



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 35 OF 2013

FRANCIS GITAU KAMAU.....CLAIMANT

VERSUS

FACTORY GUARDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein, Francis Gitau Kamau sued Factory Guards Limited his erstwhile employer seeking relief for the unlawful termination of his employment. He averred that he had been permanently employed by the Respondent since October 1997 and was issued with a letter of employment dated 13th October 1997. The Claimant averred that he was on duty guarding the main gate of Oshwal Villas on the night of 13th and 14th November 2012 when robbers broke into the compound from the rear where another guard was deployed and robbed an occupant of the house. The Claimant averred that although he was not at all involved in the commission of the crime, he was charged in Court on 15th November 2012, released on bond pending hearing of the case and that the Respondent thereafter summarily dismissed him from employment on 28th November 2012 by a letter of the same date. He averred that the summary dismissal is unlawful, malicious and in bad faith as his employment was terminated without notice, before establishing a lawful and just cause and without affording him the right to be heard. He prays for judgment against the Respondent for a declaration that the summary dismissal is unlawful and therefore null and void; salary in lieu of notice, leave allowance on account of not taking leave; costs of the suit together with interest; and for any other relief the Court might deem fit to grant.

2. The Claimant filed a witness statement dated 15th July 2019 in which he stated that he and his colleague reported the said robbery to the Respondent and who asked them to report to the police. The Claimant stated that they were charged with the offence of breaking and stealing aid in the alternative failing to prevent the occurrence of the offence vide Kibera CM's Criminal Case No. 6028 of 2012 and that the Respondent dismissed them from employment while they were in remand custody. He exhibits a certified copy of the court proceedings in the said criminal case to demonstrate that the same was dismissed by the court on 23rd October 2013. The Claimant further stated that he worked for the Respondent for 17 years and that his monthly salary at the date of the summary dismissal was Kshs. 16,692.90. He stated that the Respondent did not pay him salary for the month of November 2012 despite having worked until 28th November 2012 and which sum he therefore claims. He had sought for reinstatement but he abandons the prayer on account of the passage of time and in preference for compensation or damages for the unfair dismissal. He stated that after their criminal case was dismissed, the Respondent paid his co-accused colleague a gratuity because their contract of service was governed by the Regulation of Wages (Protective Security Services) Order, 1998. The Claimant stated that he is therefore entitled to gratuity payment equal to 18 days per month for the years worked; a sum equal to one month salary in lieu since he had not taken his annual leave at the time of dismissal; and salary in lieu of notice being three months' salary.

3. The Respondent filed an Amended Defence dated 5th June 2015 averring that it had lawful and valid reasons of summarily dismissing the Claimant who negligently performed his duties by:

- i. Failing to inspect vehicles that were going out of the compound
- ii. Wilfully opening the gate for thugs who had robbed the Respondent's client
- iii. Failing to report that there were robbers in the compound
- iv. Failing to raise an alarm to alert the public that there were robbers in the compound
- v. Failing to arrest the robbers when he had a clear chance to do so
- vi. Failing to adhere to instructions from his superiors

vii. Failing to exercise due care and attention while guarding the compound

4. The Respondent averred that it lost the said client and suffered loss of business reputation as a result of the Claimant's said commission and/or omission and that the acquittal under Section 202 of the CPC does not mean that a criminal offence had not been committed. The Respondent averred that the Claimant was dismissed for having been suspected of committing a criminal offence to the detriment of the Respondent and having been absent from work for about 14 days. It prays for the Claimant's suit to be dismissed with costs to the Respondent. The Respondent also filed a Witness Statement by Nelson Agono who stated that on 13th November 2012 they received a call from their client, Osho Properties along Gravellia Road reporting a theft incident and that when he arrived at the said premises, the police had already arrested the Claimant and his colleague attached to the said premises. He further stated that the Claimant did not report the incident to the Respondent even after his release on bond and has also never cleared with the Respondent. He states that the Claimant's dismissal was lawful with due legal procedures having been followed and that the suit against the Respondent is in bad faith.

5. The parties consented to the determination of the matter in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant's submissions were to the effect that since his letter of employment had no terms, the Regulation of Wages (Protective Security Services) Order, 1998 applies to his employment. He further submitted that the Respondent's witness, Mr. Nelson Agono admitted that they did not send the Claimant any show cause letter or notice of the intended termination and did not also afford him any audience. The Claimant submitted that he immediately reported to the Respondent upon his release on bond so as to collect his salary and prays the Court believes him. The Claimant submitted that there is no evidence offered showing that he was negligent and the particulars thereof have not been proved. Further, that the Respondent was required to establish that the Claimant was in custody for a period of 14 days to qualify the same as a ground for the dismissal letter. It is the Claimant's submission that the Respondent has not demonstrated that it had a ground warranting his summary dismissal. The Claimant further submitted that the law on summary dismissal was considered by the Court of Appeal in **Package Insurance Brokers Ltd v Simon Gitau Gichuru [2019] eKLR** where the court stated the law thus:-

"In the case of Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR, this Court held: "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 in the presence of another employee or a union official, in 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".

As stated above, although the respondent was blamed for certain transgressions relating to financial misappropriation, the letter of 1st August, 2014 gave a final verdict, summary dismissal. It follows therefore that the respondent was not subjected to due process."

6. He submitted that the Court in **Package Insurance Brokers Ltd (supra)** awarded compensation equal to 8 months' salary to the claimant who had worked for 5 years and had disciplinary issues but was similarly not given termination and neither was due process followed. The Claimant submitted that since in his case he had worked for 17 years and had never had disciplinary issues with the Respondent, he urges the Court to award him 12 months' salary. The Claimant submitted that he should also be awarded salary for November 2012, one month salary in lieu of notice and leave pay, together with interest and that his claim for gratuity ought to be paid in the interest of non-discrimination, equity and fairness as shall be decided by this Court. The Claimant sought costs on account that the Respondent caused the proceedings for unlawful termination of his employment.

