



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 588 OF 2016**

**DAVID ODUOR OMONDI.....CLAIMANT**

**VERSUS**

**MARS SECURITY GUARDS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit is premised on an amended Statement of Claim filed on 9<sup>th</sup> November, 2018, though the initial suit was filed on 11<sup>th</sup> April, 2016.
2. The claimant seeks compensation for unfair termination of employment and payment of terminal benefits to wit:-

***(a) 3 months' salary in lieu of notice .....Kshs 36,000***

***(b) Service for the nine (9) years) worked***

***(A full month salary for each year***

***worked 10,000 x ½ x .....Kshs54,000***

***(c) Unpaid leave for 9 years 12,000 x 9..... Kshs.108,00***

***(d) Unpaid overtime 31,200 x 9 ..... Kshs.280,800***

***(e) Refund of N.S.S.F contribution Kshs200 x 4.....Kshs 800***

***(f) Uniform payments..... Kshs 4,000***

***(g) Salary for the month of May..... Kshs12,000***

***(h) Unfair Termination ..... Kshs 1,000,000***

***(i) Unpaid 72 Public Holidays..... Kshs 28,800***

3. The claimant (C.W.1) testified that he was employed by the respondent on or about February, 2007 as a Guard and worked continuously and diligently until 20<sup>th</sup> May, 2015 when the respondent abruptly terminated the employment of the claimant without any cause, reason and or opportunity to be heard. That the termination was in bad faith and without notice. That he had served the Respondent for a period of (9) nine years during which period he was made to work overtime on weekdays, weekends and public holidays without requisite pay. That despite deduction of National Social Security Fund dues, the respondent failed to remit the same for four (4) months.

5. That the claimant reported the matter to the union who reported the dispute to the Ministry of Labour but the same was not settled hence the suit.

6. The claimant relied on exhibits (a) to (f) attached to the statement of claim in support of the particulars of claim.
7. C.W.1 testified that he was Paid Kshs 12,00 per month.
8. C.W.1 testified that he was arrested by police following theft that took place at a client's place. That upon investigations, C.W.1 was released without any charges being preferred against him. C.W.1 stated that the robbery was by armed robbers at his station at Westlands. That he only had a club and could not counter the armed robbers.
9. C.W.1 testified that he was cleared by the police with a letter which he took to the employer. That he had a clean record at work. That he was summarily dismissed upon return to the work place.
10. That he wrote a demand letter to the respondent which was not heeded to. That the Court grant him the reliefs sought.
11. C.W.1 denied that he was on fixed term contract. He said he had not signed any contract to that effect. Under cross-examination by Mr. Muriithi advocate for the respondent, C.W.1 testified that his actual salary was Kshs 13,233. That he was to work for 26 days a month in terms of his contract of Employment. That he was entitled to (4) rest days and to 20 annual leave days with travel allowance. That he did not go on leave from 2007 to 2015. That he did not sign attendance master roll either.
12. C.W.1 insisted that he worked during public holidays without getting paid overtime. That the uniform deposit was not refunded to him upon dismissal. That the last month he worked for 15 days. That the police cleared him by a letter dated 15/8/2015. C.W.1 said he was not aware that the respondent lost the security contract due to the robbery.
13. That despite a payment agreement at the Ministry of Labour, the respondent did not pay his terminal benefits.
14. C.W.1 stated that he was released by the police on 17<sup>th</sup> August, 2015 and when he reported back to work he was unceremoniously sacked. C.W.1 clarified that he was started with a salary of Kshs. 12,000 but it was later increased to Kshs 13,233 per month.
15. R.W.1 Jackson Ochieng Olodo testified that he was the Operations Manager of the Respondent. He adopted a witness statement filed on 20<sup>th</sup> June, 2019 as his evidence in chief and produced a list of documents filed on 26<sup>th</sup> May, 2016 and another filed on 20<sup>th</sup> June, 2019 in support of the defence case.
16. R.W.1 testified that the claimant was on a two year contract from 13<sup>th</sup> January, 2015 to 12<sup>th</sup> January, 2017 earning a salary of 13,233 per month and was paid benefits of fixed overtime, leave dues off duty and public holidays.
17. That on 16<sup>th</sup> May, 2015, the claimant was arrested by the police following a robbery at his assigned station. That the claimant was negligent and careless while on duty but was cleared by the police since the claimant did not want to pursue the matter any longer.
18. That the claimant was lawfully dismissed from employment and the respondent complied with the provisions of the Employment Act, in the dismissal.
19. That the claimant was given a fair hearing. That the union reported the dispute to the Ministry of Labour and a Conciliation meeting was held but the dispute was not resolved.
20. That due to the claimant's negligence and carelessness at work, the respondent lost a lucrative client.
21. R.W.1 produced a letter dated 31<sup>st</sup> July, 2015 written by General Plastics Limited, the client, stating that though they had no direct evidence to implicate the claimant in the theft, since he was the guard on duty at the time the robbers gained entry into their premises they had their own reservations. The claimant acknowledges that they had no such incidents in the past but had no alternative but to terminate the security contract with the respondent.
22. R.W.1 produced the contract of employment between the claimant and Respondent for the period 13<sup>th</sup> January, 2015 to 12<sup>th</sup> November, 2017.
23. The respondent also produced master register indicating hours of work of its staff.
24. The respondent prays that the suit be dismissed with costs.

