



**Maweu v Security Seven Limited (Cause 330 of 2018)
[2023] KEELRC 2504 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2504 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 330 OF 2018
L NDOLO, J
OCTOBER 18, 2023**

BETWEEN

BENJAMIN NTHENGE MAWEU CLAIMANT

AND

SECURITY SEVEN LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Benjamin Thenge Maweu alleges that his employment was unlawfully terminated by the Respondent, Security Seven Limited.
2. The Claimant lays out his claim in a Statement of Claim dated and filed in court on March 16, 2018. The Respondent filed a Memorandum of Response and Counterclaim dated August 22, 2018, to which the Claimant responded on October 30, 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Boniface Mbuthia Irungu. Thereafter, the parties filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Night Security Guard, by oral contract from May 11, 2017 to November 25, 2017, when his employment was terminated. He pleads his monthly salary as Kshs 10,600.
5. The Claimant claims that the termination of his employment was without reason and without notice.
6. He states that on May 11, 2017, he was to be assigned at Olive Point in Riverside but there was no work as the contract between the Respondent and the client had been terminated.



7. The Claimant further states that on November 16, 2017, he was assigned at KG Patel and Sons where he worked for one day and reported back to the Respondent's office on November 17, 2017. On November 18, 2017, he was assigned at Sizzling Spices for a day and on November 20, 2017, he was assigned at Woodley for four days.
8. On November 24, 2017, the Claimant reported back to the Respondent's office. He claims that his uniform was confiscated on November 25, 2017 upon which he was notified that his services were no longer required.
9. The Claimant lays a claim of unlawful termination of employment and now seeks the following remedies:
 - a. One month's salary in lieu of notice.....Kshs 14,420.90
 - b. 12 months' salary in compensation.....173,050.80
 - c. Prorata leave.....58,885.53
 - d. Underpayment.....26,746.30
 - e. Uniform refund.....3,500.00
 - f. Salary arrears.....8,171.26
 - g. Certificate of service
 - h. Costs plus interest

The Respondent's Case

10. In its Memorandum of Response and Counterclaim dated August 22, 2018 and filed in court on August 28, 2018, the Respondent admits having engaged the Claimant as a Security Guard, at a monthly salary of Kshs 12,500.
11. The Respondent however denies terminating the Claimant's employment and states that the Claimant himself decided to abscond and eventually deserted duty on November 24, 2017.
12. The Respondent avers that on November 24, 2017, its management received a telephone call from its client, Olive Point (Equinox Developers) complaining that the Claimant, together with others, were working for less hours than required.
13. The Respondent adds that it summoned the Claimant and also proceeded to the assignment to ascertain the veracity of the allegations. The Respondent claims to have confirmed that the Claimant had indeed been absconding duty.
14. The Respondent states that the Claimant and another guard were summoned to the Respondent's office on November 25, 2017, for further investigations and possible disciplinary action. The Respondent accuses the Claimant of failing to pick his show cause notice, despite being invited to do so.
15. According to the Respondent, the Claimant did not appear at the office as directed but only appeared on December 10, 2017 to enquire about his salary and left without leaving behind his uniform and had not gone back since.



16. The Respondent states that the Claimant ignored subsequent requests and/or calls to report to the office. The Respondent's case is that termination of the Claimant's employment was at his instance because he unlawfully decided to quit his employment without giving the mandatory statutory notice.
17. By way of Counterclaim, the Respondent seeks Kshs 12,500 being one month's salary in lieu of notice, from the Claimant.

Findings and Determination

18. There are three (3) issues for determination in this case:
 - a. Whether the Claimant has proved a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought;
 - c. Whether the Respondent has made out a proper Counterclaim against the Claimant.

Unlawful Termination?

19. In his Statement of Claim dated March 16, 2018, the Claimant alleges that his employment was terminated on November 25, 2017. In his written witness statement and in cross examination, he gave the termination date as November 25, 2015.
20. Section 47(5) of the *Employment Act* sets out the sequential burden of proof, in cases of unfair termination of employment or wrongful dismissal, on the employee and the employer as follows:
 5. For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
21. In *Peter Otabong v County Government of Busia* [2017] eKLR it was held that an employee who alleges that their employment has been unlawfully or unfairly terminated bears the initial burden to establish a prima facie case and it is only after the employee has discharged their burden, that the employer is required to justify the grounds for the termination.
22. In the final submissions filed on behalf of the Respondent, reference was made to the decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the Court of Appeal held that the employee has the burden to not only prove that their employment was terminated but also that the termination was wrongful or unfair. The Appellate Court went further to hold that it is only after the employee has discharged this mandate that the employer is called upon to prove and justify the reason for the termination.
23. In its decision in *Bakari Abdalla Mwangazi v Kwale International Sugar Company Limited* [2020] eKLR, this Court held that an employee who dithers on the date of termination of employment cannot be said to have discharged their evidential burden under Section 47(5) of the *Employment Act*.
24. In this case, the Claimant gave different dates in his Statement of Claim and in his testimony before the Court. For this reason, I find and hold that he has failed to establish a case of wrongful dismissal or

unfair termination.

25. The claims for compensation and notice pay are therefore without basis and are disallowed.



Other Claims

26. In his testimony before the Court, the Respondent's Human Resource Officer, Boniface Mbutia Irungu admitted the Claimant's claims for prorata leave pay, uniform refund and salary for 24 days. These claims are therefore due and payable.
27. The claim for underpayment was not proved and is disallowed.

The Respondent's Counterclaim

28. The Respondent's Counterclaim is premised on the allegation that the Claimant deserted duty without notice. The Respondent did not however adduce any evidence to support its claim that the Claimant deserted duty.
29. In this regard, the Court did not see any efforts made by the Respondent to reach out to the Claimant to resume duty or to put him on notice that termination of employment on account of desertion was under consideration.
30. In the result, I find and hold that the Respondent's Counterclaim was not proved and therefore fails.

Final Orders

31. Finally, I enter judgment in favour of the Claimant as follows:
 - a. Prorata leave for 5 months (12,500/30*1.75*5).....Kshs 3,646
 - b. Uniform refund for 5 months.....2,500
 - c. Salary for 24 days (12,500/30*24).....10,000Total.....16,146
32. This amount will attract interest at court rates from the date of judgment until payment in full.
33. The Respondent is further directed to issue the Claimant with a Certificate of Service.
34. Each party will bear their own costs
35. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Kimani for the Claimant

Mr. Nyabena for the Respondent

