



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 172 OF 2018

PETER OKOTH ODHIAMBO.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LTD.....RESPONDENT

J U D G M E N T

1. The Claim herein was instituted by the Claimant vide a Statement of Claim dated 19th March 2018, whereby the Claimant pleaded as follows:-

- a) that at all time relevant to the claim, the Claimant was an employee of the Respondent, having been employed as a security guard on 8th September 2008 and earning a salary of ksh.27,615 at the time of termination.
- b) that without any justified cause, the Respondent unfairly terminated the Claimant’s employment on 2nd February 2017 after a meeting, without following due process as per the law and without payment of the Claimant’s terminal and contractual dues.
- c) that the termination was unfair and despite having a right to appeal his termination, the Claimant was not accorded a chance to do so.
- d) that the Claimant’s claim against the Respondent is for compensation for unfair termination, one month pay in lieu of notice, gratuity pay for 9 years, service pay for 9 years, salary and overtime worked in February and payment for accrued leave.

2. The Claimant set out and tabulated his claim against the Respondent as follows:-

- a) Salary in lieu of noticeksh.27,615
- b) Salary for days worked in February 2017.....ksh.1,036
- c) Overtime for days worked in February 2017.....ksh1,197
- d) Gratuity pay (18x9 yearsxksh.1,062).....ksh. 172,044
- e) Service pay for years worked (9x15 days x 1,062).....ks.143,370
- f) Payment in lieu of leave accrued (4/12x13,444).....ksh.4,481
- g) Leave travelling fund (4/12x1000).....ksh. 333
- h) Salary arrears (12,221-12003)x12.....ksh.2,616
- i) Pending days (8x13,444x12/225).....ksh.11,472
- j) Compensation for unfair termination (ksh.27,615x12 months)

Total ksh. 697,514

3. The Claimant also prayed for a declaration that termination of his employment was unfair and wrongful, costs of the suit and interest.
4. The claimant also filed the witness statement dated 19th March 2017 and a list of documents dated the same date, listing and annexing copies of seven documents, all of which accompanied the Memorandum of Claim.
5. The documents listed and filed by the Claimant included the Claimant's national and work identity cards, a bundle of three payslips, notice to show cause letter dated 23rd January 2017, a letter of suspension from duty dated 23rd January 2017, response to the Show cause letter, termination of service letter dated 2nd February 2017, a warning letter dated 16th January 2017, Claimant's letter of appeal against termination of services dated 17th February 2017, a letter of demand dated 6th October 2017, and the Respondent's response to the demand letter dated 19th October 2017, annexing a duly signed tabulation of the Claimant's dues (according to the Respondent) as at 2nd February 2017. The Claimant also listed and filed a copy of the Claimant's provisional NSSF member Statement.
6. The Respondent entered appearance on 28th April 2018 and filed a Memorandum of Response on 21st January 2019. The Respondent pleaded, *inter- alia*:-
 - a) that the Claimant was employed by the Respondent as a security guard and later confirmed as a dog handler in December 2009 for the sole purpose, among others, of providing Security to the Respondent's Clients' property.
 - b) that on 20th January 2017, while assigned night guard duties at the Respondent's client's property at Kenya Petroleum Refinery Limited, the Claimant was found to be asleep by the area manager while on spot check.
 - c) that upon receipt of the report, the Respondent issued a Show Cause letter to the Claimant, considering that he had been previously warned on a similar issue in the year 2016.
 - d) that the Claimant responded to the Show Cause letter and was invited for a disciplinary hearing on 26th January following a suspension from duty on 23rd January 2017.
 - e) That the Claimant attended the meeting advised and failed to exonerate himself from the allegations levelled against him, prompting his termination on 2nd February 2017.
7. The Respondent further pleaded that save for the claim for compensation for unfair termination to which the Claimant was not entitled as due process had been followed, the other claims set out by the Claimant had been paid by the Respondent.
8. The Respondent also filed copies of the following documents, which accompanied the Memorandum of Response: A letter of confirmation of the claimant as a dog handler dated 1st December 2009, the Show Cause letter dated 23rd January 2017, Claimant's response to the show Cause letter dated 26th January 2017, a warning letter dated 9th July 2016 addressed to the Claimant, a statement by the Claimant dated 9th July 2016, a letter of warning dated 16th January 2017 addressed to the Claimant, a statement by the Claimant dated 16th January 2017, a letter of suspension of the Claimant from duty dated 23rd January 2017, a statement by the Claimant dated 20th January 2017, hand written minutes/proceedings dated and signed (by five individuals) on 2nd February 2017, Claimant's letter (of appeal) dated 17th February 2017, Respondent's tabulation of the Claimant's dues as on 2nd February 2017, Respondent's document on calculation of the Claimant's salary arrears for May 2014 to April 2015 (ksh.11,622) signed by the Respondent on 27th March 2018, Respondent's cheque No. 012830 (dated 11th April 2018) drawn in favour of the Claimant (for Ksh.11,622.40) and an acknowledgement of payment (ksh.11,622.40) being terminal dues dated 18th April 2018.
9. The Respondent also filed a witness statements by David Wafula (dated 25th July 2019 and Jacinta Kimathi (dated 12th November 2021).
10. When trial opened on 17th November 2021, the Claimant adopted his witness statement referred to in paragraph 4 of this judgment as his testimony in chief and further produced the documents referred to in paragraphs 4 and 5 of this Judgment as exhibit 5. The Claimant further testified, both in Chief and under cross examination:-
 - a) that he was employed by the Respondent in September 2008 as a security guard, and was earning ksh.13,444 at the time of termination.
 - b) that on 20th January 2017, he reported on duty at Kenya Petroleum Refinery Limited and at 4.00am, he was ambushed by a person beaming a torch on his face, whom he first thought was an attacker but later realized was his supervisor.
 - c) that it was not until the Claimant threatened to hit the person with a stone that he realized it was his supervisor, but did not hit him or fight with him.
 - d) that he (the Claimant) was not sleeping, but did not hear the supervisor's approaching motorbike as he was working in a place where there was a lot of noise due to roaring heavy machinery.

