



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1555 OF 2015

CELESTINE WANJALA SAKWACLAIMANT

VERSUS

HOTBIRD SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 3.9.2015 alleging that he worked continuously for the Respondent as a Security Guard from 2009 to 28.11.2014 when he was unfairly and unlawfully dismissed by the Respondent. The suit therefore, prayed for the following reliefs:

- (a) A declaration that the Respondent's dismissal of the Claimant's employment was illegal, unlawful, unfair and harsh and that the Claimant is entitled to payment of his due terminal benefits and damages.
- (b) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (c) An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totalling to Kshs. 948,788.80/--
- (d) Interest on the award from the date of filing suit till payment in full
- (e) An order for the Respondent to pay the Claimant's costs of this claim plus interest thereon.

2. The Respondent filed defence on 24.5.2016 admitting that it employed the Claimant from 30.10.2009 to 31.8.2011, and again from 1.10.2012 to 27.12.2014 when he absconded work without any prior notice after assaulting and injuring a congregant at Tassia Catholic Church, Embakasi, Nairobi where he was guarding on the night of 27.12.2014. It further averred that efforts to reach the Claimant on his mobile phone was in vain until 7.1.2015 when he appeared in its office to return company property and demand his wages. It further averred that the Claimant was paid his wages for 27 days worked but he refused to record statement about the incidence of 28.12.2014 and disappeared completely. The Respondent denied that it dismissed the Claimant unfairly or at all and maintained that the Claimant left employment voluntarily. It further denied the Claimant's entitlement to the reliefs sought and also averred that it remitted NSSF for Claimant during his employment. It therefore prayed for the suit to be dismissed with costs.

SUMMARY OF EVIDENCE

3. The Claimant testified as CW1. He stated that he was employed by the Respondent as a security Guard in 2009 and worked continuously until 28.12.2014 when he was dismissed by the Respondent's Director Mr. Samuel Ndegwa. His salary was Kshs. 8000/- per month less NSSF deductions which were never remitted to the fund.

4. He further testified that in November 2014 he was stationed at Tassia Catholic Church and the Father in-charge had instructed him not to allow people to go through a construction site at the church compound. He contended that in the same month he stopped a congregant from going through the construction site and on 28.11.2014 Mr. Samuel Ndegwa visited the site in the company of the person he had barred from going through the construction site. The reason for the visit was that the man had falsely accused him of being abusive and violent towards him.

5. The Claimant contended that his attempts to defend himself was met with an order from the Director to surrender his uniform and go home since his services were no longer required. He contended that the dismissal was unlawful and unfair because the reason for the same was not valid and also because he was not accorded a fair hearing. He denied ever absconding duty as alleged by the Respondent.

6. As a consequence of the foregoing matters, he prayed for the reliefs sought by his claim plus costs and interest. He contended that he

never received any warning letter during his service to the Respondent.

7. On cross-examination, he admitted that no written contract was given to him. He reiterated he was dismissed for barring a church member from passing through a construction site where there was a rope barrier. He maintained that the rope was put to restrict access after a sister fell into a pit at the site.

8. The Claimant admitted that he exchanged words with the congregant and a church assistant came but no one was beaten. He contended that the father spoke to the congregant and the matter ended. However, after three (3) weeks the Director came to the site bringing other guards and that is when the said church member raised the issue that he was barred entry and the Director responded by dismissing him on the spot. He later gave his uniform to the Director in the office after 7 days when he went for his salary.

9. Mr. Virginia Wanjiru Kimani is a clerk for the Respondent and she testified as RW1. She stated that her duties include keeping records of salary, leave and shifts. She found the Claimant at the Respondent and he was dismissed while she was on leave.

10. She testified that she reported back to work on 7.1.2015 and on the same day the Claimant came to the office where she was sharing with the Director Mr. Ndegwa. She then heard the Director tell the Claimant that since he had ruined his Tassia Assignment he would be deployed to another station but the Claimant declined. Thereafter the Claimant surrendered his uniform and she paid him Kshs 7209 being salary for 27 days worked in December 2014.

11. On cross-examination, she admitted that the Claimant did not sign his leave forms in page 53 and 56 of the defence documents. She further admitted that the employees signature in leave form in page 54,55 and 57 are not looking the same. However, she contended that she paid the Claimant by Mpesa for the leave days. She contended that the Claimant used to sell his leave days.

