



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 1482 OF 2011**

**FRED MASAMBAKA.....CLAIMANT**

**VS**

**BABS SECURITY SERVICES.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by memorandum of claim dated 22<sup>nd</sup> August 2011 and amended on 11<sup>th</sup> February 2013 seeks payment of terminal dues. The Respondent filed a statement of defence on 10<sup>th</sup> October 2011 but when the matter came up for hearing on 19<sup>th</sup> May 2014, there was no appearance for the Respondent. The Claimant testified on his own behalf and his Advocates filed written submissions.

**The Claimant's Case**

2. According to the Claimant, he worked for the Respondent as a security guard from 2<sup>nd</sup> February 2002 until 27<sup>th</sup> October 2010 when he tendered his resignation on medical and age grounds. The Respondent however declined to accept the Claimant's resignation and withheld his terminal dues. At the time of leaving employment, the Claimant's salary was Kshs. 6,000.

3. The Claimant claims the following:

- a. 8 years' leave pay.....Kshs. 33,600
- b. Unremitted NSSF dues.....Kshs. 28,200
- c. Unremitted NHIF dues.....Kshs. 28,800
- d. Severance pay for 8 years.....Kshs. 24,000

**The Respondent's Case**

4. In its statement of defence dated 10<sup>th</sup> October 2011, the Respondent states that the Claimant was duly discharged and paid all his dues at the time of leaving employment. It is therefore the Respondent's case that it does not owe the Claimant any money.

**Findings and Determination**

5. The single issue for determination in this case is whether the Claimant was paid his dues at the time he left the Respondent's employment. From the evidence on record, it would appear that the Claimant was not issued with a contract of employment. Section 9 of the Employment Act, 2007 places the

responsibility of documenting the terms and conditions of employment on the employer and where the employer fails to do so, it is left to the Court to interpret the applicable terms and conditions.

6. The Claimant told the Court that he worked for the Respondent from 2<sup>nd</sup> February 2002 to 27<sup>th</sup> October 2010. Apart from a general denial of the Claimant's pleadings, the Respondent did not offer any evidence to counter the Claimant's averments. Section 10(7) of the Employment Act provides that where an employer fails to produce a written contract of employment, the burden of proving or disproving an alleged term of employment rests with the employer.

7. The Respondent not only failed to provide a written contract of employment but also did not disprove the employment period as presented by the Claimant. The Court therefore finds that the Claimant was on continuous employment from 2<sup>nd</sup> February 2002 until 27<sup>th</sup> October 2010 when he tendered his resignation.

8. The Claimant testified that the Respondent declined to accept his resignation and did not pay him his terminal dues. In its statement of defence, the Respondent makes an unsupported general statement that the Claimant was discharged and was paid all his terminal dues. It is not disputed that by his letter dated 27<sup>th</sup> October 2010, the Claimant tendered his resignation on medical and age grounds. In the said letter, the Claimant asked the Respondent to release his terminal dues.

9. It is the Claimant's case that the Respondent did not respond to his resignation letter. As held by **Mbaru J** in *James Chutha Gatherer Vs Nation Media Group Limited [2013] eKLR* an employer is obligated to acknowledge and respond to a resignation notice from an employee. It is not clear whether the Claimant served notice but there is no counterclaim on this account.

10. The Claimant further testified that for the entire period of his employment with the Respondent, he did not go on leave. He therefore claims leave pay for eight years. The Respondent did not produce any leave records to counter this claim and it is therefore allowed.

11. The Claimant also claims unremitted NSSF and NHIF dues. In the case of *Beatrice Wayeko (suing as Administratrix of the Estate of Oscar Smith Njinuli) Vs Cellulant Kenya Limited [2014] eKLR* this Court held that NSSF and NHIF dues are payable to the respective statutory bodies and not to claimants and in cases where there is non remittance of NSSF dues, the proper prayer is for service pay under Section 35(5) of the Employment Act, 2007. The Claimant's claim for unremitted NSSF and NHIF dues therefore fails and is dismissed. The Claimant was not declared redundant and I therefore find no basis for the claim for severance pay which is also dismissed.

12. Ultimately, I make an award in favour of the Claimant in the sum of Kshs. 33,600 being leave pay for eight years. I also award the costs of this case to the Claimant. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Odera for the Claimant

No appearance for the Respondent