



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 891 OF 2015

STEPHEN O. EDEWA.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant filed suit on 25th May, 2015, seeking payment of his terminal dues arising out of an employment relationship with the Respondent entered into vide Form No. 4916. That in exercise of his rights under the Employment Act, the Claimant alleges that he always requested for leave and it was always denied and as a result he served a resignation notice which was accepted by the respondent. That thereafter he requested for his terminal dues to be processed but the same was not heeded. Therefore, by this suit the claimant prays for accrued annual leave, house allowance, service pay, refund of uniform levy and Certificate of Service.

2. The Respondent filed her defence on 27.7.2015 contending that she employed the Claimant on 1st May, 2002, and not on 31st January, 2001. She denied the allegation that the Claimant applied for leave and was denied the same. She further averred that after resignation, the Claimant was requested to avail his NSSF statement but failed to do so and as such they could not process any unremitted NSSF payments. She denied the claim for house allowance and contended that the Claimant's salary was a consolidated pay. She further denied that service pay was payable and explained that the claimant had voluntarily resigned. Finally, she denied the claim for prayed for that the Claimant was provided with uniforms and therefore the Claimant is not entitled to a refund of uniforms. She therefore prays for the Claim to be dismissed with costs.

Evidence

3. The Claimant testified that he was employed on 31st January, 2001, vide an oral contract but in 2013, he filled an employment form and a personnel history form. That he used to work 7 days a week all through his employment with only a change of shift from night to day. That he started with a salary of kshs.3800 per month but he was not being given any payslip. That a total of Kshs.5,000 was deducted from his salary as a refundable uniform levy. He denied that his salary was a consolidated pay and contended that it was only basic salary. He further contended that he was never showed any HR Policy Manual by the respondent.

4. He further testified that he used to apply for leave in writing but the same was denied and the application letters retained by the respondent. He admitted that the Respondent paid his NSSF for him, albeit intermittently. He clarified that in the cause of employment he fell sick and asked for leave which was denied forcing him to resign.

5. The Respondent called her HR Manager, Salome Otiendo Omondi, as her witness. She testified that the Claimant was not entitled to the reliefs sought in his suit. She contended that the claimant was a registered member of NSSF to which the Respondent remitted contributions on his behalf and as he was disqualified from claiming service pay. She further denied the claim for accrued leave and contended that the Respondent's Human Resource manual provided that if an employee failed to apply for leave, he forfeited the same at the end of the financial year. She further denied the claim for accrued house allowance and relied on a letter in the bundle of Respondent's documents and the Human Resources manual as proof that the Claimant's salary was a consolidated pay and not basic salary. She however admitted that the claimant was not refunded his uniform levy or given a certificate of service because he disappeared after the resignation and never returned to collect.

Submissions

6. The Claimant submitted that he worked seven days a week without breaks contrary to the Respondent's Human Resource Manual. That it was incumbent on the Respondent to produce records to disprove this allegation which in this case they did not as was stated in the case of

Meshack Kiio Ikulume Vs Prime Fuels Kenya Limited (2013) eKLR. The Claimant urged the Court to make an appropriate order for overtime.

7. He further submitted that under section 28 of the Employment Act, every employee is entitled to 21 working days of leave with full pay. That since he never took any leave while in employment that the same be awarded. He also prays for house allowance as provided for in section 31 of the Employment Act from the date of employment in 2001 to August, 2013. Finally, he submitted that section 35(6) of the Employment Act entitles him to service pay and pointed that the Respondent started to remit NSSF contributions in the year 2010 despite deductions.

8. On the other hand, the respondent submitted that the Claimant is not entitled to leave pay for the reason that he never requested for leave at any one time

4 | JUDGMENT CAUSE NO. 891 OF 2015 and was thus deemed to have forfeited the same as provided in their Human Resource Manual. She further submitted that under section 31(2) of the Employment Act an employee is not entitled to house allowance where the pay is a consolidated one like in the instant case. Regarding Service pay, she submitted that section 35(6) disqualifies an employee who is a registered member of a provident fund under the Retirement Benefits Act or NSSF from payment service pay.

9. Finally, concerning the unpaid uniform allowance it is submitted that the Claimant was furnished with uniform which was to be returned when so required such as when exiting employment. She however contended there is no evidence adduced in Court to show that the Claimant was deducted for uniform which he is now demanding for a reimbursement. She urged the Court to dismiss the Claim with costs.