12. She admitted that the Claimant cleared with the Respondent and he was paid his salary after he said he did not wish to continue working. She further admitted that she had no written evidence to prove that the Claimant was deployed to a new station but declined.

13. Mr. George Kimani Gichani is an Accountant for the Respondent and he testified as RW2. He stated that the Respondent paid NSSF and NHIF for the Claimant regularly as required by the law.

14. On cross-examination he contended that the Claimant was paid for all his leave days not taken. He further contended that he used to pay the Claimant the salary he had agreed with the Respondent.

SUBMISSIONS

15. The Claimant submitted that it is a fact that he never absconded duty but he was ordered by the Respondent's Director to surrender his uniform as his services were no longer required. He submitted further that RW1 confirmed that he was dismissed while she was on leave. He contended that he was dismissed for no valid reason.

16. He further submitted that he was dismissed without being accorded fair hearing as required under Section 41 of the Employment Act. He relied on **Kenya Union of Domestic, Hotels, Educational Institution and Hospital Workers v Mombasa Sports Club [2014]eKLR and Ken freight (EA) Limited V. Benson K. Ngui[20156]eKLR** where the court held that termination and employment is unfair if it is not grounded on valid reason and the procedure followed is not fair. He further submitted that he is entitled to the reliefs sought in the suit and prayed for judgment accordingly.

17. The Respondent reiterated that she did not dismiss the Claimant and maintained that it is the claimant who absconded duty. On without prejudice, the Respondent submitted that it was entitled to dismiss the Claimant summarily for absenting himself from work without leave for 10 days from 28.12.2014 to 7.1.2015 and for rudely refusing to record statement on an incidence that occurred while on duty on 28.12.2014.

18. As regards the procedure followed, the Respondent submitted that it invited the Claimant to the office to explain the events, of the morning of 28.12.2014, but he declined and went away until 7.1.2015 when he went to the office to demand for his pay and his documents. The Respondent further submitted that it had no power to retain the Claimant after deciding to quit his employment.

19. As regards, the reliefs sought, the Respondent submitted that the claimant is not entitled to any because he voluntarily quit his employment. It further contended that the Claimant did not work extra hours because he was employed to work from 6 p.m to 6 a.m. It denied the alleged salary underpayment and averred that it paid the Claimant the lawful salary of Kshs. 8000 per month. In its view, the Claimant has exaggerated the claim for underpayment.

ISSUES FOR DETERMINATION

20. There is no dispute that the Claimant was employed by the Respondent and he was stationed at Tassia Catholic Church. It is also common ground that the Claimant never reported back to work after 28.12.2014. The issues for determination are:

(a) Whether the Claimant voluntarily resigned or he was summarily dismissed by the Respondent's Director.

(b) If the answer to (a) is dismissal, whether the same was unfair and unlawful.

(c) Whether the Claimant is entitled to the reliefs sought.

Resignation or dismissal

21. RW1 told the court that she was on leave when the Claimant was dismissed but she saw him on 7.1.2015 when he returned his uniform and received his salary for December 2014. RW2 did not say anything on the termination of the Claimant's employment. It follows that the defence witnesses did not rebut the Claimant's evidence that he was dismissed by the Respondent's Director Mr. Samuel Ndegwa when he visited Tassia Catholic Church following false report that he had assaulted a church member. In fact RW1 acknowledged that the claimant was dismissed. Consequently the answer to the first issue for determination is that the Claimant was dismissed by the Respondent.

22. As required the alleged desertion although RW1 alleged that the Claimant was offered deployment to another station but declined, she did not produce any written evidence of the alleged redeployment. She also did not state which new station the Claimant was being deployed to.

UNFAIR TERMINATION

23. Under section 45 of the Employment Act, termination of employees contract of employment is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done in accordance with a fair procedure. As observed above, none of the two defence witnesses was present when the Claimant was dismissed by the Director on 28.12.2014. They also did not say anything about the reason for the dismissal of the Claimant or the procedure followed before the dismissal.

24. It follows that the evidence by the Claimant that he was dismissed following false allegations that he assaulted a church member without any hearing has not been rebutted. Under section 43 and 45 of the Employment Act, the burden of proving the reason for the dismissal rests with the employer. In this case the Director did not give evidence herein nor did the assaulted church member do so.