- e) that he had not tethered the security dog a distance from where he was as alleged.
- f) that ordinarily they got radio calls first, but he had not received any radio call.
- g) that he was not charged with assault.
- h) that he was given a Show Cause letter and called for a meeting where he was given an opportunity to defend himself and the Supervisor also spoke; upon which the claimant was told that he was wrong and was terminated, and told that he could appeal.
- i) that he wrote a letter of appeal but his appeal was never heard.
- j) that during his nine(9) years of service, the Claimant did mistakes twice and admitted, but the incident with his supervisor was not one of them, and he never admitted it.
- k) that upon termination, the Claimant was told that his dues would be paid, but only ksh.11,622.40 was paid through a cheque delivered to the Respondent's Kisumu office, and for which the Claimant signed in acknowledgment (of terminal dues) on 8th April 2018, on being told that the remaining amount would be deposited into his bank account.
- l) that the Respondent had tabulated the Claimant's dues at ksh.47,584.14, and the balance was never paid.
- m) that the Claimant returned the (his) uniforms to the Respondent's Mombasa office when he was terminated.

11. The Respondent called one witness, Jacinta Kimathi, who adopted her recorded and filed witness statement dated 12th November 2021 as her testimony in chief and further testified, both in chief and under cross-examination:-

- a) that the incident occurred before she joined the Respondent company as she joined the company in September 2019.
- b) that the Claimant had been paid all his dues though she (the witness) did not have the pay advice.
- c) that the Claimant's termination was fair because due process was followed.
- d) that during the Claimant's nine years of service, the Claimant was warned twice and he admitted wrong doing, but he denied the third one which gave rise to his termination.
- e) that the Claimant was sleeping while on duty, thus endangering himself and others, including the security dog.
- f) that the ksh.11,622.38 paid to the Claimant was a refund for deduction earlier made regarding uniforms.
- g) that the Claimant had appealed (against his termination), but the witness did not know whether the appeal had been heard.
- h) that the witness was not aware of any case where the Claimant had been charged with assault.

12. Having considered the pleadings filed herein and the evidence presented by both parties, the issues for determination, in my view, are as follows:-

- a) whether the reason on the basis of which the Claimant's employment was terminated was valid.
- b) whether termination of the Claimant's employment was fair.
- c) whether the Claimant is entitled to the reliefs sought.

13. On the first and the second issues, reference must be made to the Claimant's letter of termination of services dated 2nd February 2017. The letter states in part:-

"Reference is made to the above subject and further to today's disciplinary hearing regarding your duty performance on 20th January 2016 which and while at KPRL PIT as a night dog handler.