Analysis and determination

10. There is no dispute the claimant was employed by the Respondent until January 2015 when he resigned. The only issue for determination is whether he is entitled to the reliefs sought herein including service pay, accrued annual leave for 14 years, unpaid house allowance and unpaid uniform refund.

House Allowance

11. Section 31 of the Employment Act provides that:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

12. The claimant contended that he was only being paid basic salary and prayed for his house allowance in arrears. He further contended that under Sections 10 and 74 of the Employment Act the employer has a duty to prove by records that the claimant was paid house allowance. However, the Respondent contended that house allowance was included in the Claimant’s salary because he was drawing a consolidated salary and produced as an exhibit the HR Policy Manual as her evidence. Clause 3 of the said Manual deals with salaries, wages, allowances and advances. Clause 3.3 states as follows:

“... The company’s policy on payment of salaries to security guards will be as set out by the relevant Act governing payment of salaries of security guards. The company shall pay all its employees a consolidated salary which shall include house and medical allowances.”

13. The foregoing is corroborated by the payslip produced as an exhibit by the claimant which showed that the sum paid as basic pay was also described as gross pay. Consequently, and in view of the provisions of section 31 of the Act,

I find that the claimant’s salary was consolidated pay that included his house allowance and as such his claim for that allowance fails.

Service pay

14. The claimant prays for service pay for 10 years at the rate of 15 days’ pay per year of service. However, the respondent submitted that the claimant is disqualified from service pay because of his membership to NSSF. It is true that under section 35[6] of the Employment Act, service pay is not payable where an employee is a member of:-

- a) a registered pension or provident fund scheme under the Retirement Benefits Act;
- b) a gratuity or service pay scheme established under a collective agreement;
- c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- d) the National Social Security Fund.

15. In this case, the Claimant has admitted to being a member of NSSF and that the Respondent made deductions on his salary and submitted it to the Fund on his behalf. However, he contended that the respondent only remitted the same from 2010 and not regularly. The Respondent

did not deny the foregoing and by her letter dated 5.5.2015, she admitted that she had contacted NSSF officer to update claimant's NSSF remittances from 2010 because no remittances were made for 2001 to 2010. I therefore find that the respondent did not invest properly towards claimants' social security and as such, the claimant is entitled to payment of Service pay for 10 years from 2001 -2010 under section 35(5) of the Employment Act. I believe a rate of 15 days' pay per year of service is fair and reasonable.

Accrued annual leave

16. The claimant prays for leave earned and not utilised during the 14 years' service at the rate of 21 days per year. However, the respondent contended that the claimant never applied for leave during the said period and as such, he forfeited the same. The Respondent's human resource manual under section 2.3 provides that:

“Every employee will be required to take all earned leave during the leave year. An employee who willingly does not request for his/her annual leave and therefore does not proceed for annual leave shall forfeit all his leave entitlement for that particular year.”

17. The claimant stated that he applied for leave by letters but the leave was never granted and the letters were retained by the employer. He further contended that he was never shown the said HR Policy Manual. I however dismiss the said general statement as lacking merit, that he used to apply for leave and was denied. The failure to apply for the annual leave meant that the leave was forfeited except for the last year. I therefore award him cash for 21 leave days.

Unpaid uniform refund

18. According to the Respondent's Human Resource Manual, the Claimant was to be provided with uniform returnable on leaving employment. The Claimant was deducted Kshs.5,000 for the uniform and the Respondent's witness stated that the failure to refund money was because the claimant disappeared. On this admission, I grant the said claim as prayed.

Conclusion and disposition

19. I have found that the claimant is entitled to the claim for service pay for 10 years, accrued annual leave for the last year of service and unpaid uniform refund. Consequently, I enter judgment for the claimant against the respondent as follows based on the pleaded salary of Kshs.10,500 per month:

Service pay for 10 years	Kshs.52,500.00
Accrued annual leave for 1 year	Kshs. 8,480.75
Unpaid uniform refund	Kshs. 5,000.00
Total	Kshs.65,980.75

20. The award is subject to statutory deduction. The claimant is also awarded costs plus interest at court rate from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July 2019

ONESMUS N. MAKAU

JUDGE