



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 609 OF 2014

DIXON MBARIE OTIPI.....CLAIMANT

VERSUS

INTER SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim dated 19th November, 2014 on the 20th November, 2020 through the firm of Kamau Lagat and Company Advocates contending unlawful and unfair termination of his employment and failure to pay his terminal dues by the Respondent.

2. The Claimant's case is that he was employed by the Respondent in the year 2009 and worked in various capacities including serving as a branch manager and also as the controller of operations in the respondent's head office in Nairobi where he performed his duties diligently and skillfully until August 2012 when the respondent dismissed him without any justification or an opportunity to be heard.

3. The claimant states that at the time of his termination he was earning a gross salary of Kshs. 18,946.67 and annexed a copy of his pay slip for the month of March 2012.

4. In his oral evidence, he adopted his witness statement as his examination in chief and marked the same as exhibit-1. He further produced his pay slips for March 2012 and April 2012 both marked as exhibit 1a & 1b. The demand letter was marked as exhibit 4 and proof of postage of service of pleadings marked as exhibit 5. The claimant further testified that he was never given the reason for his dismissal neither was he granted an opportunity to be heard. He thus urged this Court to allow his claim as prayed.

5. The claimant therefore sought for the following reliefs;

- a) A declaration that the respondent termination was unfair and unlawful**
- b) General damages for unfair and unlawful termination**
- c) 3 month's salary in lieu of Notice**
- d) An order directing the Respondent to issue the claimant with a certificate of service**
- e) Costs of this suit**
- f) Such other relief that the court shall find just and fair in the circumstance**

6. The Respondent was served with the Memorandum of Claim and Summons to Enter Appearance on 16th January, 2015 as per the affidavit of service sworn by **Winfred Meta Kitavi** and filed in Court on 19th January, 2015.

7. Upon service, the Respondent filed a notice of appointment of Advocate on 4th February, 2015 and a Memorandum of Defence on 21st October, 2015 both through the firm of Anthony Burugu and company Advocates. The respondent basically denied all the contents of the memorandum of claim and alleged that the claimant is not entitled to the reliefs sought.

8. The Respondent was also served with a hearing notice for hearing of this case on 9th February, 2021 as per return of service dated 4th December, 2020 but they also failed to attend hearing and so this claim proceeded exparte.

Claimants submissions.

9. The claimant submitted that he was unfairly terminated from the respondent's employ when the respondent summarily dismissed him without according him hearing as mandated under section 41(2) of the Employment Act.

10. He submitted that the burden of justifying the grounds for termination of employment rest with the employer and cited the case of **Jared Aimba –versus- Fina Bank Limited [2016] eklr.**

11. The claimant further relied on the case of **Walter Ogal Anure –versus- teacher service commission [2013] eklr** where the court held that;

“... For a 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 in effecting the termination.”

12. Accordingly, the claimant submitted that, since due procedure of according him hearing was not followed the dismissal becomes unfair and unlawful as contemplated under section 45 of the Employment Act and urged this Court to hold as such.

13. The claimant therefore prayed that the court allows his claim as prayed.

14. I have examined the evidence of the claimant on record and submissions herein the claimant having proceeded exparte, the respondent having failed to attend court for hearing.

15. The claimant's case was that he was dismissed unfairly by the respondent who failed to pay him his terminal dues. He avers that he was not given any reason for dismissal and neither was he subjected to any disciplinary process.

16. Indeed the respondents having failed to give evidence, there is no evidence that the claimant was subjected to any internal disciplinary processes. There is no reason also assigned to his dismissal.

17. This in effect means the claimant's dismissal was unfair and unjustified as per Section 45 (2) of the Employment Act 2007 which states as follows;-

45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

18. In the circumstances I find the claimant has established his case against the respondents and I find for him and enter Judgement as follows;-

1. 1 month salary in lieu of notice

= 18,946.67 less overtime pay of 3750

= 15,196.67 = **15.197/=**

2. Unpaid leave for 3 years

(15197 x 3) = **45,591**

3. 9 month salary as compensation for unlawful and unfair termination

= 15,197 x 9

= 136,773

Total = 197,561

Less statutory deduction

4. The respondent will also pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

Dated and delivered virtually this 29TH day of APRIL, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karuga holding brief for Kamau for plaintiff – present

Bwugu for Respondent – present

Court Assistant – Fred