REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.972 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ROBERT MURURO MUNGAI.....CLAIMANT

VERSUS

AVION LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant has brought a claim under a memorandum of claim dated 25th May, 2016. He states he was employed by the Respondent as a security guard from 8th April, 2015 and salary was kshs.10,000/=.

2. He says that on 13th January, 2016 his employment was terminated without any notice or payment in lieu of notice.

3. He claims for payment of terminal dues as follows:-

(1) One month salary in lieu of notice Kshs.11,500/=

(2) Overtime: 4 hours x 6 days X 4 weeks x 9 months Kshs.53,138/=

(3) Public holidays Kshs.4,666.60

(4) House allowance 15 % of basic salary Kshs.1500 x 9 Kshs.13,500/=

(5) 12 months compensation Kshs.138,000/=

(6) Service pay Kshs.10,000/=

(7) Certificate of service

TOTAL AMOUNT Kshs.230,000/=

4. The case proceeded as an undefended cause since the Respondent did not file a response and did not participate in the proceedings despite being notified of the same by the Claimant on diverse dates.

The suit being undefended suit the Claimant filed an affidavit dated 27th October, 2021 in support of his claim. He also filed his written submissions dated 27th October, 2021.

DETERMINATION

5. The court considered the evidence and the facts and also the Claimant's submissions in making its determination.

The Claimant alleged he was unlawfully terminated from the Respondent's employment without any reason.

The Employment Act 2007 provide in Section 45 (1) that no employer will terminate the employment of an employee unlawfully. Section 45 (2) of the said Employment Act further provide that a termination of employment by an employer is unfair if the employee fails to prove that the reason for termination is valid.

6. In the current case the Respondent did not defend the case and therefore did not controvert or dispute the evidence given by the Claimant.

Section 43 of the Employment Act 2007 also provide that 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 of the Employment Act.

7. In the instant case the Respondent failed to prove the reason for termination of the Claimant's employment and so the court is bound to declare the termination of his employment unlawful.

8. In the Case of **WALTER OGAL ANURO VS TEACHERS SERVICE COMMISSION CASE NO.955 OF 2011** the court noted that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness. Further Section 43 of the Employment Act obligated an employer to prove the reason for termination of employment and where the employer failed to do so the termination is deemed to have been unfair.

9. The Respondent having failed to defend his case in essence he did not dispute the Claimant's claims. The court has no choice but to declare the termination of the Claimant from employment both unlawful and procedurally flawed as per the evidence adduced by the Claimant as well as his submissions.

Judgment is subsequently entered on behalf of the Claimant.

RELIEFS AWARDED

10. The court finds the Claimant is entitled to some of the reliefs claimed as follows:-

(1) one month salary in lieu of notice as per the claim Kshs.10,000/=

(2) Overtime Kshs.53,138.00/=

(3) Public holidays Kshs. 4,666.60/=

(4) House allowance Kshs.13,500/=

(5) Compensation for wrongful dismissal for 2 months Kshs.20,000/=

(6) Service pay Kshs.10,000/=

Claimant is awarded a total of Kshs.111,304.60/=

11. Costs follow the event and the Claimant having succeeded in his claim is awarded costs.

The Respondent will also pay interest at court rates till full payment from the date of this judgement.

Finally Claimant to be given a certificate of service.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 15TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules,** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE