



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 445 OF 2018

JOB MUSITA OMUKUYIA.....CLAIMANT

VERSUS

RADAR SECURITY LIMITEDRESPONDENT

J U D G M E N T

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 26th June 2018 and pleaded, *inter alia*, as follows:-

- a. that the Claimant was employed by the Respondent as a security guard in February 2015, earning a monthly salary of ksh.13,595 and was assigned duties and deployed to different areas at the discretion of the (Respondent's) management.
- b. that on 31st March 2017, the Respondent was given a letter terminating his employment with effect from the same date.
- c. that the instant termination was harsh and drastic, the Claimant having worked for the Respondent for over two years.
- d. that failure by the Respondent to issue the Claimant and/or his union with notice of the intended termination was unfair, improper and unlawful and grossly violated the principles of natural justice as well as the provisions of Section 35,41,43,45 and 49 of the Employment Act 2007.
- e. that despite the Respondent promising to pay the Claimant's terminal dues in full, no such payment had been made.

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

- a. Compensation for wrongful termination (12x13,595).....Ksh.163,140
- b. Salary for one month worked without pay.....ksh.13,595
- c. Payment in lieu of noticeksh.13,595
- d. Severance pay.....ksh.13,595
- e. Leave pay for the two years worked.....ksh.27,190

Total ksh 231,115

3. The Claimant also sought a declaration that termination of his employment was unfair, unjust and unlawful.

4. The Claimant filed his witness statement and a list of documents dated 26th June 2018, both of which accompanied the Memorandum of Claim. Documents listed on the Claimant's list of documents included the Claimant's payslip for February 2015, KRA Tax Deduction Card for the year 2016, the termination letter dated 31st March 2017, a copy of reference letter dated 8th April 2017 and a demand letter dated 8th May 2018. Copies of these documents were attached to the said list of documents that accompanied the Memorandum of Claim.

5. Although Summons and suit documents are shown to have been served on the Respondent on 11th July 2018 and an Affidavit of Service duly filed in Court on 27th September 2018, the Respondent did not enter appearance, and did not file any response to the Claimant's claim.

Further, the Respondent is shown to have been served with Mention Notices on 4th June 2019 and 18th January 2021 and Affidavits of Service duly filed in Court. This subsequent service does not seem to have elicited any response from the Respondent either, as no pleadings are shown to have been filed by the Respondent. Hearing, therefore, proceeded ex-parte on 15th February 2022 by way of formal proof.

6. The Claimant adopted his filed witness statement as his testimony and produced as exhibits the documents referred to in paragraph 4 of this Judgment. The Claimant further testified that he was not allowed to take leave or off days during the period of his employment, and that he was told by his supervisor on 31st March 2017 that his employment had been terminated; and prayed that judgment be entered in his favour as prayed in the Memorandum of Claim.

7. It is stated at paragraphs 5,6,7,8 and 9 of the Claimant's filed witness statement, which the Claimant adopted on oath as his testimony:

a. that in the month of January 2017, the Claimant was assigned at some station in Utange for a period of approximately thirty four (34) days, but was never paid for that assignment despite making numerous requests to be paid.

b. that the letter of termination was given to the Claimant on 31st March 2017, while at work, and that the letter stated that the Company no longer required the Claimant's services as there was no pending vacancy or opportunity to be deployed elsewhere.

c. that the Claimant was not notified of any impending termination of employment on any grounds.

d. that although the letter (of termination) stated that the Respondent would pay the Claimant's final dues in full, payment was never made.

e. that the Claimant complied with the directions contained in the termination letter to return all company property and equipment in his possession.

f. that the Claimant did not understand why the company (Respondent) treated him so harshly despite his years of good service.

8. Upon considering the Claimant's pleadings and evidence presented in Court, issues that emerge for determination are as follows:-

a. whether termination of the Claimant's employment was unfair.

b. whether the Claimant is entitled to the reliefs sought.

9. In determining whether or not termination of an employee's employment is unfair, the provisions of Section 41 of the Employment Act, 2007 must be invoked and looked at against the termination of employment in issue to see if the employer complied with the mandatory provisions of the said section. Failure by an employer to comply with the said section renders termination of employment unfair. Section 41 of the Employment Act, 2007 provides as follows:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

10. In the present case, the Claimant was handed a termination letter on 31st March 2017, dated the same date, and terminating his employment effective the same date. The said letter of termination of employment states, in part:-

“...we regret to inform you that your employment with the company has been terminated with effect from 31ST MARCH 2017 this is due to the fact that our client SAFARICOM/CONTRACTED GUARDS) no longer requires our services and as such we have no current vacancies or places to redeploy you.

We value the services you rendered during the course of your employment and we will consider you in the future where need arises.

The company shall undertake to pay your final dues in full and in the meantime kindly arrange to return all company properties and equipment in your possession.

We wish you well in your future endeavors.”

11. The letter of termination of employment is dated 31st March 2017, the effective date of termination of the Claimant's employment. The Claimant testified that he had no prior notice of impending termination on any grounds. The letter of termination of employment did not refer to any notice, and does not refer to any compliance by the Respondent with Section 41 of the Employment Act, 2007. I find, hold and declare that termination of the Claimant's employment by the Respondent was unfair.

12. On the second issue, it is my finding that the Claimant is entitled to compensation for unfair termination of employment. Taking into account the circumstances of termination of the Claimant's employment, and the abrupt manner in which it was done, I award the Claimant ten months salary as compensation for unfair termination of employment. The claim for one month salary in lieu of notice is also allowed.

13. As already stated in this judgment, the Respondent never entered appearance and never filed any response to the Claimant's claim. The Claimant's evidence on his entire claim was neither rebutted nor controverted. The claim for one month unpaid salary (being January 2017) was not opposed and evidence thereon was not controverted. The same is allowed.

14. The claim for severance pay is declined. Termination of the Claimant's employment did not result from redundancy.

15. On the claim for leave pay for two years worked by the Claimant, it is my finding that the Claimant proved and established that he worked for the Respondent from February 2015 to 31st March 2017. This he did by exhibiting his payslip for February 2015, KRA Tax Deduction Card for the year 2016 and his termination letter dated 31st March 2017. The Claimant's evidence that he was not allowed to take leave during those two years not having been controverted, I allow the claim for two years leave pay.

16. The Claimant's KRA Tax Deduction Card (Exhibit no. 2) shows that the Claimant's monthly earnings during the year 2016 were ksh.13,595. The Claimant pleaded that his monthly salary was ksh.13,595, and based his claim and calculation thereof on the said sum. On a balance of probability, the Claimant established that his gross monthly salary as at the time of termination of his employment was ksh. 13,595.

17. Judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a. Ten months salary being compensation for unfair termination of employment (ksh.13,595x10).....
.....135,950
- b. One month salary in lieu of noticeksh. 13,595
- c. One month unpaid salary.....ksh.13,595
- d. Leave pay for two years workedksh.27,190

Total ksh.190,330

18. The Claimant is also awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF APRIL 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment 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:

Mr. Bett for Claimant

No appearance for Respondent