



**REPUBLIC OF KENYA**

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

**AT MOMBASA**

**APPEAL NO. 15 OF 2020**

**(Being an appeal from the judgment and decree of Hon. G. Kiage,**

**Senior Resident Magistrate in CMCC ELRC No. 104 of 2019**

**given on 21.05.2020)**

**TEXAS ALARMS (K) LIMITED.....APPELLANT**

**VERSUS**

**JUMA RAMADHAN SADIKI.....RESPONDENT**

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

**JUDGMENT**

The respondent filed before the trial Court a memorandum of claim on 12.02.2019 through C.Masinde & Company Advocates. The respondent alleged that the appellant employed him continuously and uninterrupted from 23.03.2011 up to 05.07.2018 as a day time security guard and initially as at termination at Kshs.14, 000.00 per month. The respondent stated that he was abruptly terminated from employment without reasons and an opportunity to defend himself. He stated that conciliation failed to yield amicable resolution of the unfair termination and he filed the suit in the trial Court praying for:

- a) A declaration the termination was unfair and unlawful.
- b) Respondent to pay Kshs. 287, 335.00 particularised as follows:
  - i. 12 months' compensation for unfair and unlawful termination Kshs.168, 000.00.
  - ii. Pay in lieu of notice Kshs.14, 000.00.
  - iii. Accrued annual leave for 7 years Kshs.98, 000.00.
  - iv. Salary for the days worked Kshs.2, 335.00.
  - v. Uniform refund Kshs.5, 000.00.
- c. Costs of the suit plus interest.
- d. Certificate of service.
- e. Any other relief the Court deems fit to grant.

The appellant filed the response to the claim on 27.03.2019 through E.W Munyari & Company Advocates. The appellant stated that the respondent was employed on and off from 31.03.2011 and the appellant employed him permanently on 01.04.2015 and worked until 28.07.2018 when he deserted duty. The appellant admitted that the respondent was employed as a day security guard. The appellant stated that the monthly gross pay was Kshs.13, 900.00 and not Kshs. 14, 000.00 as was claimed for the respondent. Further, the respondent had

worked until 28.07.2018 and deserted duty thereafter until 17.09.2018 when he reported at the office and served a resignation letter which he gave to the Assistant Human Resources Manager Madam Janet stating that he needed to rest. Further, the claimant returned the uniform and was paid terminal dues computed as follows:

- a) Uniform refund Kshs.2, 500.00.
- b) Pro rate leave for 2 months Kshs.1, 746.00.
- c) Total Kshs.4, 246.00.
- d) Less loan balance Kshs.500.00.
- e) Balance Kshs.3, 746.00.

The appellant stated that the claimant was duly paid for leave days. The appellant denied that the claimant was entitled as prayed. The appellant prayed that the respondent's suit should be dismissed with costs.

The suit was heard by the trial Court and judgment delivered on 21.05.2020. The trial Court found as follows:

- a) The respondent testified that on 27.07.2018 he asked for 3 days of off duty and he resumed duty but another guard had been assigned his duties. The appellant asked him to go home to be recalled but he was never recalled. The respondent then went back on 17.09.2018 to follow up but he was handed a piece of paper and asked to copy from another sheet of paper and then asked to go back home.
- b) The appellant's witness (DW1) was the Human Resource Manager Bernard Odhiambo. His evidence was that the respondent absconded duty on 28.07.2018 when he delivered the letter of resignation.

The trial Court having considered the rival evidence concluded thus, **"The respondent's position that the claimant absconded duty is untenable and is not supported by evidence, there is no evidence to show that a warning letter or a reprimand was given to the claimant for absconding from duty. Further, when the claimant allegedly tendered his letter of resignation, the respondent took a decision to dismiss the claimant summarily for alleged gross misconduct. It is therefore admitted by the respondent that the claimant was summarily dismissed."**

The trial Court found that the appellant had failed to comply with section 41 of the Employment Act, 2007 requiring an explanation to an employee in a language that he understands the reason for intended termination and to accord the employee a hearing in presence of the employee's representative. The trial Court found that the respondent had failed to demonstrate that the provisions had been complied with and further found that the claimant was unjustly and unfairly terminated. The trial Court the proceeded to state thus, **"... It follows therefore that the claimant's termination from employment was unfair and that he is entitled to compensation for unlawful termination and proceed to make the following awards:**

- a) Six (6) months' salary in compensation for unfair termination Kshs. 84, 000.00.**
  - b) One (1) month salary in lieu of notice Kshs. 14, 000.00.**
  - c) Accrued annual leave Kshs. 98, 000.00.**
  - d) Unpaid salary Kshs. 2, 335.00.**
  - e) Uniform Kshs. 5, 000.00.**
- Total Kshs. 203, 335.00**

**Judgment is therefore entered for the claimant for the sum of Kshs. 203, 335.00 plus costs of the suit and interest from the date of this judgment."**

The appellant is aggrieved with that judgment in its entirety and filed the memorandum of appeal on 18.06.2020 through its advocates at the trial Court, E.M. Munyari & Company Advocates. The grounds of appeal are as follows:

1. The learned trial Magistrate misdirected himself in law by awarding 6 months' salary in compensation for unfair termination Kshs. 84, 000.00; one-month salary in lieu of notice Kshs. 14, 000.00, accrued annual leave Kshs. 98, 000.00, unpaid salary Kshs. 2, 335.00, and uniform refund Kshs. 5, 000.00, considering the circumstances of the case.
2. The learned trial Magistrate erred in law in making a decision that the respondent herein was unlawfully and unfairly terminated from employment whereas the respondent had resigned from employment by the letter dated 17.09.2018.
3. The learned Magistrate misapprehended the evidence and misapplied, misunderstood or overlooked the correct legal principles and judicial precedent and submissions by parties that he made an award that was erroneous and inordinately high.

4. The trial Magistrate erred in making the decision that it was necessary to establish first, whether the respondent's termination from employment was lawful and procedural and whether there existed a fair reason for terminating the respondent as per statute whereas, in the instant case, the respondent resigned from employment but had not been terminated.
5. The trial Magistrate erred in finding the respondent had tendered the resignation letter and thereafter the respondent had proceeded to summarily dismiss the respondent in breach of section 41 of the Employment Act, 2007 and the learned Magistrate had failed to rely on section 44(1) of the Act and, the respondent had resigned from employed and not been terminated.
6. The learned Magistrate erred in law in failing to consider that the respondent was paid the salary for July 2018 for the days he had worked for per the appellant's payment schedule of July 2018.
7. The learned Magistrate erred in awarding the respondent Kshs. 98, 000.00 for leave and failing to consider that the respondent had had been given leave for 2016, 2017, and 2018 and had been paid Kshs. 1, 746.00 pro rate leave.
8. The Honourable Magistrate erred in law in awarding the respondent Kshs. 5, 000.00 for uniform refund whereas the respondent had already been refunded the same at Kshs. 2, 500.00 paid on his account and that as at time the claimant left employment the refund had been Kshs. 2, 500.00.

The appellant prayed that the appeal be allowed with orders:

1. That the judgment and the decree of the subordinate Court is set aside and substitute thereof an order dismissing the respondent's suit.
2. Costs of the appeal be granted.

Submissions on the appeal were filed for both parties. The parties appear to mutually submit that this is a first appeal and the Court is not bound to follow the trial Court's findings of fact but the Court must reconsider the evidence, evaluate itself, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. The respondent has cited Selle-Versus- Associated Motor Boat Co. of Kenya & Others (1968) EA 123 and Abdul Hameed saif –Versus- Ali Mohamed Sholan (1955) 22 EACA 270 for that proposition. The appellant on its part does not expressly submit on that guiding principle but has proceeded to delve into re-evaluation of evidence before the trial Court. The Court is guided accordingly.

The Court has considered all the material on record and makes pertinent findings as follows.

The **1<sup>st</sup> major issue** for determination is whether the appellant dismissed the respondent or the respondent of his own free will resigned from employment. To answer that issue, the Court is guided by the parties' express pleadings and the evidence before the trial Court. The respondent pleaded that he was abruptly terminated and without a notice and chance to defend himself. The respondent did not plead about the resignation letter of 17.09.2018 as pleaded for the appellant as the circumstance for the termination of the contract of service. The claimant testified on 24.09.2019 in Swahili. His evidence was that on 02.07. 2018 he was given 3 days off and he resumed duty on 05.07.2018 and found another person had been assigned his duties. His evidence was that he took 3 days off duty because he had injured his leg and he was unwell but he was not given a sick off chit. He stated that he was asked to go back home to be recalled and he was never called back. He does not state the person who told him to go back home but further testified that he followed up on the issue of being recalled on 17.09.2018 and was given a piece of paper and asked to copy from another piece of paper. He also testified that he then reported his case to the labour officer and he was given a paper to take to his employer (and the Court observes that the letter by the labour officer is dated 25.09.2018 and it states that the respondent reported that he was in the appellant's employment from 11.05.2011 to 05.07.2018 when the appellant terminated his services unlawfully.) In cross-examination he testified that he was terminated on 05.08.2018 and not 05.07.2018 and no formal letter of termination was given. Further he testified that he was given a letter to copy but he did not understand the meaning of the letter.

For the appellant the 1<sup>st</sup> witness (DW1) was Bernard Odhiambo Aduda. His testimony was that the respondent was employed from 01.04.2015 to 28.07.2018 when he stayed away from work without giving any reason. He was contacted and he said he was handling personal problems and he would resume work after he finished handling the problems. On 17.09.2018 he came back bearing a resignation letter dated 17.09.2018. Further he was not forced to write a resignation letter and he was never injured while on duty as a reason for absence from work. DW1 stated that the resignation was accepted and the respondent left employment.

