



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 54 OF 2019**

**ODUORI MAKALE SIMON.....CLAIMANT**

**VERSUS**

**SECURITY GUARDS SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 1/12/2017 praying for a declaration that termination of his employment was unlawful and unfair and that the court does award the claimant compensation in respect thereof, and payment of terminal benefits including one-month salary in lieu of notice in the sum of Kshs. 26,000 and payment for leave days not taken for 17 years in the sum of Kshs. 309,399.
2. The respondent filed a Memorandum of Response on 27/2/2018 in which the respondent admits it was the employer of the claimant but from a different date and at a different salary as alleged in the Statement of Claim.
3. The respondent denies the rest of the claim and puts the claimant to strict proof thereof.
4. The claimant (C.W.1) testified that he was employed as a Security Guard from 14/4/2000 and worked continuously for the respondent until 11/6/2017. That the claimant earned Kshs. 26,000 per month at the time of leaving employment.
5. C.W.1 testified that he was paid overtime when he worked during public holidays but not all the time.
6. C.W.1 stated that on the night of 11/6/2017 he reported to work and when he tried to clock in the machine was non-responsive and he was called to the office and given a warning letter to the effect that he had failed to clock in.
7. C.W.1 asked for a print-out of the clocking machine but was not given one. C.W.1 was then asked to go home and report to the Manager the following morning. The claimant was told to report to the manager for many subsequent days until he got tired. C.W.1 then wrote a letter of apology and he was then put in the cell and asked to write a letter of apology dictated to him by the employer.
8. C.W.1 denied that he was subject to a disciplinary hearing. The claimant received a letter of dismissal on 28/6/2017 but the letter was dated 20/6/2017.
9. C.W.1 reported the dispute to the Kenya Human Rights Commission who wrote a demand letter to the respondent on his behalf. The letter was not responded to and C.W.1 filed this suit.
10. C.W.1 states the dismissal was unlawful and unfair. That Mr. Ernest hated him and mistreated the claimant all the time. That Ernest took C.W.1 to dangerous assignments. That in the last re-assignment Ernest had removed his friend and took C.W.1 to the station.
11. C.W.1 said he was not paid upon dismissal and never went on leave at all. That C.W.1 asked for leave and it would be refused. C.W.1 said he was not paid compensation for the job loss nor was he given a Certificate of Service.
12. The claimant prays for the reliefs set out in the claim including interest and costs.
13. Under cross-examination by Mr. Nyamisi for the respondent the claimant denied he had a letter of employment stating the employment was verbal. The claimant denied having seen any code of conduct nor having received any warning letters. The claimant admitted having written one letter of apology in which he stated he had moved the clocking machine from its normal location to another and that he was forced by the claimant to do that since the neighbouring company was complaining about the location of the clocking machine. That he had moved the clock to avoid conflict. Claimant testified that he never went on leave.

14. He however admitted that he had received Kshs. 3,850 in April, 2013 to go on leave. That he had had gone on leave in 2012 and 2011, 2014, and 2017. That it is earlier years when he did not go on leave.
15. Claimant stated he did not refuse to take Certificate of Service but acknowledged a copy shown to him under cross-examination. Claimant denied that he had attended a disciplinary hearing as alleged by counsel for the respondent.
16. R.W.1 Ernesto M. Kingondu testified for the respondent. He adopted a witness statement dated 30/1/2018 as his evidence in Chief. He produced exhibit '1' to '9' in support of his testimony. R.W.1 stated that the claimant was employed by the respondent between the year 2007 and 11/8/2017. That the claimant was dismissed for misconduct for refusing to clock in for two (2) hours.
17. That the clock had sent a signal failure and when the claimant was called he was offline. That one Mr. Stanley Kathurima, a field officer was sent to the site and told the claimant to clock but the claimant refused and slept. That on 12/6/2017, the claimant was summoned to show cause. That the claimant attended the hearing on 20/6/2017 with his colleague Wilson Mukabi. The claimant was charged and given opportunity to explain.
18. That the claimant wrote an apology instead. That the apology was not sufficient and the claimant was dismissed for misconduct.
19. That the claimant was given letter of dismissal which he refused to take and was very rude.
20. That the claimant went on leave all the time and records show that. That R.W.1 paid him leave allowance whenever he went on leave.
21. That the claimant was a delinquent employee and had many mistakes. That he had many written warnings produced before Court in different years.
22. That the dismissal was lawful and fair.
23. R.W.1 under cross-examination stated he served a notice to show cause and to the claimant at his house. R.W.1 stated that the claimant received many warnings and he apologized severally hence he had continued to work.
24. R.W.1 denied that the claimant was employed in 2000 insisting that he was employed in 2007.
25. R.W.1 insisted that a disciplinary hearing took place on 20/6/2017 and claimant attended.

#### Determination

The issues for determination are:-

- (a) Whether the claimant was dismissed for a valid reason following a fair procedure.
- (b) Whether the claimant is entitled to the relief sought.

26. A careful analysis of the testimony by C.W.1 vis a vis that by R.W.1 has led the Court to the conclusion that the claimant is not a credible witness in that firstly he denies having taken any leave days in the statement of claim and went ahead to claim payment in lieu of leave for 17 years.
27. However under cross-examination the claimant admitted having gone on leave in 2011, 2012, 2013, 2014, 2015 and 2016. He said that it was only in the years before 2011 when he had not gone on leave. This is a very material departure from the pleadings by the claimant as to completely dent his credibility and cause the Court to have sufficient doubt on the truthfulness of his entire testimony.
28. It was demonstrated by R.W.1 that the claimant had not only gone on leave but was paid leave allowance whenever he went on leave.
29. The testimony by R.W.1 regarding the circumstances under which the claimant was dismissed true in view of the fact that R.W.1 produced many warning letters which the claimant had received for misconduct while at work.
30. The claimant had also admitted the last misconduct that led to his dismissal in a written apology before Court. The Court does not believe that the claimant was forced to pen the apology.
31. The Court is satisfied that the claimant was served with a Show Cause letter which he refused to accept from R.W.1 but nevertheless attended a disciplinary hearing with a colleague of choice on 20<sup>th</sup> June, 2017.
32. Accordingly, the claimant has failed to discharge the onus placed on him under Section 47(5) of the Employment Act, 2007 read with Sections 107 and 108 of the Evidence Act Cap. 80 Laws of Kenya to show on a balance of probability that his dismissal from employment was wrongful and unfair.
33. To the contrary, the respondent has demonstrated that the respondent had a valid reason to dismiss the claimant summarily. The claimant was given a Certificate of Service which he declined to take. He was described by R.W.1 as consistently rude to his supervisors, which testimony the Court accepts.

34. Accordingly, the suit by the claimant lacks merit and it is dismissed in its entirety. All the reliefs sought by the claimant were not proved and are not granted.

35. Due to the long service the claimant had given to the respondent, the Court deems this an appropriate case for each party to bear their costs of the suit.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of March, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and Judgment 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 18 of the Civil 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

**Claimant in person.**

**Mr. Nyamisi for respondent**

**Chrispo: Court clerk.**