



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 632 OF 2017

TOLIVER GAMBO NURL.....CLAIMANT

- VERSUS -

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

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 14.08.2017 through Oduor Siminyu & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A finding that the claimant's services were terminated wrongfully and award damages.
- b) The respondent to pay Kshs. 204, 000.00 being 12 months' salary for unlawful termination of services, one-month salary in lieu of notice and five years' pending leave.
- c) Issue certificate of service.
- d) Costs of the suit plus interest thereon.

The claimant has pleaded that the respondent employed him as a security guard in December 2010. The basic salary was Kshs. 12,000.00 per month until sometimes in June when his services were terminated on account of neglecting his duties by not patrolling on the assigned premises. The termination was by the letter dated 19.06.2017 but the reason for termination has never been established. He further pleads that he was not heard at all prior to the termination and his right to natural justice was undermined.

The respondent filed a statement of defence on 28.09.2017 through E.W. Munyari & Company Advocates. The respondent pleaded as follows. It employed the respondent as a guard on permanent basis per letter dated 01.04.2015 and prior to that the claimant served as a casual employee, on and off. The claimant earned a salary of Kshs. 12, 000.00 per month and his services were terminated by letter dated 19.06.2017 due to gross misconduct and the termination was not unfair. In particular, on 20.07.2016 the claimant was working at Xanadu Apartment in Nyali when theft incident occurred and the claimant was called to explain the incident. He wrote a statement and was given a warning letter dated 27.07.2016. He was transferred to Furaha Apartment in Nyali and on the night of 03.07.2016 he was found drunk by the supervisor and he wrote admitting the misconduct and he received a warning letter dated 08.07.2016. He was transferred to Mkomani Estate in Nyali and on 09.07.2017 the house for the respondent's client was broken into and a television set stolen. The claimant stated he was not aware of the theft and he was arrested. On 19.06.2017 the claimant reported back to the office to resume duty and he was given a letter to show cause and subsequently terminated by the letter of summary dismissal dated 19.06.2017. The claimant was not entitled as claimed except for days worked until 19.06.2017 and leave on pro-rate basis upon return of the respondent's property being equipment and uniform. It is prayed that the suit be dismissed with costs.

The Court has considered the parties' respective pleadings, evidence, and final submissions. The Court makes findings as follows:

- 1) The Court finds that parties were in a contract of service. The parties were in casual relationship per the respondent's evidence until the respondent appointed the claimant on permanent basis as per the letter dated 01.04.2015 and at Kshs. 12, 000.00 per month.
- 2) The respondent terminated the claimant's employment by the letter of summary dismissal dated 19.06.2017 on account of theft of a TV set from a house at Mkomani Estate on the night of 09.06.2017 and where the claimant had been assigned to guard.
- 3) The claimant admitted (in his testimony) receiving and signing the two warning letters as pleaded for the respondent. The claimant testified that he wrote a statement on events of the theft leading to his termination. The claimant testified that in the last

case of theft he was summoned and taken to the police and they were two guards in that regard. He was charged but later set free. The respondent's witness (RW) testified that on 19.06.2017 the premises had a gate with a perimeter wall. A TV set was reported stolen from the premises which the claimant had been assigned to guard. RW summoned the claimant and they discussed the incident at RW's office. He failed to explain the theft and he was dismissed. The Court finds that on the evidence before the Court, the claimant knew the case that confronted him. He was given a chance to explain but he failed to do so. The Court finds that the respondent has shown that as at termination the respondent had a genuine reason to dismiss as per section 43 of the Employment Act, 2007. The evidence is that the claimant was heard and even if the letter to show cause was not served as per notice prescribed in section 41 of the Act, the Court has considered the previous warning letters and finds that the claimant was undeserving of any compensation under section 49 of the Act because his conduct was clearly inconsistent with the heavy dues of a security guard as had been imposed upon him by reason of the contract of service he had voluntarily signed. On the same accounts, the Court considers that the respondent was entitled to dismiss with a shorter notice per section 44(1) of the Act and no pay in lieu of notice is found available.

4) The claimant testified that he took leave from 01.04.2017 to 04.05.2017 and he signed for it. The Court finds that such evidence is inconsistent with the claimant's case that throughout the service with the respondent he never took leave at all. On a balance of probability, the Court finds that he was accorded due leave except the leave admitted for the respondent being for 12.03.2017 to 12.05.2017 **Kshs. 1, 400.00** found due. In any event the claimant did not particularise the claim and strictly prove the same as required for special damages and as submitted for the respondent.

5) The claimant is entitled to a certificate of service per section 51 of the Act.

In conclusion the suit is hereby determined with orders:

- 1) The respondent to pay the claimant a sum of **Kshs. 1, 400.00** within 7 days of this judgment.
- 2) The respondent to deliver a certificate of service within 7 days of this judgment.
- 3) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH JUNE, 2021.

BYRAM ONGAYA

JUDGE