7. The Respondent's submissions were to the effect that it had no alternative but to dismiss the Claimant under Section 44(4)(f) of the Employment Act after the Claimant was arrested on 13th November 2012 and remanded in the Police Custody until 28th November 2012. The Respondent submitted that Section 44(4)(f) of the Employment Act provides as follows in the material part:-

"in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty;"

The Respondent submitted that the said Section 44(4)(f) of the Employment Act does not depend on the employee being found guilty of offence charged but is based on the employee's arrest for a cognizable offence, the freedom to go back to work, or report to work has been curtailed by the said arrest and being held in remand. The Respondent submitted that the Claimant has not in any way shown that he had been set free on bond or bail and/or that he was out of a lawful custody. The Respondent further submitted that under a summary dismissal on account of misconduct and poor performance, the employee has to be subjected to a hearing as under Section 41(2) of the Employment Act. The Respondent submitted that this requirement does not however cover summary dismissal based on Section 44(4)(f) where the Claimant is in a lawful custody for a period of 14 days without reporting to work. The Respondent submitted that it cannot therefore be condemned for lawfully dismissing the Claimant while in custody and that the Claimant also confirmed in his evidence that he was held in custody for over a month. The Respondent further submitted that the Claimant states in his own evidence before the Court that he was not able to assist the other guard during the said theft and confirms that he was not able to discharge his duty. The Respondent submitted that it had also exhibited the loss suffered by its client and that the Claimant seeking to have his claim in the light of Regulation of Wages (Protective Security Service Order) 1998 is intended to mislead this Honourable Court. The Respondent submitted that the Claimant is seeking remedies under an outdated Order yet taking advantage of the current legal position. It is the Respondent's submission that the last part of page 3 and the first paragraph of page 4 of the Claimant's submissions contain evidence not tendered at the hearings. The Respondent submitted that since the Claimant has not proved that the dismissal was unfair, he is not entitled to any compensation. It urges the Court that in the event the Court finds for the Claimant, the Court may consider the loss suffered by the Respondent's client as a result of the Claimant's conduct and decline to make any award. The Respondent submitted that it had exhibited at Page 7 of the Respondent's bundle of documents a leave application form dated 6th November 2012 showing the Claimant had nil leave due as at November 2012. The Respondent submitted that the Claimant did not question the said exhibit or in any way deny its contents and has also not proved that he was entitled to leave days beyond what is recorded in the said exhibit. It submitted that having exhibited the full leave records for the Claimant from page 7 to 23 of the Respondent's bundle of documents, and with the Claimant not having any pending leave, he ought not to be awarded what he has not proved. On the claim for gratuity, the Respondent submitted that the Claimant never called Mr. Okumu (the other guard) to testify before the Court to confirm if he was indeed paid gratuity as alleged and how much he was paid. The Respondent submitted that therefore the Claimant did not adduce any evidence for his claim for gratuity and since the Claimant was a member of NSSF, under Section 35(6)(f) of the

Employment Act, no gratuity is payable to him. On the claim for salary for November 2012, the Respondent submitted that the Claimant had been advised vide his dismissal letter to first clear with the company before he could collect his dues together with the Certificate of Service. The Respondent submitted that the Claimant has not proved his case on a balance of probabilities and the same should be dismissed with costs.

8. The Claimant was dismissed for allegedly being involved in the omission or commission resulting in theft at a client's premises. The Claimant was never heard prior to his dismissal and the Respondent cites Section 44(4)(f) of the Employment Act as basis for the failure and/or refusal to hear the Claimant before dismissal. Section 44(4)(f) of the Employment Act permits summary dismissal. What it does not do is discard or overwrite the provisions of Section 41 of the Employment Act. The Claimant ought to be heard even if the circumstances leading to the intended dismissal are egregious. In the case of **Lawrence Onyango Oduori v Kenya Commercial Bank Limited [2014] eKLR** Rika J. held as follows:-

The fact that an Employee is absent from work on Police arrest and detention for up to 14 days, does not give an Employer the right to dismiss the Employee without observing the procedural guarantees given under Section 41 and 45 of the Employment Act 2007. All that Section 44 of the current Employment Act states is that the specified acts, amount to gross misconduct for which summary dismissal may be justified. Summary dismissal is not dismissal on the spot, without a hearing or in the absence of the Employee. The right to be heard is never discarded. The Respondent had the duty to hear the Claimant, particularly as the Respondent was privy to the criminal case, and knew the circumstances of his absence.

The Respondent in this case knew exactly where the Claimant was and that was sufficient for the Respondent to trigger the mechanism for a hearing under Section 41 before summarily dismissing the Claimant. The Claimant did not prove that he had not taken leave at the time of his termination and the Respondent is therefore not liable for any claim in relation to leave. In regards to the relief the Claimant is entitled to, it would be the days worked in November 2012, the gratuity as provided for under the Regulation of Wages (Protective Security Services) Order, 1998. The upshot of the foregoing is that the Court enters judgment for the Claimant as against the Respondent for:-

- a) Kshs. 16,692.90 being salary for November 2012.
- b) Gratuity @18 days for each completed year of service in terms of the Order applicable to the Claimant – Kshs. 170,267.58
- c) Costs of the suit
- d) Interest at Court rates on the sums in a) and b) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2021

Nzioki wa Makau

JUDGE