



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 265 OF 2018

NYUNDO KANGA DZOMBO.....CLAIMANT

VS

GUARD FORCE GROUP LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 25th April 2018, the Claimant filed a Memorandum of Claim, seeking compensation for unfair termination of employment, plus terminal dues from the Respondent. The Respondent filed a Response on 14th June 2018.
2. The matter came up for hearing on 25th September 2019, but did not proceed because the Respondent’s Counsel was held up in the Court of Appeal. I therefore granted an adjournment but because the Respondent’s Counsel had not given prior notice to the Claimant’s Counsel, that he would not be proceeding, I ordered costs of Kshs. 5,000 in favour of the Claimant to be paid by the Respondent before the next hearing date.
3. By 16th December 2020, when the matter came up again for hearing the Respondent had not paid the costs ordered more than a year earlier. I therefore directed the Respondent to pay the costs within seven (7) days, failing which the Respondent would lose its right of audience before the Court. I then proceeded to take the testimony of the Claimant and that of the Respondent’s witness, Kenneth Douglass Otieno.
4. On 1st February 2021, the matter came up for mention to confirm filing of final submissions. By this date, the Respondent had not filed submissions and had not paid the costs as directed by the Court. Miss Sidinyu holding brief for Mr. Gakuo confirmed that the costs had not been paid and further informed the Court that Mr. Gakuo wished to file an application to cease acting for the Respondent.
5. Owing to the Respondent’s persistent defiance of the order of the Court directing it to pay pending the Claimant’s costs, the Court ruled that the Respondent had no further right of audience and therefore set the date for judgment. This judgment is based on the parties’ pleadings and testimony as well as the final submissions filed by the Claimant.

The Claimant’s Case

6. The Claimant states that he was employed by the Respondent as a Guard in 2016. He worked as such until his employment was terminated in February 2018.
7. The Claimant’s case is that the termination of his employment was unlawful and unfair, in that there was no justifiable reason for the termination and the Claimant was not allowed an opportunity to be heard.

8. The Claimant now claims the following:

- a) 12 months’ salary in compensation.....Kshs. 72,000
- b) 1 month’s salary in lieu of notice.....6,000
- c) Compensation for unutilised leave
- d) Service pay for 2 years

e) Certificate of service

f) Costs plus interest

The Respondent's Case

9. In its Response dated and filed in court on 14th June 2018, the Respondent states that the Claimant was not a permanent employee but was engaged to provide security on contractual basis.

10. The Respondent denies terminating the Claimant's employment without justifiable cause and in violation of due procedure.

11. The Respondent states that the Claimant's contract of employment terminated after the agreed contractual term came to an end.

12. The Respondent contends that it was under no obligation to issue a certificate of service to the Claimant because he was not a permanent employee.

Findings and Determination

13. There are two (2) issues for determination in this case:

a) Whether the Claimant has made out a case unfair termination of employment;

b) Whether the Claimant is entitled to the remedies sought.

Unfair Termination?

14. The Claimant testified that he worked for the Respondent for a period of 2 years, running from 2016 to February 2018.

15. In denying the Claimant's claim of unfair termination of employment, the Respondent states that the Claimant was employed on a fixed term contract, to provide security services at the Kenya Railways Corporation.

16. The Respondent's Senior Supervisor, Kenneth Douglass Otieno referred the Court to an employment contract dated 29th January 2016, which the Claimant admitted having signed. Otieno also made reference to a contract for provision of security guarding services between Kenya Railways and the Respondent.

17. Clause 7 of the employment contract provides that the Claimant's employment was dependent on the subsistence of the contract between the Respondent and the assignment client. The Claimant told the Court that he was assigned to guard Kenya Railways premises. It is therefore logical to conclude that the client referred to in Clause 7 of the Claimant's employment contract is Kenya Railways.

18. The contract with Kenya Railways was to run for two years from 1st February 2016. This period coincides with the Claimant's employment period. It seems to me therefore that the Claimant was employed on a fixed term contract for two years, which he fully served. As held by **Rika J in *Margaret A. Ochieng v National Water and Pipeline Corporation [2014] eKLR*** an employee serving on a fixed term contract should not expect automatic continuation of employment after the contract term.

19. Having served his full term, the Claimant cannot complain about unfair termination of employment. The claims for compensation and notice pay are therefore without basis and are disallowed.

Other Claims

20. The Claimant also claims leave pay. On its part, the Respondent admits that the Claimant was not granted annual leave because he was a contractual employee. The Court found no justification in law to support this proposition.

21. It follows therefore that the Claimant was entitled to 21 days' leave per year and because he did not go on leave, I award him leave pay for 2 years.

22. In similar fashion, because the Claimant was not a contributing member of the National Social Security Fund (NSSF) he is entitled to service pay.

23. In the end, I enter judgment in favour of the Claimant as follows:

a) Leave pay for 2 years (6,000/30x21x2).....Kshs. 8,400

b) Service pay for 2 years (6,000/30x15x2).....6,000

Total.....14,400

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant is also entitled to a certificate of service plus costs of the case.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mr. Wachenje for the Claimant

Miss Nyagah h/b Mr. Gakuo for the Respondent