25. In **Kenfreight E.A` Lintied v. Benson K. Nguti[2016] eKLR** the Court of Appeal held that:

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to an employee on a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any considered by an employer before the decision to terminate his contract of service is taken.”

26. Again in **Walter Ogal Amuro v Teachers Service Commission[2013]eKLR**, the court held that:

“For termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

27. Having found that the Respondent did not adduce any evidence towards proving the validity of the reason for the dismissal and the fairness of the procedure followed before the dismissal, I must hold as I do, that the Claimant has proved that his dismissal by Mr. Samuel Ndegwa was unfair and unlawful within the meaning of section 45 of the Employment Act.

RELIEFS

28. In view of the foregoing, I make declaration that the dismissal of the Claimants was unfair and unlawful and he is entitled to compensatory damages. I therefore award him one month salary in lieu of notice plus 3 months salary as compensation for unfair dismissal. In making the said award I have considered the fact that the Claimant served the Respondent continuously only for about 2 years and that he did not contribute to the dismissal through misconduct. The award is based on the minimum wage under the Gazetted Wage Order in place in May 2013 as pleaded by the Claimant being Kshs. 10911.70.

29. The claim for underpayment is only granted for 2013 and 2014 because that is the only period he worked continuously for the Respondent according to the schedule of payment filed by the Respondent (page 1 of Respondent's bundle of documents).

30. From January to May 2013, the Claimant was receiving Kshs. 6000, from June to July 2013 he was paid Kshs. 6500, from August 2013 to January 2014 he was paid Kshs. 7000, from February to September 2014 he was paid Kshs. 7500 and thereafter he was paid Kshs. 8000 per month. The applicable minimum wage for January to April 2013 was the 2012 Wage Order being Kshs. 9,571.65 for the rest of the period the minimum salary is the one prescribed for the night watchman by the 2013 Wage Order being Kshs. 10,911.70.

31. Using the minimum wage of Kshs. 9571.65 the underpayment for January to April 2013 was Kshs. 9571.65 – Kshs. 6000 + 3571.65 equalling Kshs. 14286.60. In May 2013 the underpayment was Kshs. 10911.70 – 6000 equalling Kshs. 4911.70. In June and July 2013, the under payment was Kshs. 10911.70 – 6500 + Kshs. 4411.70 x 2 equalling to Kshs. 8823.40. From August 2013 to January 2014 the underpayment was Kshs. 10911.70 7000 = Kshs. 3911.70 x 6 equalling Kshs. 23470.20. In February to September 2014, the under payment was Ksh. 10911.70 – 7500 = Kshs. 3411.70 x 8 equalling to Kshs. 27,293.60. Finally in October to December 2014, the underpayment was Kshs. 10911.70 – 8000 = 2911.70 x 3 equalling Kshs. 8735.10. Consequently, the total underpayment was Kshs. 87,520.60.

32. The claim for leave is dismissed because the Respondent evidence that he encashed his leave has not been rebutted. Likewise the claim for public holidays worked is dismissed for lack of particulars and evidence.

33. The Claimant worked from 6 p.m to 6 a.m. daily for 2 years. Under the Wage Order normal working hours for a night watchman is 60 hours per week. In this case, the Claimant was working 84 hours per week representing overtime of 24 hours. It follows that the Claimant

worked 96 extra hours per month and 1152 hours per year equalling to 2,304 hours for 2 years. Consequently, I award him overtime of Kshs, $10911 \div 30 \times 1/10 = \text{Kshs. } 45.46 \text{ per hour} \times 2304 \text{ hours equalling Kshs. } 104,752.30$.

CONCLUSION

34. I have found that the Claimant was unfairly dismissed by the Respondent from employment. I have further found also that he is entitled to some of the reliefs sought. Therefore, I enter judgment for him as follows:

Notice	Kshs. 10911.2
Compensation	Kshs. 32735.10
Underpayment	Kshs. 87520.60
Overtime	<u>Kshs. 104,752.30</u>
Total	<u>Kshs. 235,919.20</u>

The award is subject to statutory deductions. The Claimant will have costs plus interest at court rates from the date hereon.

Dated, signed and delivered in Nairobi this 5th day of February, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE