



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 171 OF 2018

DOUGLAS BARASA.....CLAIMANT

VS

TEXAS ALARMS (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Douglas Barasa filed his Memorandum of Claim on 27th March 2018, seeking compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Statement of Defence on 28th May 2018.

2. The matter proceeded to trial, with the Claimant testifying on his own behalf and the Respondent calling its Group Human Resource Manager, Bernard Odhiambo Aduda. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a night security guard on 7th February 2012. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 11,400.

4. The Claimant avers that he was arrested on 9th February 2017, on accusations of theft, which were later withdrawn. The Respondent however, went ahead to terminate the Claimant's employment.

5. The Claimant further avers he was not paid for the days worked, prior to his arrest on 9th February 2017. He adds that he was not notified of his impending termination and was not paid his contractual dues.

6. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore claims the following from the Respondent:

- a) Salary in lieu of notice.....Kshs. 12,221
- b) Leave pay for 5 years.....61,105
- c) Gratuity pay for 5 years.....42,300
- d) Underpayment from May 2015 to February 2017.....18,062
- e) 12 months' salary in compensation.....146,652
- f) Costs plus interest

The Respondent's Case

7. In its Statement of Defence dated 23rd May 2018 and filed in court on 28th May 2018, the Respondent states that the Claimant was not a permanent employee but was employed on casual basis.

8. The Respondent however admits that the Claimant was earning a monthly salary of Kshs. 11,400.

9. The Respondent denies that the Claimant's employment was terminated and states that the Claimant himself absconded duty from 8th February 2017.

10. The Respondent goes on to state that on the night of 8th to 9th February 2017, the Claimant had been assigned to guard Blue Pearl Apartment, being residential premises of the Respondent's client, when a theft occurred. The Claimant was arrested and charged in court but was later released in September 2017, after the complainant withdrew the complaint.

11. The Respondent adds that the Claimant did not report back to work until 22nd November 2017. The Respondent claims that on the same day, the Claimant was summoned by his supervisor and a panel sat and heard his case and it was clear that the Claimant had no reason or proper explanation as to why he had absconded duty. The Claimant was therefore issued with a dismissal letter dated 25th November 2017.

12. The Respondent states that the Claimant is only entitled to salary for the days worked up to 8th February 2017.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

14. The Respondent filed a letter dated 25th November 2017, addressed to the Claimant as follows:

“RE: SUMMARY DISMISSAL

Following the incident at your working place Blue Pearl Apartment where you were arrested and remanded due to an alleged theft at your assignment (sic). When you were released in Sept 2017, you wilfully refused to report on duty until 22/11/2017 when you finally came to the office. You have not given proper explanation to why you continue to abscond your duties without any legal or lawful cause.

Due to the above mentioned gross misconduct the company has decided to terminate your services with immediate effect.

Arrange to return all the company equipments and materials in your possession to enable us to prepare your final dues if any.

Be advised accordingly.

Yours Faithfully,

For Texas Alarms (K) Ltd.

(signed)

Ben O Aduda

Human Resource Manager”

15. According to this letter, the Claimant was dismissed on account of absconding of duty.

16. In his testimony before the Court, the Respondent's Group Human Resource Manager, Bernard Odhiambo Aduda, alluded to some meeting held on 22nd November 2017, where the Claimant's case was allegedly heard. Aduda was however not present at the alleged meeting and no record of the proceedings were availed to the Court.

17. On his part, the Claimant maintains that his employment was terminated in February 2017, following an alleged case of theft at his place of assignment.

18. The Claimant's position in this regard accords with the Respondent's pleading at paragraph 14 of the Statement of Defence to the effect that the Claimant is only entitled to salary for the days worked up to 8th February 2017.

19. It is therefore clear that the Claimant did not work for the Respondent after 8th February 2017 and that is when his employment was effectively terminated.

20. The allegation that he was subjected to some form of disciplinary process on 22nd November 2017 is therefore an unimpressive

concoction by the Respondent. The dismissal letter dated 25th November 2017 falls in the same category and does not help the Respondent's case in any way.

21. In the end, the only finding to make is that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure.

Remedies

22. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service plus the Respondent's unlawful conduct in executing the termination.

23. I further award the Claimant one (1) month's salary in lieu of notice.

24. The Respondent's witness admitted that the Claimant had outstanding leave days but he could not tell the number. In the absence of leave records, I allow the claim for leave pay in full.

25. Having been employed in the Protective Security Services Sector, the Claimant is entitled to gratuity at the rate of 18 days' pay for every completed year of service, as provided under the Regulation of Wages (Protective Security Services) Order.

26. The Respondent admits the claim for underpayment to the tune of Kshs. 11,081.70, which the Court adopts as the payable figure under this head.

27. Finally, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 73,326
b) 1 month's salary in lieu of notice.....	12,221
c) Leave pay for 5 years (12,221/30*21*5).....	42,773
d) Gratuity for 5 years (12,221/30*18*5).....	36,663
e) Underpayment.....	<u>11,082</u>
Total.....	176,065

28. This amount will attract interest at court rates from the date of judgment until payment in full.

29. The Claimant will have the costs of the case.

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mbithe for the Claimant

Miss Munyari for the Respondent