



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA T KISUMU

CAUSE NO. 238 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PATRICK KANGA LUSEKACLAIMANT

VERSUS

BEDROCK HOLDINGS LTD.RESPONDENT

J U D G M E N T

In his Memorandum of Claim filed on 11th September, 2013 the Claimant states that he was employed by the Respondent on 28th November, 2005 initially as a casual senior security guard. After 8 months probation he was confirmed on 1st July, 2006 at a basic salary of Shs.4,100 without house allowance. He states that due to health problems he was forced to retire on medical grounds by a doctor's recommendation dated 7th December, 2009. The Claimant gave notice of retirement by letter dated 1st April, 2010 but the Respondent turned down his application to retire on medical grounds. The Claimant then reported a dispute to the Labour Officer through his trade union the Kenya National Private Security Workers Union. The issue in dispute was failure to pay terminal benefits. The Labour officer called a conciliation meeting on 24th April, 2013 but the Respondent failed to attend. The Labour Officer thereafter issued a certificate of disagreement recommending that the Claimant files his claim in court, hence this suit.

In the Memorandum of Claim the Claimant seeks the following remedies:-

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| 1. Under payment for 5 years | = Kshs.273,905/= |
| 2. Overtime for 5 years | = Kshs. 55,264/= |
| 3. N.S.S.F. for 5 years | = Kshs. 24,000/= |
| 4. Gratuity for 5 years | = Kshs. 23,141/= |
| 5. House allowance for 5 years | = Kshs. 62,766/= |
| 6. Leave allowance for 5 years x 6,430 | = Kshs. 31,700/= |
| 7. Leave transport for years x 850 | = <u>Kshs. 4,250/=</u> |

Kshs.476,026/=

The Respondent filed a Statement of Defence on 6th November, 2013 denying terminating the Claimant's employment or owing the sums claimed by him.

The case was heard on 3rd February, 2015 when the Claimant's testimony was taken and on 25th June, 2015 when the Respondent's witness Oscar Ingosi testified.

According to the Claimant's testimony he worked until May, 2010 but was not paid salary for the last 2

months. His last salary was Shs.10,000 per month. He worked from 5.30 p.m. to 6.30 a.m.

The Respondent's witness testified that the Claimant worked on and off from December, 2009 when he presented a medical report recommending retirement on medical grounds until February, 2010 when he stopped reporting for work following which the Claimant was declared a deserter.

The Respondent in its written submissions raises the issue of limitation. The Respondent submits that the claim was filed on 11th September, 2013 yet the Claimant alleges his employment was terminated in May, 2010. This is borne by the facts pleaded in the Memorandum of Claim and the evidence adduced by the Claimant.

Section 90 of the Employment Act provides that all claims arising under the Act must be filed before the lapse of 3 years from the date of accrual of the course of action. Since the Claimant alleges to have left employment at the end of May, 2010, he should have filed his claim by the end of May 2013. He however filed the claim on 11th September, 2013 without seeking leave to file out of time.

In the case of *Divecon v Samani [1995-1998]EA 48* the court stated that no court has the right or power to entertain an action that is time barred. Again in the case of *Owners of Motor Vessel 'Lilian S' v Caltex oil (Kenya) Limited [1998] KLR I* the court stated that *jurisdiction is everything and once a court finds that it has no jurisdiction, it must not make any further step*. Limitation has the effect of taking away the jurisdiction of the court to hear such matters.

For reason that the claim is time barred, I strike out the claim with no orders for costs.

Dated signed and delivered 4th day of November, 2015

MAUREEN ONYANGO

JUDGE