It is in record (sic) that on the referred date while assigned duties as a night dog handler, you were found asleep by your Area Supervisor after hooting twice with no response from your end, he parked his motor bike to try and get your image by taking your photo only after the flash light, the dog barked twice and you stood from where you were seated and started fighting and throwing stones at him.

...you were not to use abusive language. This is a serious contravention of your work standing orders which cannot be taken

lightly. It is now clear that your duty performance is below company expectation.

Accordingly, and in accordance with the Employment Act, 2007 Section 44(4) (d&e) the management thus hereby terminate (sic) your services with immediate effect.

You will be paid all your dues, (if any), which are subject to deduction on any outstanding bills...

14. On the same date (2nd February 2017), the Respondent issued a signed tabulation of the Claimant's terminal dues, tabulating the same at a total sum of ksh.47,584.14 (Claimant's exhibit no. 4).

15. It is to be noted that although the Respondent alleged in the termination letter that the Claimant was on 20th January 2017 found sleeping while on duty by his supervisor who took a photo of the Claimant, leading to a fight between the Claimant and his supervisor on the said date, and to have used abusive language, these allegations were never proved by the Respondent.

16. The Claimant's said supervisor was not called to testify and the photo of the Claimant allegedly taken by his supervisor while sleeping on duty was not produced in evidence. No evidence on the alleged fight between the Claimant and his supervisor was adduced or produced in Court. The Claimant was never charged with assault and no report was shown to have been made to the police on the alleged fight. Further, the alleged use of abusive language by the Claimant on his supervisor was never proved as the Supervisor never testified in Court.

17. Further, whereas correspondence and proceedings leading to the Claimant's termination on 2nd February 2017 referred to an incident that occurred on 20th January 2017, the termination letter dated 2nd February 2017 referred to an incident which occurred on 20th January 2016. The Respondent never addressed this issue in evidence in Court. The Respondent did not even include the said termination letter among the documents filed in Court and produced in evidence by the Respondent.

18. Section 43 of the Employment Act 2007 provides as follows:-

“ (a) in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(b) the reason or reasons for termination of a contract are the matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

19. As already stated in paragraph 16 of this Judgment, the respondent did not prove the reason for the Claimant's termination. The termination was, therefore unfair, and I so hold and declare.

20. On the third issue, and as stated in paragraph 8 of this Judgment, the Respondent issued the Claimant with a tabulation of his terminal dues on 2nd February 2017; amounting to ksh.47,584.14. These dues included payment for:-

a) days worked in February 2017.....	ksh.1,036
b) overtime pay for days worked in February 2017.....	ksh.1,197
c) pay in lieu of leave accrued	ksh.4,481
d) leave travelling fund.....	ksh.333
e) service (8) complete years of service.....	ksh.44,492.
f) payment in lieu of notice.....	ksh.13,414
g) pending days	ksh.11,472.
h) salary arrears	<u>ksh.2,616</u>
Total	ksh.79,072.00
Less final dues bills	<u>ksh.31,488.00</u>
Total amount due	<u>ksh.47, 584.14</u>

21. Out of the Ksh.47,584.14 tabulated by the Respondent as being due and payable to the Claimant, only ksh.11,622.40 is shown to have been paid to the Claimant, and the Claimant admitted receiving a cheque for the said sum (ksh.11,622.40) through the Respondent's Kisumu office on 18th April 2018. The Respondent did not produce any evidence on payment of balance of the aforesaid tabulated sum of ksh.47,584.14, and the Claimant did not dispute the tabulation. The balance, amounting to ksh.35,961.74, remains due and payable to the Claimant. I so find and hold.

22. The only item in the Claimant's claim that is not covered in the Respondent's said tabulation of the Claimant's terminal dues is the claim for compensation for unfair termination, on which I award the Claimant eight months' salary being compensation for unfair termination. I have taken into account the manner in which the Claimant's employment was terminated.

23. According to the payslips produced in evidence by the Claimant (exhibit no.3), and which the Respondent did not dispute, the Claimant's monthly salary at the time of termination was ksh.15, 461(basic salary plus house allowance). Eight months' salary is therefore ksh.123,688.

24. Judgment is, therefore, entered in favour of the Claimant against the Respondent for a total sum of ksh.159,649.74.

25. The Claimant is also awarded costs of the suit and interest at Court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Munene for Claimant

Mr. Salim for Respondent