The Court has carefully re-evaluated the evidence. The Court has to determine who, between the two parties, is truthful on the circumstances the contract of service came to an end. The Court finds that the answer is rather clear that the respondent is inconsistent in his evidence and the appellant was more coherent. First the respondent never pleaded that he signed the resignation letter that he alleges he did not understand. The fact of the resignation letter was carefully not disclosed in the memorandum of claim and when the appellant raised it in the response to the claim, the respondent decided to allege that he recalled copying the letter as authored by the appellant. The issue of the inability of the respondent to understand Swahili, the language of the resignation letter, was never pleaded for the respondent. In any event, the respondent testified in Swahili and he in fact confirmed he wrote the resignation letter and there is no reason for the Court to conclude that the respondent did not understand Swahili or was incapable of writing and reading Swahili. Second the respondent was general in his evidence carefully refusing to disclose the appellant's officers or employees he had dealt with in his account of alleged forced writing of resignation letter and then alleged termination. In particular, in evidence in chief he stated that he went back on 17.09.2018 and then, in cross-examination, he stated that he was terminated on 05.08.2018 and not 05.07.2018 – and the Court finds that the claimant clearly had gaps in his evidence first on dates and then on how the allegedly forced resignation transmitted into the alleged termination on 05.08.2018. Third, while justifying 3 days off duty the respondent in his evidence suddenly introduced an injured leg without having pleaded the same or exhibited medical records in that regard. Fourth and finally, the respondent had reported to the Labour Officer per the Officer's letter of 25.09.2018 that he had been terminated on 05.07.2018 while he had pleaded and testified that he had asked for off on 02.07.2018 and resumed on 05.07.2018 and told to go away to be recalled.

On the other hand, both DW1 and DW2 were consistent that the respondent worked until 28.07.2018 and thereafter deserted duty and resurfaced on 17.09.2018 with a resignation letter. He was then paid the July 2018 salary.

The Court finds that the evidence was that the respondent deserted and resurfaced with a resignation letter and the Court finds that as urged for the respondent, the trial Court misdirected itself in finding that the respondent ought to have provided evidence of a warning and reprimand in view of the desertion. The Court finds that the respondent deserted and resurfaced to tender a resignation. The Court finds that looking at the pleadings and the evidence, the contract of service ended when the respondent voluntarily wrote a resignation letter which he signed and the respondent accepted the same. The issue of unfair termination did not therefore arise at all.

While making that finding the Court has considered the submission for the respondent that he was a person with illiteracy but the Court finds that submission inconsistent with the claimant's evidence that he in fact of his own hand wrote the resignation letter. Further the Court finds the respondent's submission that the appellant ought to have explained the contents of the resignation letter to the respondent as unfounded because the respondent never pleaded the issue and his predicament in that regard and parties being bound by their pleadings, the submission is unjustified – and the Court has found that the respondent carefully failed to disclose the details and circumstances of the resignation letter in his pleadings and further failed to plead the alleged illiteracy and he understood Swahili, the language of the resignation letter and testimony in Court.

To answer the 1<sup>st</sup> issue for determination the Court returns that the respondent resigned from employment. By that finding the grounds of appeal Nos. 2, 3, 4, and 5 are thereby determined accordingly as there was no unfair termination but the respondent voluntarily resigned from employment.

The 2<sup>nd</sup> issue for determination is whether the trial Court made an error in awarding final remedies as was ordered in the Judgment. The Court makes the findings as follows:

- a) There being no unfair termination established, the award of 6 months' compensation was unjustified. In any event the respondent had prayed for 12 months' compensation and without any reference to the factors for consideration prescribed in section 49 of the Employment Act, 2007, the trial Court had simply awarded the 6 months.
- b) As the termination was not unfair and as submitted for the appellant, the respondent had resigned and the issue of pay in lieu of termination notice did not arise.
- c) The respondent confirmed in his testimony that he had received the final dues as pleaded for the respondent Kshs. 3,746.00. Thus prorate leave and uniform refund had been paid. The exhibited leave forms showed that the respondent had taken leave by signing and the respondent testified that he went on leave three times. He also testified that he was initially a casual employee until permanent employment on 01.04.2015. Looking at the date of separation, the Court finds that as submitted for the appellant the uniform refund at the prevailing rates had been made and the due leave taken or paid for. Similarly, salary for days worked had been paid.

The Court therefore returns that the grounds of appeal Nos. 1, 6, 7 and 8 have been answered in favour of the appellant. In particular, the Court finds that the trial Court erred in making awards as was done in its judgment without providing a justification and taking into account the evidence and submissions that had been made for the parties and in particular the appellant, in that regard.

In conclusion, judgment on the appeal is hereby entered for the appellant against the respondent with orders:

1. The appeal is allowed.
2. The judgment and the decree by the trial Court is set aside and the respondent to pay the appellant's costs of the suit.
3. The respondent to pay the appellant's costs of the appeal.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 21<sup>st</sup> May, 2021.**

**BYRAM ONGAYA**

**JUDGE**