



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

ELRC. CAUSE NO. 1136 OF 2015

ALBERT OMWENO ONTWEKA.....CLAIMANT

-VERSUS-

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Security Guard from 15.11.2008 until 10.7.2012 when he was summarily dismissed by the Respondent for gross misconduct. On 1.7.2015 he brought this suit alleging that his dismissal was unfair and unlawful and sought the reliefs:

- a. A declaration that the Respondent's action to summarily dismiss the Claimant from her employment was unlawful, unfair and inhumane.**
- 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 due terminal benefits and compensatory damages totalling to Kshs. 628,137.9/-**
- d. Interest on the award from the date of filing suit till payment in full.**
- e. Cost of this suit plus interest thereon.**

2. The Respondent filed defence on 7.10.2015 denying that the dismissal of the Claimant was unfair and averred that it was indeed lawful. It further averred that the Claimant performed his duties negligently and he was granted opportunity to defend himself and instead by letter dated 3.4.2012 he admitted the offence he committed and apologised. However, the Respondent proceeded to dismiss him and also paid him his terminal dues. Therefore it prayed for the suit to be dismissed with costs.

EVIDENCE

3. The Claimant testified as CW1 and reiterated that he joined the Respondent on 15.11.2008 as a Security Guard and his salary was Kshs. 13,985.62 per month.

4. On 16.2.2012 he was attached to a go-down owned by Magic Oven which had two front doors and one rear door. There was also a main gate guarded by G4S Security Guards. On the said date, the owner of the go-down Mr. Alex told him that there was 20 Kg wheat flour found outside and the two went and recovered the said wheat. They found G4S guards still at the main gate.

5. On 17.2.2012, he was transferred to another place and the issue of wheat flour was never reported to the police. In March 2012 he went to the office to check why he was not paid his salary but all what was given to him was a suspension letter to pave the way for investigations into the wheat flour issue. He was also asked to surrender his uniform.

6. He further stated that he was later called to record a statement by the investigator but thereafter he was never given copy of the investigators report or called for any disciplinary hearing. He remained on suspension until July 2015 when he received a summary dismissal letter. Therefore, he prayed for the reliefs set out in his suit.

7. On cross-examination, he admitted that his terminal dues were computed as per the document on page 7 of his claim bundle. He further

admitted that all his payslips show that he was being paid a standard overtime pay every month. However, he contended that the said pay was not according to the labour law. He also admitted that his pleadings do not show the months when he was not paid for overtime worked.

8. He confirmed that the wheat flour found outside the client's gate on 16.2.2012 was from the client's stock according to the owner of the go-down Mr. Alex. The Claimant contended that he was recording the vehicles entering and leaving the go-down and he was also inspecting the cargo brought in and taken out. He contended that he was the only guard doing the above duties at the front door yet there was a rear door which was not guarded.

9. He reiterated that he recorded a statement with the investigator and later he wrote a letter apologizing for the offence. He denied knowledge that the Respondent lost business from the said client because of the issue of the said flour. He contended that the Respondent did not tell him that the client asked for his transfer because he had lost trust in him.

10. He further contended that he was not explained anything by the Respondent's HR Officer, Mr. Ochuku, but he was only given suspension letter and later a dismissal letter to read for himself.

11. On re-examination, he reiterated that the flour was found outside the main gate and blamed the G4S guards for negligence at the main gate. He denied being the one who took the flour outside the main gate. He contended that he had complained about the rear door which was unguarded but no guard was posted there. Finally he reiterated that he was given a suspension letter when she went to the officer to demand for his salary.

12. The Respondent's Chief of Staff Mr. Denis Michieka testified as RW1. He testified that the Claimant was paid for over time worked throughout his period of service and that after dismissal he was paid all his terminal dues.

13. RW1 further testified that, the Respondent's client, Magic Oven reported that it had lost confidence in the Claimant and it wanted him transferred. He further testified that the Respondents Field Officer visited the said client and the Claimant confirmed the incidence complained of and tendered an apology.

14. RW1 stated that on the material date wheat flour belonging to the said client was carried out of the go-down in a lorry carrying waste and the G4S guards at the main gate noticed the wheat being off loaded outside the gate. RW1 contended that the investigator, Mr. Sitati, recorded statements from the client and the Claimant and formed the opinion that the Claimant was negligent in allowing the flour to be taken out by the waste material vehicle. Further the investigator blamed the Claimant because it was his duty to inspect the vehicles leaving the go-down.

15. RW1 reiterated that the Claimant wrote an apology and asked for forgiveness. He contended that there was no prior complaint by the Claimant about unguarded rear door or any other security risk. He contended that the claimant terminated the contract with the Respondent citing laxity in providing security. He reiterated that the offence by the Claimant was serious and consequently, his apology was not accepted.

16. On cross-examination, RW1 admitted that the flour incidence was not reported to the police but the Claimant was transferred to another assignment until March when he was suspended. He further admitted that the Claimant was not served with show cause letter or invited to disciplinary hearing because he admitted the offence and apologised. He maintained that the Claimant was negligent in his duty but he did not steal.

SUBMISSIONS

17. The Claimant submitted that the procedure followed in dismissing him was not fair because he was not accorded fair hearing as required under section 41 and 45 of the Employment Act. He contends that under section 45 of the Act, the employer is required to prove that termination was done for a valid reason but also that it was done in accordance with a fair procedure.

18. As regards the reason for the dismissal, the Claimant contended that it was not valid because the Respondent did not prove the offence by calling G46 officers as witnesses or in any other manner substantiated the allegations contained in the defence. Therefore, he submitted that his dismissal was without any substantive justification as required under section 43 and 45 of the Employment Act.

19. To emphasize the foregoing submissions, he relied on **Donald Odeke v Fidelity Security Ltd. [2012]Eklr.** **Walter Ogal Anuro v Teachers Service Commission[2013]eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd[2014]eKLR** where the courts unanimously agreed that an employer should not dismiss his employee without a valid reason and without according him an opportunity to defend himself.

20. In this case, the Claimant contended that his dismissal was unfair and unlawful and prayed for an award of 12 months salary as compensation for the unfair dismissal.

21. The Respondent submitted that after receiving complaint from Magic Oven, it did investigations and confirmed that the Claimant had been carrying out his duties negligently by failing to inspect pilfered goods from the client's premises for those approved for departure. As a result he allowed drivers employed by the client to exit the go-down with pilfered goods which were frequently dropped at the nearby kiosks.

22. The Respondent submitted that due to the Claimant's lack of diligence theft continued and the client lost trust in him and even terminated the contract for security services. The Respondent relied on **Thomas Sila Nzivo v Bamburi Cement limited[2014]eKLR** to urge that an employer is not required to have conclusive evidence if the employee's involvement in a crime but only to have reasonable and sufficient

grounds to suspect his involvement.

23. As regards the procedure followed, the respondent submitted that it gave the Claimant an opportunity to make his representations which were duly considered before the dismissal was decided. It contends that it took the Claimant's statement and received his apology letter and compiled an investigation report. Consequently, in its view, the procedure followed was fair.

24. As regards the reliefs sought, the Respondent, the Claimant is not entitled to compensatory damages because the dismissal was fair and his negligence caused it to lose business for the said client. In the alternative the Respondent contended that if the dismissal is found to be unfair; the Claimant should only be awarded salary in lieu of notice and denied compensation because the court ought to consider, under section 49 (4) (b) & (c) of the Employment Act, that he contributed to the dismissal through misconduct.

25. The Respondent further denied the claim for overtime pay contending that the Claimant was receiving a standard overtime pay every month and the outstanding amount was paid under his last payslip after the dismissal. It further submitted that the claim for overtime pay is exaggerated as it does not factor the standard overtime pay he received monthly and it does not also factor the days the Claimant was on annual leave, sick leave, off days and public days.

26. He also relied on **Kenya Union of Domestic, Hotels Education Institutions, Hospitals and Allied Workers v Charles Waitaha Goko t/a Apple Bees Pub and Restaurant[2013]eKLR and John Mulinge Mutuku v Kartasi Industries Limited[2019]eKLR** where the courts held that a claim for overtime must be properly pleaded and proved. Therefore, the Respondent prayed for the entire suit to be dismissed with costs.

ISSUES FOR DETERMINATION

27. There is no dispute that the Claimant was employed by the Respondent as a Security Guard until 18.9.2012 when he was served with the dismissal letter dated 17.9.2012. The issues for determination are:

a. Whether the reason for dismissal was valid and fair.

b. Whether the procedure followed was fair.

c. Whether he is entitled to the reliefs sought.

REASONS FOR THE DISMISSAL

28. The Claimant has not denied that he was on duty on the day when a lorry exited the client's go-down with pilfered wheat flour. He admitted that he saw and recovered the said wheat which was off loaded by a lorry outside the client's main gate. He further admitted that the lorry left the go-down where he was guarding. He also admitted that it was his duty to inspect the vehicles before departing from the go-down to ensure that only approved goods exited the premises.

29. He further admitted that he was the only guard at the go-down while the main exit gate was guarded by G4S officers. He also admitted that the stolen wheat flour was reported by G4S officers to the Client. Finally he admitted that he wrote an apology letter and sought forgiveness for the said flour incidence.

30. Having considered the foregoing matters the Respondents deemed that summary dismissal was justified under section 44(4) of the Employment Act and I agree. The said matters including his voluntary apology letter led to the conclusion that the Claimant acted negligently in failing to prevent the pilferage or he was involved in the crime. Therefore, I find and hold that the Respondent has discharged the burden of proving that the reason for dismissing the Claimant was valid and fair as required under section 43 and 45 of the Act.

PROCEDURE FOLLOWED

31. The Respondent admitted that the Claimant was not taken through disciplinary hearing before his dismissal. According to the Respondent, after recording a statement with the investigator during his suspension and again writing an apology letter seeking for forgiveness, there was no need for disciplinary hearing. The apology letter was not produced as exhibit but it was quoted verbatim in the investigation report and the Claimant did not dispute its contents.

32. The letter in my view raised a defence which ought to have been tested during a disciplinary hearing. Despite the Claimant's admission that property was lost when he was on duty, he contended that the place he was guarding was too busy for one guard which led to the loss of property without his knowledge.

33. In my view that defence was reasonable and fairness demanded that he be accorded a fair hearing in the presence of another employee of his choice as required under section 41 of the Employment Act. The hearing was not done and it is my view that the dismissal was not done in accordance with a fair procedure.

RELIEFS SOUGHT

34. In view of the finding that the dismissal was not done in accordance with a fair procedure I make declaration that the dismissal was unfair within the meaning of section 45 of the Employment Act and he is entitled to compensatory damages under section 49(1) of the Act. Considering his service period of about four (4) years and the fact that he contributed to the dismissal through gross misconduct, I award

him three (3) months salary as compensation for the unfair dismissal.

35. As regards the claim for overtime pay, I agree with the Respondent that it is not pleaded with precision and it is exaggerated. It has not factored the standard overtime paid to him monthly and also the days he was away on leave, off days and public holidays. Therefore the claim is declined entirely.

36. In the end, I enter judgment for the Claimant declaring his dismissal unfair and unlawful and awarding him Kshs. 13,985.62 x 3 = Kshs. 41,956.86 subject to statutory deductions. The Claimant is also awarded costs plus interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF APRIL, 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