through the firm of Nyabena Nyakundi & company Advocates. It is the Claimant's case that on or about 2009 the Respondent employed him as a Security Guard at a salary of 10,382.90 per month excluding house allowance which was never paid to him in violation of Section 31 of Employment Act 2007.
2. That he worked for the Respondent with due diligence and faithfulness until on or about 27th December 2012 when the Claimant was forced to resign from employment as per his resignation letter dated 27th December 2012. He avers that he was forced to resign from his employment on the undertaking by the Respondent to pay him his outstanding dues. This resignation was accepted by the Respondent who promised to pay him his dues less loans owed to the company. The Claimant thereafter cleared from the Respondents Company and was given a clearance certificate (Appendix 3b). He avers that he was never paid his terminal dues after this as promised by the Respondent.
3. The Claimant now seeks payment of his dues which he has tabulated to 504,858.88/= which include house allowance, overtime, annual leave, travelling allowance, uniform, RIFA, soap policy, premium control, public holidays, gratuity and a certificate of service.
4. The Claimant avers that for all the period he worked, he was never paid any house allowance and neither was he allowed to go for annual leave. He also avers that he worked 3 extra hours daily and on public holidays. It is his averment that he was also entitled to a leave travelling allowance of 2,000/= per year and a refund of 4,420/= which was being deducted monthly at 85/= for uniform.
5. He prays for prayers listed in his claim and also seeks for interest and costs of this suit.
6. The Respondents on the other hand filed their Memorandum of Response on 20/5/2013 through the firm of Obura Mbeche and Company Advocates. Their defence is that they employed the Claimant as a guard on or about 8th September 2008 on a one year fixed term contract basis as per Appendix B. He was thereafter engaged in another fixed term contract of one year, being one to

run till 25th January 2013. On 27th December 2012 the Claimant gave a notice to the Respondent indicating that he was resigning from 27th January 2013 (Appendix C).

7. The Respondent acknowledged receipt of the resignation as per Appendix D. That the Claimant issued yet another notice of resignation to resign on 9/1/2013 and this was to run upto 9th February 2013 (Appendix E).
8. The Claimant worked upto the 31st of the month as per his clearance form Appendix F. His terminal dues were calculated at Kshs.13,264/= and a cheque was prepared for his collection but he rejected it. (Appendix G) is the copy of the said cheque. He proceeded to make other demands through his Advocate and thereafter filed this claim.
9. The Respondents have submitted that the Claimant is not entitled to what he claims i.e. house allowance as he was being paid a consolidated salary. Further, that he is not entitled to any leave or overtime payment as his payment for leave was calculated but he refused to accept it. That as for overtime, it is not justified as he was being paid a daily rate which took into account a possible 12 hours shift as provided in clause 9.1 of the Claimant's contract. That also payment for public holidays was paid in his salary. Concerning leave and uniform allowance, they submitted that the Claimant has refused to collect it.
10. The Respondents have further submitted that the claim is prematurely before court as under clause 11.2, the case could only be filed after a dispute had undergone ADR.
11. Concerning RIFA (Riley Funeral Association) the Respondents have submitted that it can only be made through the association and not the Respondent as they are two different entities. They aver that gratuity is not payable as the Claimant was a member of NSSF. They are willing to issue him with a certificate of service and pay him 13,264.25/= his terminal dues which he refused to collect.
12. Having considered evidence of both parties, issues for determination are whether the Claimant having resigned from employment is entitled to any of the prayers sought. I will consider the issue of house allowance. The Respondent submitted that he is not entitled to it as his salary was a consolidated amount inclusive of house allowance.
13. I have looked at the contract submitted by Respondent which states the salary will be consolidated but the amount payable is left blank.
14. Under Section 31(1) & (2) of Employment Act, the law is clear that:

“(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –

- a. ***where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;***
- b. ***where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or***
- c. ***where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.***

(2) Subsection (1) shall not apply in the case of a contract of service whose

terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

15. The reading of this section is that payment of house allowance is only excluded if this is expressly provided for in the contract. The contract submitted before me is vague and does not expressly state that the salary payable would cover the house allowance. There being such an omission, I find that Claimant is entitled to payment of house allowance for the period served being 15% of his monthly salary = $15\% \text{ of } 48 \text{ months} = 15/100 \times 48 \times 10,382.90 = 74,750/=$
16. On annual leave, the Respondent have agreed that the Claimant didn't go for leave for 4 years but will restrict myself to the last contract he was serving on for purposes of leave and award him 1 month salary for that 1 month = 10,382/=
17. On overtime there is no denial that the Claimant worked on a 12 hour shift meaning he served 3 hours overtime daily. He is therefore entitled to overtime pay being 3 hours x 48 months = $3 \times 10,382/8 \times 48 \text{ hours} = 186,876/=$
18. Having been a member of NSSF, the Claimant is not entitled to payment of gratuity as provided for under Section 35 of Employment Act.
19. Other claim of RIFA and soap and uniform refund are admitted by the Respondent as being payable and Respondents are willing to pay 13,264.25/= for the same.
20. I therefore award Claimant a total of **Kshs.285,272/=** as his terminal dues. I also order Respondents to issue him with a Certificate of service and also pay costs of this suit.

Read in open Court this 14th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Gitonga holding brief for Nyabena for Claimant

No appearance for Respondent