



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1382 OF 2014 CONSOLIDATED WITH

CAUSE NO.1381 OF 2014

CAUSE NO.1383 OF 2014

MAURICE OTIENO NGICHO.....CLAIMANT

JOSEPH SAKWA OKUTOTO.....CLAIMANT

HYRINE MIKAE BONARERI.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGEMENT

The claims herein were consolidated for hearing and determination under Cause No.1382 of 2014 and including Causes No.1381 and 1383 of 2014 as the causes of action arose on the same facts and against the same respondent.

Claim

The claimant's case is that they were employed by the respondent as tailors in the tailoring department and earning Ksh.16, 000 per month.

On 1st July, 2014 the claimants reported to work as was the practice but were issued with termination notices of equal date falsely stating they had refused to work extra hours as required and that they had declined to take instructions from their seniors. Such amounted to summary dismissal without notice or reasonable cause. Such was unlawful and unfair because the claimants had done nothing wrong, there was no warning or hearing and the decision taken was harsh and lacking in due process.

The claimants are seeking the following terminal dues;

- a) *One month notice pay ksh.16,000;*
- b) *Payment in lieu of taking annual leave for a year Ksh.16,000;*
- c) *Compensation for 12 months Ksh.192,000; and*
- d) *Costs.*

Josphat Sakwa Ukutoto testified for and on behalf of the claimants that he was employed by the respondent on 8th July, 2013 as a tailor while the other claimants, Maurice and Hyrine were both employed on 23rd July, 2013 all for a contract of 11 months at a monthly wage of ksh.16, 000.

On 1st July, 2014 they were issued with notices terminating employment on the grounds that they had refused to work overtime the previous month. That they had been working overtime and when they demanded for payment this was not done. Previously they had been allocated more work overtime and no payment. There was no off day or leave allowed and worked under a year. Work hours were 8am to 5.30pm for 5

days a week, Monday to Friday. On weekends they would report ad hoc and paid. No work on Sunday.

Josphat also testified that before employment terminated they were not given a hearing, no notice to show cause and no payment of terminal dues.

Upon cross-examination, the claimant testified that on 30th June, 2014 it was month end and had expected his wages to be paid for night duties and for work on 3 Fridays but his overtime work was not paid. They were told that a security company does not pay overtime work. At the time there was a lot of work but had not been paid for 3 nights of overtime work. That the respondent said no overtime would be paid and they opted to call the supervisor to address them on the non-payment of overtime but this was not addressed. The next day upon reporting to work, they were issued with notices terminating employment. This was shocking because on 30th June, 2014 they had demanded payment for overtime work.

Josphat also testified that they were issued with 7 days note of termination of employment and they remained at work until employment terminated. They took this to be summary dismissal as no hearing was conducted. Notice was served on 8th July, 2014 while they were at work. The claim that they were absent from work was not true.

On the notice to show cause, the claimants did not reply. They have not challenged the contents. They did not know how to write a response.

The claim is for notice pay, leave pay and compensation.

Defence and counter-claim

The respondent filed a defence and counter-claim. The defence is that the claimants were employed by the respondent on fixed term contract and last earning Ksh.16, 000 per month. On 30th June, 2014 the claimants were required to work some extra hours in order to accomplish the urgent work that was pending. The claimants defied the respondent's directions and left for home without completing the work.

This conduct amounted to insubordination and the claimants were issued with notice to show cause why disciplinary action should not be taken against them and they refused to reply. Because of the gross misconduct, the respondent issued notice terminating employment on 1st July, 2014 within 7 days. Upon the notice the claimants stopped attending work. They refused to attend work during the notice period.

On 8th July, 2014 there was summary dismissal of the claimants for insubordination and failure to attend at work. Such dismissal was justified.

The claims made are without foundation.

In the counter-claim, the respondent's case is that the claimants left their employment without notice. Such notice pay is due at ksh.16, 000 each and costs of the suit and counter-claim.

In evidence Raymond Nzioka testified that the claimants were employed as tailors earning ksh.16, 000 per month and on 30th June, 2014 they were required to work overtime to complete urgent work that was pending but they defied and left for home. This amounted to insubordination. The next day, 1st July, 2014 the respondent issued the claimants with notices to show cause why disciplinary action should not be taken against them due to the misconduct of refusing to work and ignoring instructions and they refused to reply. Notice to terminate employment was issued taken effect in 7 days and the claimant refused to return to work.

Mr Nzioka also testified that the respondent had urgent tailoring work to be done and the claimants as the tailors refused to work overtime forcing the respondent to hire other persons to complete the work. This placed the respondent at risk of failing to perform its work and the claimant were made aware but refused to comply.