#### **Determination**

25. The parties filed written submissions restating their respective cases and the law applicable. The issues for determination are:-

*(a) Whether the summary dismissal of the claimant was for a valid reason and done following a fair procedure.*

*(b) Whether the claimant is entitled to the reliefs sought.*

26. It is not in dispute that the claimant was in the employment of the respondent as a Security Guard and earned Kshs 13,233 per month.

27. The Court finds that the claimant had worked for the respondent from February, 2007 but as at the time of summary dismissal, he had been placed on a two year contract from 13<sup>th</sup> January, 2015 to 12<sup>th</sup> January, 2017.

28. The claimant was summarily dismissed by the respondent after an armed robbery took place in the premises of the client of the respondent. The claimant testified that at the time of the robbery he was only armed with a club and could not resist entry of the robbers to the premises of the client since they had a gun.

29. The respondent blamed the claimant for negligence and carelessness without adducing any evidence at all, that the claimant was subjected to a disciplinary hearing and found to have been negligent on the material night. To the contrary, the police who investigated the robbery exonerated the claimant by a letter dated 17<sup>th</sup> August, 2015. The police said, that the claimant was arrested on 16<sup>th</sup> May, 2015 as a suspect of stealing whereby a vehicle was stolen from a house where he was guarding.

30. The police said:-

***“After the investigations, he was found not connected with the above offence. Kindly accord him any necessary assistance.”***

31. C.W.1 testified that he presented this letter to his employer but the respondent ignored the same and summarily dismissed the claimant from employment the same day.

32. The respondent did not adduce any documentary evidence or at all to counter this narrative.

33. The summary dismissal was without notice, notice to show cause and no disciplinary hearing actually took place. The Court finds that the summary dismissal violated Sections 36, 41, 43 and 45 of the Employment Act. It was not for a valid reason proved by the respondent and the respondent did not follow a fair procedure in dismissing the claimant summarily from employment. The Court so finds.

34. The claimant is therefore entitled to compensation in terms of Section 49(1) and 4 of the Employment Act.

35. In this regard the claimant had served the respondent diligently and without any adverse record since the year 2007 although he had in the end been placed on a two year contract which was prematurely terminated by the respondent. The claimant was not paid any terminal benefits including; in lieu of three months' notice as per the Collective Bargaining Agreement, in the sum of Kshs 36,000; Service pay for 8 years in terms of the applicable Regulations in the Security industry calculated at 18 days salary for each completed year of service. Refund of National Social Security Fund contribution of Kshs 800, Refund of uniform payment in the sum of Kshs 4,100; arrear salary for the month of May, 2015 in the sum of  $3,233 \times \frac{1}{2}$  = Kshs 6,616.

36. The claimant did not prove satisfactorily that he did not take annual leave for nine (9) years and that he worked overtime on weekdays; weekends and public holidays and was not paid for a period of nine (9) years. These particular claims are dismissed for want of prove.

37. With regard to compensation, the Court finds that the claimant was summarily dismissed on mere suspicion and therefore did not contribute to the dismissal. That he lost his job without notice, and without payment of compensation and/or any terminal benefits which is an aggravating factor. That the respondent disregarded police advice on the matter. That the claimant had carefully served the respondent for a period of 9 years despite being placed on fixed term contract from time to time.

38. The claimant lost career advancement prospects and has suffered loss and damage.

39. The Court has considered the Supreme Court decision in **Kenfreight (EA.) Limited –vs- Benson K. Nguti, (2018) eKLR and the ELRC Cause No. 438 of 2016 - Bansio Ngota –vs- Market Masters Limited**, in which the Courts awarded compensation of equivalent of 12 months and 10 months' salary respectively and awards the claimant the equivalent of 10 months' salary in compensation for the unlawful and unfair summary dismissal in the sum of **Kshs 132,330**.

40. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:-

***(a) Kshs 132,330 in compensation.***

***(b) Kshs 36,000 in lieu of 3months notice per Collective Bargaining Agreement.***

***(c) Kshs. 71,442 being gratuity for 9 years at the rate of 18 days salary for each completed year of service.***

***(d) Refund of uniform – Kshs 4,000.***

***Total award: Kshs243,772.***

***(e) Interest at Court rates from date of judgment till payment in full.***

***(f) Costs of the suit.***

**Dated and delivered at Nairobi (virtually) this 17<sup>th</sup> day of March, 2022.**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mrs Morara for claimant

Mr. Mureithi for Respondent

Ekale – Court Assistant