



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 131 OF 2015

DANIEL NYACHUBA ONDIEKI.....CLAIMANT

- VERSUS -

KUNDAN SINGH CONSTRUCTION CO.LTD T/A

LEOPARD BEACH RESORT & SPA..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 13.03.2015 through Hezron Gekonde & Company Advocates. The amended memorandum of claim was filed on 19.06.2015. The claimant's case is as follows. He alleges that the respondent employed him as a watchman on 01.09.1998 at basic pay of Kshs.3, 057.00, house allowance Kshs.1, 609.00, and travel allowance of Kshs.1, 800.00 per month. On 03.12.1998 he was promoted and deployed as a supervisor of the hotel security and he held the position for 2 years without a letter of appointment. On 21.02.2001 he was given a letter indicating that he was watchman grade 3 although he was working as supervisor for hotel security – and he alleges he complained about that discrepancy to the management. In 2011 the management promised to consider his grievance but no resolution was conveyed to him. In February 2012 he was recalled from an off duty and sometimes in February 2012 he was served with a dismissal letter upon the ground that he had failed to prevent a theft. He states that he had denied the allegations but the respondent had failed to give him a hearing and the reason for termination was invalid. He was not given a notice prior to the termination. When the respondent discovered that the termination was unlawful, the respondent purported to change the dismissal to a termination per the letter dated 26.03.2012. As at dismissal the gross salary was Kshs. 22, 273.00 per month. The claimant prays for:

- a) A declaration the dismissal was contrary unlawful and contrary to the terms of service.
- b) A declaration the claimant is entitled to compensation per Employment Act for illegal and unlawful termination.
- c) 12 months' salaries in compensation Kshs.267, 276.00.
- d) Salary under payment for 13 years 5 months Kshs. 980,424.00 as Supervisor for hotel security which was not paid.
- e) Night allowance per CBA for 13 years 5 months Kshs.82, 620.00.
- f) Overtime not paid for 2 years (1999 – 2000) and throughout the service Kshs. 986, 700.00.
- g) Uniform not paid for one year in 1999 Kshs.18, 000.00.
- h) Acting year not paid Kshs. 346, 521.00.
- i) Acting allowance per CBA clause 117 Kshs.39, 800.00.
- j) Total claim Kshs.2, 829, 881.00.
- k) Any other relief the Honourable Court may deem fit and just to grant to meet ends of justice.
- l) Costs of the suit.

The respondent filed the defence to the memorandum of claim on 22.05.2015 through Mburu Kariuki & Company Advocates. The

respondent's case was as follows. The respondent denied employing the claimant and in alternative, if a contract of service existed between the parties, there was no breach and the claimant was not entitled to the claims and prayers as made. Further, the respondent alleged as follows:

- a) The claimant was employed as a watchman and not as a supervisor.
- b) The respondent was justified to terminate the employment on account of gross misconduct.
- c) In the spirit of reconciliation, the termination was commuted to termination following intervention by the union and the claimant was involved in the relevant deliberations.
- d) The suit is an afterthought, bad in law, time barred by statute. And should be dismissed with costs to the respondent.

The claimant testified to support his case. The respondent's witness (RW) was Mwanaisha Suleiman Hassan, the Respondent's Human Resource Manager. The parties filed their respective final submissions. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court returns that the parties were in a contract of service. The respondent employed the claimant as a watchman. The letter of appointment was dated 31.08.1998. The claimant wrote to the respondent on 23.03.2000 about his deployment as a security supervisor stating he had worked as a supervisor since December 1998 but had not been confirmed as such and no promotion letter had been issued. The management endorsed on the claimant's letter that he had to wait until 01.07.2001. By the letter dated 24.11.2000 the respondent's personnel manager one A.M. Lassie wrote informing the claimant that he had been appointed to act in the position of Security Supervisor effective 01.12.2000. The payable acting allowance was Kshs. 826.00 as per the CBA and that the acting allowance was payable together with the claimant's salary. The claimant accepted the acting appointment by signing on 01.12.2000. In absence of any other correspondence between the parties terminating the acting appointment, the Court returns that the claimant acted as Security Supervisor as duly appointed until the termination of the employment relationship.

To answer the **2nd issue** for determination the Court returns that the circumstances of separation of the parties were as follows. By the letter dated 26.01.2012 the respondent suspended the claimant for one week pending investigations in view of the claimant's alleged actions on Wednesday 25.01.2012 whereby the listed items namely 01 jar 3 litres of yoghurt, 03 pieces of chicken, 06 beef fillet, 04 pieces T-bone steak were found in a vegetable supplies van Registration No. KBN 796P. The claimant was to be informed about the outcome of the investigation at the end of the 7 days' suspension. The claimant acknowledged receipt of the suspension letter by signing on the same 26.01.2012. The claimant received the letter of summary dismissal dated 02.02.2012 stating that the claimant had refused to admit that he knew about the items found on the van, but, the respondent had established beyond reasonable doubt that the claimant was part of the syndicate. In particular, the letter stated that the claimant knew the receipt of items was being done in absence of a security personnel but failed to notify the Chief Security Officer or Duty Manager that the correct procedure had not been followed. Further, the claimant had certified that he had been involved in the receiving of the goods as per supplies invoice No. 4082 where he had signed against the said deliveries. That, the letter stated, meant that the claimant had full knowledge of what was happening and in the process failed to prevent a crime from happening, namely, stealing by servant. He was therefore being summarily dismissed.

