



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 55 OF 2016**

**MICHAEL MULI MUINDE.....CLAIMANT**

**- VERSUS -**

**G4S KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> May, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 20.01.2017 through J.M Mutua & Company Advocates. The amended memorandum of claim was filed on 02.02.2017. The claimant prayed for judgment against the respondent for:

- a) A declaration the termination was unfair.
- b) One-month salary in lieu of notice Kshs.15, 000.00.
- c) Unpaid sick leave Kshs.29, 375.00
- d) 12 months' salaries in compensation for wrongful and unfair termination Kshs.180, 000.00.
- e) Treatment expenses to be tabulated at hearing.
- f) General injuries sustained (but compromised by consent order recorded at the hearing on 24.03.2021).
- g) Costs of the suit.

The respondent filed on 22.05.2017 the response to the claim through Hamilton Harrison & Mathews Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness No. 1 (RW1) was Odoyo Wambura respondent's Dog Master and respondent witness No. 2 (RW2) was Michael Maina Muita, respondent's Operation Manager.

The Court has considered the pleadings, the evidence, and the final submissions. The Court makes the following pertinent findings.

To answer the **1<sup>st</sup> issue** for determination the Court returns that there is no dispute that the respondent employed the claimant as a security officer and later as a dog handler.

The **2<sup>nd</sup> issue** for determination is whether the termination of the claimant's employment was unfair. The claimant's case is that on 10.05.2014 while on duty he was attacked by the respondent's dog and the claimant sustained severe and extensive bodily injuries and he suffered loss and damage. Further, when he reported the occurrence of the accident to the respondent, he was immediately dismissed from employment without notice and no reasons were given by the respondent for the said dismissal. Further, the claimant was not accorded any opportunity to be heard by the respondent as required by the Employment Act, 2007. The claimant states that the termination was therefore unfair. The claimant pleads that the termination was without notice, he was not given reasons for the termination, he was not accorded a disciplinary hearing, he was not heard in his defence, and the respondent did not act in accordance to justice and equity in effecting termination.

For the respondent, it is pleaded that on 10.05.2012 the claimant reported that he had been bitten by the respondent's dog and the incident was recorded. The claimant was taken to hospital, treated and the respondent reimbursed the claimant for all medical expenses the claimant

had incurred due to the dog bite. The respondent pleaded that the termination of the claimant's employment occurred much later and it was due to the claimant's gross misconduct as follows:

- a) Between October 2014 and July 2015 the claimant engaged in gross misconduct on diverse dates.
- b) On 24.10.2014 the claimant while assigned at Rift Valley Railways whereby a hawker without an ID card accessed the premises and threw stones at the gate prompting the claimant to press alarm for reinforcement. The claimant recorded a statement on that incident.
- c) On 16.02.2015 the claimant was found asleep at the assignment at Rift Valley Railways and the claimant signed a warning on 18.02.2015 in that regard.
- d) On 18.03.2015 the claimant went into another guard's assignment and washed his clothes contrary to the operational policy and he signed a warning in that regard on 19.03.2015.
- e) On 02.07.2015 the claimant reported to an assignment in civilian boots and trouser contrary to the policy to be in full uniform while on duty and he signed for the warning on 09.07.2015.
- f) On 07.07.2015 the claimant was assigned to work at the weigh bridge but left the location unmanned. He failed to inform his supervisor of his absence. He was invited to a disciplinary hearing on 29.07.2015 accompanied with a co-worker as per the memo dated 24.07.2015 which invitation he received but failed to attend as was scheduled. He was given another invitation which he received on 06.09.2015 for a disciplinary hearing on 29.07.2015. He had been suspended from work by the notice he signed for on 24.07.2015.
- g) On 06.08.2015 the claimant was heard at the disciplinary hearing and after deliberation, the management decided to summarily terminate the claimant's employment. The letter of summary dismissal is dated 06.08.2015 with pay for days worked up to 06.08.2015; leave earned but not taken; and house allowance for days worked but less loan liability to the respondent and statutory deductions.

