



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 365 OF 2016 CONSOLIDATED WITH CAUSE NO 363 OF 2016

JUSTUS MORARA NYASWAMBU.....1ST CLAIMANT

HEZRON LOTONYI ONDETO.....2ND CLAIMANT

VERSUS

WINDSOR FLOWERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated claim is brought by Justus Morara Nyaswambu as the 1st Claimant and Hezron Lotonyi Ondeto as the 2nd Claimant.
2. The Claimants claims are contained in amended Memoranda of Claim filed in November 2018, to which the Respondent responded by way of amended Memoranda of Reply filed on 8th January 2019 and 23rd May 2019.
3. At the trial, the 1st Claimant Justus Morara Nyaswambu testified on his own behalf and on behalf the 2nd Claimant, Hezron Lotonyi Ondeto. The Respondent called Patrick Kariuki, David Wanyonyi and Justin Momanyi. The parties also filed written submissions.

The Claimants' Case

4. The 1st Claimant, Justus Morara Nyaswambu states that he was employed by the Respondent in the year 2010 as a security guard. His entry monthly salary was Kshs. 4,032 which was progressively increased to Kshs. 6,086.
5. The 2nd Claimant, Hezron Lotonyi Ondeto states that he was employed by the Respondent also in the position of security guard effective 16th October 2007. He earned a starting monthly salary of Kshs. 4,114 which was increased over time to Kshs. 6,086.
6. The Claimants state that on 30th July 2013, they were falsely accused of theft by the Managers of the Respondent Company. They were arrested on 1st August 2013 and detained at Thika Police Station, pending investigations and were subsequently released on a cash bail of Kshs. 5,000 each with instructions to resume duty.
7. On 13th July 2013, the Claimants were issued with letters to show cause why their employment should not be terminated.
8. On 8th August 2013, the Claimants' Advocate wrote to the Respondent asking that the case against the Claimants be withdrawn in writing and that the Claimants be reinstated also in writing.
9. The Claimants aver that their attempt to resume duty was thwarted by the Respondent's Human Resource Manager, who denied them access to their work station and instead demanded a report from the Police. They add that the Police had declined to write a report stating that it was the duty of the area Labour Officer to handle such matters.
10. On 5th August 2013, the Claimants reported the matter to the Kenya Plantation and Agricultural Workers Union, who wrote a letter to the Respondent asking that the Claimants be reinstated. This letter did not yield any fruit.
11. The Claimants make a claim for unlawful and unfair termination. They further claim that during the entire period of their employment

they did not go on leave and were not paid house allowance

12. The Claimants tabulate their claims as follows:

1st Claimant: Justus Morara Nyaswambu

- a) 1 month's salary in lieu of notice.....Kshs. 6,086.00
- b) Unpaid leave from January 2010-2013.....23,352.00
- c) Severance pay @ 15 days per year of service.....13,693.50
- d) House allowance for 60 months.....54,774.00
- e) Underpayment.....175,489.60
- f) 12 months' salary in compensation.....109,176.00

2nd Claimant: Hezron Lotonyi Ondeto

- a) 1 month's salary in lieu of notice.....Kshs. 10,774.00
- b) Unpaid leave from January 2010-2013.....27,577.00
- c) Severance pay @ 15 days per year of service.....32,322.00
- d) House allowance for 60 months.....81,882.00
- e) Underpayment.....218,655.40
- f) 12 months' salary in compensation.....109,176.00

13. The Claimants also ask for Certificates of Service, costs plus interest.

The Respondent's Case

14. In its amended Memoranda of Reply to amended Claim, the Respondent admits having employed the Claimants as security guards between 1st August 2011 and 31st July 2013.

15. The Respondent avers that on the night of 30th July 2013, a theft occurred at its premises. According to the Respondent, two greenhouse curtain rollers and two handles were stolen from greenhouse 7. The Respondent adds that during the night of 30th July 2013 and morning of 31st July 2013, the Claimants were assigned to guard greenhouses 5,6 & 7 on the company premises.

16. The Respondent asserts that the Claimants' primary duties included inspection of assigned premises before taking over their night shift at 6.00 pm. The Claimants were also obligated to physically hand over their assignment to the incoming day guard, in the presence of the shift supervisor.

17. The Respondent states that on the morning of 31st July 2013, the Claimants left for home without reporting any theft incident on their assignment. They also failed to physically hand over their assignment to the incoming guard, in the presence of a supervisor.

18. The Respondent avers that the day shift guard, Virginia Wanza, who took over patrolling and securing greenhouses 5 to 7 was conducting her preliminary patrol, when she discovered that two greenhouse curtain rollers and two handles were missing from greenhouse 7. She reported the incident to her day supervisor, Ali Abkaro, who personally confirmed the incident and reported to the Human Resource Manager, Patrick Kariuki.

19. The Human Resource Manager reported the incident to the Police on 31st July 2013, for investigations. On 1st August 2013, the Police decided to arrest the Claimants, who were assigned to secure the premises on the night of the incident. The Claimants were later released on bail on 2nd August 2013.

20. The Respondent states that following the finalisation of the police investigations on 7th August 2013, the Human Resource Manager personally advised the Claimants to resume duty beginning 8th August 2013. A letter dated 7th August 2013, to this effect was also given to the Claimants. A copy of the letter was sent to the Branch Secretary, Kenya Plantation and Agricultural Workers Union, of which the Claimants were members.

21. The Respondent adds that it forwarded a copy of the above mentioned letter to the Chief Shop Steward and Deputy Shop Steward who personally advised the Claimants to return to work. However, the Claimants declined, ignored or out-rightly defied the orders to return to work.

22. The Respondent maintains that the Claimants refused to return to work continuously for several days, compelling the Respondent to send them show cause letters (erroneously dated 13th July 2013 instead of 13th August 2013). The letters invited the Claimants to show cause why disciplinary action should not be taken against them due to their continued absence from work. The Claimants were given time to respond to the show cause letters but no response was forthcoming.

23. The Respondent goes on to state that relying on Clause 12 of the Claimants' letters of employment and Section 44(1),(3),(4)(a-g) of the Employment Act, the Claimants were summarily dismissed on 20th August 2013. This was after the Claimants continued to absent themselves from their job and neglected, ignored, or otherwise defied orders to resume work. The Respondent avers that the Claimants acted negligently, and/or recklessly in the discharge of their assigned duties and with outright defiance of their employer by refusing to return to work.

Findings and Determination

24. There are two (2) issues for determination in this case:

- a) Whether the Claimants' dismissal was lawful and fair;
- b) Whether the Claimants are entitled to the remedies sought.

The Dismissal

25. On 20th August 2013, the Respondent wrote to the Claimants as follows:

“Re: Summary Dismissal

On 13/8/13 we issued you with notice to show cause why disciplinary action should not be taken against you for absenteeism without permission and failure to obey lawful instructions from your superiors since 7/8/2013.

Up to date we have not received your personal response on the issues raised. Consequently the management has decided to summarily dismiss you from the company service with effect from 20/8/2013 on the grounds of gross misconduct as spelt out in the employment act 2007.

On receipt of this letter you are advised to make arrangements to clear with the company to facilitate discharge of any final dues you may be eligible for.

Yours Faithfully

For: Windsor Flowers Limited

(signed)

Patrick Kariuki

Human Resource & Admin Manager”

26. From this letter, it is evident that the Claimants were dismissed on account of absenteeism without permission and failure to obey lawful instructions from their superiors.

27. The Respondent's three witnesses gave consistent testimony to the effect that the Claimants were instructed to resume work after being released from police custody. This is confirmed by the Claimants in their Memoranda of Claim where they state that they were arrested on 1st August 2013 and detained at Thika Police Station, pending investigations and were subsequently released on cash bail, with instructions to resume duty.

28. The Respondent states that after failing to resume duty, the Claimants were issued with show cause letters to which they did not respond. The Claimants concede that on 13th July 2013, they were issued with letters to show cause why their employment should not be terminated.

29. The Claimants not only refused to resume duty but also failed to respond to the show cause letters. In its decisions in ***Dexter Muye Mwangombe v Mombasa Go-Kart-Garimeli Limited [2019] eKLR*** and ***Randa Ali Charo v Riley Services Limited [2020] eKLR*** this Court held that an employee who, without any good cause, declines an offer to resume work cannot lay a claim for unlawful or unfair termination of employment.

30. Further still, an employee who refuses to participate in an internal disciplinary process initiated by their employer cannot turn around and

claim that they were not heard. This position was affirmed by the Court of Appeal in its decision in *Energy Regulatory Commission v John Sigura Otido [2021] eKLR*.

31. In this case, the Claimants squandered every opportunity offered by their employer to continue in employment and they cannot come to this Court and ask for relief for a termination choreographed by themselves. Their claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

32. The Claimants claim house allowance. However, from their payslips, it is evident that they were paid house allowance. The claims thereon are therefore disallowed.

33. Regarding the claims for leave pay, the Respondent availed records showing that the Claimants took their leave as it fell due. These claims thus also fail.

34. No basis was established for the claim for severance pay and the claims for underpayment were not proved.

35. In the end, the Claimants claims fail in their entirety and are dismissed.

36. Each party will bear their own costs.

37. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022

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JUDGE

Appearance:

Miss Wavinya h/b Mr. Nyabena for the Claimants

Mr. Abuya for the Respondent