The evidence is that the claimant appealed against the summary dismissal by his letter dated 10.02.2012. His appeal was upon the grounds that he had not been listened to or heard and he wanted the truth to be established and justice done per the prevailing law. The evidence is that the trade union through the Works Committee, KUDHEIHA Ukunda intervened and by the letter dated 26.03.2012 the respondent informed the claimant that the letter of summary dismissal earlier served upon the claimant had been changed to termination. The respondent calculated the final dues amounting to a net of **Kshs. 152, 230.00** including:

- a) February 2012 salary up to 02.02.2012 Kshs. 696.00.
- b) House allowance up to 02.02.2012 Kshs. 342.00.
- c) Annual leave 13=days double rate Kshs.13, 494.00.
- d) Annual leave travelling allowance prorata for 5 months Kshs. 1, 480.00.
- e) 4 days' public holiday at double rate pay Kshs.4, 152.00.
- f) 8 pending off days at double rate Kshs.8, 304.00.
- g) Termination gratuity 1/2 monthly gross pay for 13 years served Kshs. 101, 205.00.
- h) January 2012 night allowance 06 days Kshs. 522.00.
- i) 04 months' salary in lieu of notice Kshs.62, 276.00.
- j) Acting allowance from 01.12.1998 to November 2000 at 826.00 per month Kshs. 19, 824.00.
- k) Total Kshs. 212, 295.00.

l) Less PAYE, NSSF, NHIF, AND UNION DUES Kshs. 40, 065.00.

m) Less salary advance owed Kshs. 20, 000.00.

n) Total net due **Kshs. 152, 230.00.**

By letter dated 10.07.2012 the claimant was reminded by the respondent to collect the final dues.

To answer the **3rd issue** for determination, the Court returns that the termination of the claimant's employment was unfair for want of due notice and a hearing as provided for in section 41 of the Employment Act, 2007 and for want of a valid reason as per section 43 of the Act. Whereas the union appears to have intervened, RW testified that there had been no evidence of a disciplinary hearing. Further, RW confirmed that the claimant's letter of 27.02.2012 had not been responded to. Despite the claimant having appealed seeking a hearing, there was no evidence that he had been granted the hearing and an opportunity to state his case in view of the serious allegations made against him. The Court finds that clause 9 (d) of the CBA provided that on termination or summary dismissal, reasons shall be given in writing to the employee with copies to the shop steward and union representation. While alleging a soft landing in view of the earlier summary dismissal, the respondent placed no material before the Court to show that the claimant was guilty of misconduct as had been alleged. The Court therefore returns that the respondent has failed to establish the reason for termination and in absence of the record of proceedings between the union and the respondent, the Court finds that the termination was unfair both in procedure and substance as it was unlawful for failure to comply with sections 41 and 43 as read with section 45 of the Act. In any event the investigation report consequential to the suspension was never said to exist or exhibited and is difficult to find that the claimant was part of the syndicate as had been alleged for the respondent.

The **4th issue** for determination is whether the claimant is entitled to the 12 months' compensation as prayed for. The Court has considered the factors in section 49 of the Act. The claimant was willing to continue in the respondent's service. The claimant appears to have served the respondent for 13 years and 5 months with a clean record. The Court has considered that consequential to the termination the respondent was willing to pay the claimant a sum of **Kshs. 152, 230.00** as computed and set out earlier, and, which the Court awards as justified and due. In view of the that amount found due and in view of the other stated factors found to exist, the Court awards for the unfair and unlawful termination, seven months' gross salaries at Kshs. 22, 273.00 per month making **Kshs.155, 911.00.**

The **5th issue** for determination is whether the claimant is entitled to claims and prayers on the headings of underpayment, night allowance, uniform for 1999, and acting allowance. The Court finds that except as acknowledged in the final computation by the respondent and as already awarded, the claimant's claims and prayers in that regard are otherwise time barred. The termination was by the letter dated 26.03.2012 and the suit was filed on 13.03.2015 and the same being continuing injuries, the cause of action was limited to 12 months after the cessation of the continuing injury per section 90 of the Employment Act, 2007 and the same being about 26.03.2013. For the uniform claims, the breach was in 1999 and the three years of limitation stipulated in section 90 of the Act lapsed long before the filing of the suit. The prayers will therefore collapse as time barred.

The claimant has substantially succeeded in his claims and the respondent will pay costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination of the contract of employment by the respondent was unfair and unlawful.
- 2) The respondent to pay the claimant a sum of **Kshs. 152, 230.00** plus **Kshs.155, 911.00**(less PAYE only on the **Kshs.155, 911.00**) by 01.09.2021 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH JULY, 2021.

BYRAM ONGAYA

JUDGE