



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 123 OF 2013

JOSHUA MBEGO ORORI

CLAIMANT

v

PINKERTONS KENYA LIMITED

RESPONDENT

JUDGMENT

1. Joshua Mbego Orori (Claimant) was employed by Pinkertons Kenya Limited (Respondent) in the year 2005 as security guard.
2. According to the Statement of Claim filed in Court on 29 May 2013, the employment relationship was governed by a Collective Bargaining Agreement and towards the end of February 2013 the Claimant resigned (a letter of notice of resignation dated 22 November 2012 was produced and not disputed), but the Respondent failed to settle his final dues.
3. The Claimant therefore seeks Kshs 44,550/- being 99 off days, Kshs 20,475/- being service pay for 7 years worked and Kshs 3,000/- uniform refund all totalling Kshs 68,025/-.
4. On 25 June 2013 the Cause was mentioned but only the Claimant was in attendance. The Court was not satisfied that the Respondent had been properly served and I directed the Claimant to serve afresh and a mention was fixed for 11 July 2013.
5. On 13 July 2013, the Claimant informed me that he had served the Respondents Manager in Mombasa and an affidavit of service filed. There was an affidavit of service sworn on 5 July 2013 and filed in court on the same day. I fixed hearing for 2 September 2013 and directed the Claimant to serve a hearing notice.
6. On 2 September 2013 the Claimant appeared on his own behalf while Mr. Fredrick Kyalo who stated that he was the Respondent's Branch In Charge appeared for the Respondent.
7. The Respondent's In Charge informed the Court that they had calculated the Claimants dues but he had refused to collect the same. I directed the parties to attempt out of court settlement and report back on 25 September 2013.
8. On 25 September 2013 Mr. Kyalo informed the Court he had records of the Claimant and I fixed hearing for 30 October 2013. On the hearing day, the parties opted to proceed through submissions.

Claimant's submissions

9. The Claimant submitted that he was employed by the Respondent on 7 August 2005 at a salary of Kshs 4500/- per month and that he signed an agreement but was not given a copy. He was also not being issued with a pay slip.

10. In September 2010 his salary was increased to Kshs 5850/- per month.
11. According to the Claimant, he was not going on offs as required and that in January and August 2006 he went for only 1 off day respectively, and that when he asked he was told he was inciting others. He further submitted that the Respondent kept records.
12. Regarding the formula used to arrive at the figures claimed, the Claimant submitted that he used his salary of Kshs 5850/- which he divided by twenty six to get the daily rate of pay which he then multiplied by the number of days and two because of overtime.
13. He further submitted he was entitled to a uniform refund of Kshs 3000/- per year for the seven years worked.

Respondent's submissions

14. The Respondent did not file a Response but the Court allowed it to make submissions through its Branch Manager in Charge (the Court had directed the Respondent produce/file the Claimant's records which was done).
15. The Manager submitted that the Claimant was employed by the Respondent through a service agreement dated 27 August 2005 and that the contract provided for 4 days off per month and that the Claimant used to take his offs.
16. To illustrate this point, the In charge submitted that for example in December 2007 the Claimant took 7 off days and that cumulatively the Claimant went on offs for 334 days over the 7 years instead of the 336 off days and therefore there was a balance of only 2 days.
17. On accrued leave days, uniform allowance of Kshs 3000/- and service pay, the Manager submitted that these were calculated and a cheque made out in favour of the Claimant but he refused to take the refund cheque. The service pay was calculated at Kshs 28,140/- while accrued leave was Kshs 8600/-. The Respondent had prepared a cheque for a total of Kshs 39,740/- as final dues.
18. The Manager also submitted that the Claimant was earning Kshs 6190/- in 2010.
19. The Court will proceed to evaluate the respective parties submissions against the specific claims of the Claimant based on the records produced by the Respondent.

99 off days

20. The Claimant's employment records were produced, and I am satisfied that the Claimant took 334 out of 336 offs during the 84 months leaving a balance of 2 off days for which he would be entitled to Kshs 476/- using the formula referred to in the next paragraph.

Service pay/Gratuity

21. The Claimant is entitled to service pay by virtue of section 35(5) of the Employment Act and Regulation 17 of the Regulation of Wages (Protective Security Services) Order, 1998. There was no suggestion that the Claimant was a member of the National Social Security Fund or any of the schemes mentioned in section 35(6) of the Employment Act.
22. The Claimant had served for more than 5 years and would be entitled to gratuity at eighteen days pay for each completed year of service. The Claimant worked for 7 years and is therefore entitled to gratuity for a total of 126 days.
23. According to the Respondent's records, the Claimant salary at termination was Kshs 6190/-. Using the correct formula of basic pay plus housing allowance divided by twenty six to get the daily rate multiplied with the number of days, the Claimant is entitled to Kshs 29,997/- and not Kshs 28,140/-.

Outstanding Accrued leave

24. The Claimant did not claim outstanding leave in his Statement of Claim but in its submissions and Clearance form/records the Respondent stated that the Claimant was owed Kshs 8600/- as leave balance. I would award the Claimant this sum.

Uniform refund

25. The Respondent also acknowledged that the Claimant was owed a uniform refund of Kshs 3000/-. I would award him this claim.

Conclusion and Orders

26. Based on the parties submissions and records produced, I would find in favour of the Claimant and award him

a. Two off days	Kshs 476/-
b. Gratuity equivalent to 126 days pay	Kshs 29,997/-
c. Outstanding accrued leave	Kshs 8,600/-
d. Uniform refund	Kshs 3,000/-
e. Costs	Kshs 10,000/-

TOTAL

Kshs 52,073/-

Delivered, dated and signed in open court in Mombasa on this 19th day of December 2013.

Radido Stephen

Judge

Appearances

Joshua Mbego Orori

Claimant in person

Fredrick Kyalo, Branch In Charge

Respondent