The Court has considered the pleadings and the evidence. The claimant testified that he received the warning letters exhibited for the respondent but he signed under duress. He also testified that he left the company in 2015. The Court finds that by his own evidence, the claimant has confirmed that after reporting the dog bite, he was not immediately terminated but after treatment, his evidence shows that he resumed duty. The claimant's pleaded case is based on the pleading that after reporting the dog bite, he was terminated immediately. That pleading is obviously inconsistent with his evidence that he signed the warnings – which were issued long after the date of the dog bite and as pleaded for the respondent and demonstrated by the documents exhibited for the respondent in that regard. While pleading that the termination was without notice and without a disciplinary hearing, the Court finds the claimant's case contradictory with his pleaded reason for termination that it was immediately after reporting the dog bite. The Court has considered the documents filed for the respondent and the evidence by RW1 and RW2 and finds that there is no established ground to doubt the respondent's case and evidence that the claimant was summarily dismissed on account of gross misconduct after the warnings on record and ultimately on account of leaving the assignment without permission and notice to his supervisor. The Court finds that the termination was upon valid reason per section 43 of the Employment Act and the due procedure of a notice and hearing per section 41 of the Act was complied with.

While making that finding the Court has considered the evidence by RW1 that he was the claimant's immediate supervisor on matters of dog-handling and the claimant was a good worker. The court has also considered the evidence by RW1 that on operational matters outside dog handling he was not the claimant's immediate in-charge. The Court has considered the evidence by RW2 that the invitation to attend disciplinary hearing was given to the claimant and he signed for it and that the claimant failed to attend the 1<sup>st</sup> hearing on 29.07.2015 but he attended the 2<sup>nd</sup> hearing on 06.08.2015. Further the Court has considered the evidence by RW2 that he was not responsible for taking the minutes for the disciplinary hearing, the minutes in the instant case had not been filed and he was not responsible of keeping the minutes. It is elaborately submitted for the claimant that the respondent failed to establish the reasons for termination because RW1 stated that the claimant was a good worker with no adverse reports. But the Court has found that the claimant has not denied signing the warning letters as a build up to the eventual dismissal. Further the claimant's alleged duress in signing the warnings has not been established at all. While the minutes for the disciplinary hearing are not exhibited, there is no notice to produce in that regard and on a balance of probability, the claimant's alleged reason for **"immediate termination"** was reporting the dog bite but which the Court has established not to have been the case. The Court returns that between the parties and in answering the question, between the parties, who is more likely to be stating the truth, the Court finds the respondent's account of the circumstances of the termination more coherent and credible. As submitted for the respondent, the claimant pleaded that he was dismissed immediately after reporting the dog bite but taking the evidence into account, the claimant had continued to work for a long time after the dog bite. Further, the claimant was clearly contradictory in his evidence. For instance, during cross-examination he stated, **".... I was not granted a hearing. I attended a meeting convened by G4S. I did not have notices of the disciplinary hearing. I have seen notice at page 14 of Response. No hearing went on, in spite of notice being served."** Earlier in chief-examination he had stated, **".... I was called to a meeting by management. I was not given time. I was told I could have my contract terminated. No reason was given for this. I was dismissed...."** The Court finds that it cannot be that the claimant attended the disciplinary hearing but never received the relevant invitations. The Court further finds that it cannot be that the claimant was invited to the disciplinary hearing and he attended but failed to know the reasons for the termination of the contract of employment or that the same was not subject of his meeting with the management.

In view of the findings, the Court returns that the claimant was dismissed upon valid reasons and after due process as urged and submitted for the respondent.

The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court has found that the dismissal was not unfair and the declaration and compensation for unfair termination will not issue. As the termination was on account of gross misconduct, the Court finds that the respondent was entitled to dismiss with shorter notice than the contractual or statutory terms as per section 44(1) of

the Employment Act, 2007 and the prayer for pay in lieu of notice is found unjustified. As submitted for the respondent the claimant has not particularised and established basis for Kshs. 29, 375.00 for unpaid sick leave and the prayer is declined.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 21ST MAY, 2021.**

**BYRAM ONGAYA**

**JUDGE**