



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 438 OF 2016

BANSIO NGOTA.....CLAIMANT

VERSUS

MARKET MASTERS LIMITED.....RESPONDENT

JUDGMENT

1. The suit commenced by a Statement of Claim filed on 16/3/2016 in which the Claimant prays for: -

- (i) one-month salary in lieu of notice - Kshs. 39,291;**
- (ii) Service gratuity for completed years of service – Kshs. 117,873; and**
- (iii) compensation for unlawful termination of employment;**
- (iv) Costs of the suit.**

2. The suit is undefended, the respondent having failed to file a Statement of defence despite the Advocates for the respondent having entered appearance on 19th April, 2016.

3. The matter was set down for formal proof and the claimant filed affidavit evidence in support of the Statement of Claim and list of documents attached to the Statement of Claim.

4. In his testimony the claimant stated that he was employed by the respondent as a Security Guard in February, 2003 and was confirmed to the position on 18th July, 2005.

5. On 10/4/2007, the claimant was promoted to a security officer and given a letter to that effect which he produced in Court. The claimant's salary was increased to Kshs. 39,291.

6. The claimant worked diligently and continuously until 22/12/2015, when he was suspended for alleged misconduct for 21 days and was summarily dismissed on 12th January, 2016.

7. The respondent alleged that the claimant had allowed items from an evicted tenant to be returned to the respondent's premises. The alleged tenant was German Point Limited.

8. The claimant denied the allegations stating that the tenant returned following instructions from a senior officers namely Mr. Jared Obonyo and Nohad Keraldeen following a Court order for the tenant to return. The order was by a magistrates' Court at Milimani dated 11/12/2015.

9. The claimant testified that he was dismissed without notice and or payment in lieu of notice and that he was not paid terminal gratuity as is required under the Security Services Regulation Order, 2012.

10. That he was not given a hearing at all since no disciplinary hearing was held.

11. That the dismissal violated Sections 36, 41, 43 and 45 of the Employment Act, 2007 and he is entitled to compensation in terms of Section 49(1) (c) and 4 of the Act.

12. The claimant has proved his case on a balance of probabilities, there being no evidence to contradict the statement of claim, documentary evidence and the Affidavit evidence. This is in terms of Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

13. *The Court award the claimant: -*

(i) payment in lieu of one-month notice in the sum of Kshs. 39,291;

(ii) Service gratuity at the rate of 15 days' salary for every completed year of service in the sum of Kshs. 117,873.

This is as per the pleadings since the Security Services Regulation order provides for service pay at the rate of 18 days' salary for each completed year of service. This is regardless of whether the security guard was on National Social Security Fund (NSSF) and or any other pension.

(iii) With regard to compensation, the claimant had faithfully served the respondent for a period of 13 years. The claimant was dismissed summarily for no fault at all proved and without any contribution on his part to the dismissal. The claimant was not paid any terminal benefits. The claimant suffered loss and damage as a result of the unlawful and unfair summary dismissal.

14. The claimant lost prospects of a career progression since he had been promoted to a supervisor. The respondent conduct was aggravated by fact that it victimized its employees for obeying a Court order to return an evicted tenant from their premises.

15. The Court relies on the reasoning of the Supreme Court in **Kenfreight – (E.A.) Limited –vs- Benson K. Nguti [2019] eKLR** in which the Court held:-

“We find that once a Court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is one provided under Section 49 of the Employment Act. We also need to clarify that a payment of an award in Section 49(1) (a) is different from an award under Section 49(1) (b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4) (m).

16. In the present case, the claimant was neither paid notice pay, any ex-gratia payment nor compensation upon being summarily dismissed. The claimant has incurred expenses in the conduct of this suit not specified and the Court has now awarded the claimant service gratuity for the period served together with payment in lieu of one-month salary.

17. The Court is guided by the Court of Appeal decision in **CMC Aviation Limited –Vs- Mohammed Noor- Civil Appeal No. 199 of 2013, [2015] eKLR** in which the Court upheld an award of 12 months' salary in compensation for unlawful dismissal.

18. Having considered all the factors set out herein before in this judgment the Court awards the claimant the equivalent of 10 months' salary in compensation for unlawful summary dismissal in the sum of Kshs. 392,910.

19. In the final analysis judgment is entered in favour of the claimant against the Respondent as follows: -

(a) Kshs. 39,291 in lieu of one-month notice.

(b) Kshs. 117,873 being service gratuity in terms of Security Services

Regulation Order applicable to Security Guards.

(d) Kshs. 392,910 being equivalent of 10 months' salary in compensation.

Total award Kshs. 550,074.

(e) Costs of the suit.

20. The claimant did not pray for interest in the Statement of Claim and therefore none is awarded.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 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 15th 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 rulings 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

Kabaiku & Co. Advocates for the claimant

Ekale – Court Assistant