The claimants were issued with notice over their gross misconduct and they ignored to respond. Absence from work compounded the matter and justified the dismissal from employment on 8th July, 2014. The respondent is entitled to notice pay.

The claimants made demand alleging unfair termination of employment. The respondent responded noting they had refused to work as required and also failed to show cause and therefore they should pay for notice period.

Parties filed written submissions.

Determination

The claimants filed the Memorandum of Claim and therein attached letters and notices dated 1st July, 2014, termination notice. The basis was that;

On 30/6/2014, you were required to work extra hours in order to accomplish what was set for you but instead you declined the instructions from your seniors and opted to go home having not completed your work which was urgently needed. You were instructed to show cause why disciplinary action should not be taken against you and you also declined.

The management has lost faith in you and therefore this letter serves as a seven days' notice of intended termination. You are

required to handover all company property in your possession on 7th July 2014 upon which your dues will be paid less advances if any. ...

The claimants have not denied that they were issued with notice to show cause why disciplinary action should not be taken against them following events on 30th June, 2014 save, they refused to reply on the grounds that they did not know how to respond. Josphat testified for and on behalf of the claimants and asserted that they did not reply to the show cause notice.

The claimants further did not attend work overtime as directed on 30th June, 2014 on the grounds that they were owed 3 weeks overtime and had not been paid. That they called their supervisor over the non-payment of their overtime and the respondent refused to attend. They did not attend work as directed on 30th June, 2014.

Josphat further testified that upon attending work on 1st July, 2014 they were issued with termination notice. They took it to be summary dismissal without notice, hearing or being given good reasons despite being owed in overtime pay.

Three issues emerge.

First, the claimant refused and failed to attend overtime work as directed by the employer and respondent.

Secondly, the claimants failed to show cause why disciplinary action should be taken against them following failure to attend work.

Thirdly, upon notice to terminate employment on 1st July, 2014 the claimants took it this was summary dismissal of employment and did not return to work. The notice issued was to take effect in 7 days. The claimants effectively left employment and did not serve the termination period.

Section 44(3) and 44(a) (c) and (e) of the Employment Act, 2007 allow an employer to terminate employment summarily for breach of the employment contract, for absenteeism, neglect of duty, and failure to take lawful directions from the employer. Such warrant summary dismissal subject to the employee being issued with notice however short to defend themselves.

In this case, the claimants failed to respond to the show cause notice issued to them on 30th June, 2014, they followed with refusal to attend work overtime and upon notice to terminate employment, they proceeded and failed to report to work and to serve the notice period. Upon refusal to show cause and notice having issued that employment would terminate in 7 days; the respondents were justified to dismiss the claimants. There was a lawful cause and valid reasons for summary dismissal. The due process of section 41(2) of the Employment Act, 2007 was followed.

There is no case of unlawful and unfair termination of employment.

Upon the claimants making demand against the respondent on 16th July, 2014 there was a response on 24th July, 2014 and the respondent noted that the claimants were required to work extra hours on 30th June, 2014 but refused and further refused to show cause and remained absent from work from 1st July, 2014. These much details were within the knowledge of the claimants at the time they filed suit. On this basis, the claims made found without basis, they should pay costs to the respondent.

On the claim for notice pay, such is not due in summary dismissal found justified.

The claims for leave pay, section 28 of the Employment Act, 2007 has secured the right to enjoy annual leave the reasons leading to termination of employment notwithstanding.

Maurice and Hyrine worked from 23rd July, 2013 to 8th July, 2014 a few days short of a full year. Annual leave is due for the 11 months of service pursuant to section 28(2) of the Employment Act, 2007 at 1.75 days a month and based on the monthly basic wage of Ksh.16, 000 all due in leave pay is Ksh.10, 267.

Josphat worked from 8th July, 2013 to 8th July, 2014 a full year and is entitled to ksh.16, 000 in leave pay.

On the counter-claim, without evidence that the claimant attended work following notice to terminate employment within 7 days from 1st July, 2014, the respondent is entitled to notice pay. On the wage of ksh.16, 000 for each claimant, notice pay for 7 days all amounts to ksh.3, 730.

Accordingly, the claims made are found without merit save payment of annual leave in the following terms;

(a) Maurice Otieno Ngicho Ksh.10,267;

(b) Josphat Sakwa Okutoto Ksh.16,000;

(c) Hyrine Mikae Bonareri ksh.10,267;

The counter-claim is found with merit and each claimant shall pay Ksh.3, 730 to the respondent in notice pay;

Costs of the counter-claim awarded to the respondent.

The claims shall be paid the dues owing less the award in the counter-claim.

DELIVERED AT NAIROBI THIS 13TH APRIL, 2021.

M. MBAR?

JUDGE

In the presence of: