



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2239 OF 2016**

**JOHN OYIER .....CLAIMANT**

**VERSUS**

**STEADFAST SECURITY LIMITED..... RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. At all material times, commencing 4<sup>th</sup> August 2017, until 19<sup>th</sup> October 2015, the claimant was in the employment of the respondent as a security guard. Following a work place accident, the claimant was constrained to be off duty for some time. He alleges that his absence from duty was with the knowledge and consent of the respondent. Contrary to his expectation, when he reported back to duty, the respondent failed to accommodate him, bringing the employee-employer relationship to a grinding halt. He charged that the respondent's act amounted to an unfair and wrongful dismissal, prompting him to sue it in this matter for reliefs related to unfair and wrongful termination, and damages for the injuries sustained as a result of the accident.

2. When the matter came up for hearing on the 29<sup>th</sup> September, 2021, the date having been taken by consent, I allowed the matter to proceed, the absence of the respondent, its witness and or representative notwithstanding, any explanation for their absence being absent.

**THE CLAIMANT'S CASE**

3. The claimant moved Court to adopt his witness statement dated 9<sup>th</sup> September 2016, as his evidence in chief, and the documents that were filed under the list of documents of the even date as his exhibit 1 – 6. The adoption was done.

4. The claimant stated that at all material times he was an employee of the respondent, from the 4<sup>th</sup> August 2012 as a security guard, until the 19<sup>th</sup> October 2015. He tendered an NSSF statement (Exh. 2) to demonstrate that he was an employee of the respondent.

5. He further stated that on the 19<sup>th</sup> October 2015 he got involved in an accident, when at his place of work, within the premises of the respondent in the course of his work. The accident occurred as a result of a slip causing him to fall in the generator room, hitting glass window panes, thereby sustaining cuts on his person. The claimant tendered a case summary document from Kenyatta National Hospital – Exh.2, to support this. He first went to Ong'ata Rongai Health Centre, before being transferred to Kenyatta National Hospital for a surgical operation.

6. The claimant stated that he was discharged on the 29<sup>th</sup> October 2015, as demonstrated by the discharge letter – Exh. 3. At this time he was still in pain and could not work. He brought this to the attention of the respondent and sought for more time off duty.

7. He was assured, that the respondent was to pick up the issue of his work injury benefits with its insurer. This never happened.

8. On or about January 2016, the claimant returned to work – only to be told that he could be informed when the respondent was in need of his services.

9. The claimant states that the occurrence of the accident was as a result of the respondent's negligence and breach of statutory duty. The claimant incurred medical expenses which expenses the respondent refused to pay.

10. The claimant asserted that he was unfairly terminated.

**DETERMINATION**

11. I consider the following issues as the issues for determination in this matter: -

- (i) Whether a termination of the claimant's employment occurred.
- (ii) If the answer to (i) above is in the affirmative, was it procedurally and substantively fair?
- (iii) Has the claimant proved his case for work place injury reliefs?
- (iv) What are the reliefs available if any to the claimant?
- (v) Who should bear the costs of this matter?

12. It is imperative to state at this point that the respondent herein only entered appearance never to file a reply to the claimant's statement of claim. The factual contents thereof were never controverted therefore.

**(i) Whether a termination of the claimant's employment occurred.**

13. Termination of employment comes in various forms, with or without notice, termination by an employee where the employer has made continued employment intolerable (constructive dismissal), and through a declaration of redundancy, to mention but a few.

14. The common denominator of the various forms of dismissal is that all of them are ultimately caused by the employer. Dismissal by definition is not initiated by the employee nor is it "something which merely happen." In essence some "overt action" by the employer is required to bring employment to an end.

15. The claimant pleaded and testified, and it was not controverted that upon return to work after recovering from the injuries he sustained as a result of a work place accident, the respondent failed to accommodate him back. The later expressly pronounced to him, that he would inform him when need for his services would arise. I find this to be an overt act, on the part of the respondent as the employer, that brought the employment to an end.

16. Section 47 (5) of the Employment Act placed upon the claimant a burden of proving that his employment was terminated. By reason of the premises hereinabove I have come to a conclusion that he did discharge this burden.

**(ii) Whether the dismissal was procedurally and substantively fair.**

17. Section 41 of the Employment Act, 2007, supplies the structure for procedural fairness, it provides: -

*"Subject to section 42 (1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."*

*(2) Notwithstanding any other provision of the Act, an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) & (4) have and consider any representation which the employee may on grounds of misconduct or poor performance and the person, if any chosen by the employee within sub-section (1) make."*

18. From the claimant's un rebutted evidence on record, it is clear that the mandatory procedure provided for in section 41 of the Employment Act, was not adhered to. The respondent woke up and just dismissed the claimant. Procedural fairness was absent here.

19. Section 45 of the Employment Act stipulates: -

*(1) No employer shall terminate the employment of an employee unfairly.*

*(2) A termination of employment is unfair if the employer fails to prove: -*

*a) That the reason for termination is valid;*

*b) The reason for termination is a fair reason;*

*c) Related to the employer's conduct, capacity or compatibility."*

20. The respondent had the onus of discharging the burden placed upon him by this provision in order for it to shake off the claimant's claim. He did not and therefore it is not difficult for this Court to conclude that in absence of any evidence from the respondent, geared towards, and establishing that there was a valid reason for dismissal and the reason for dismissal, falling within the circle of those provided under section 45 (2), the dismissal was substantively unfair.

**(iii) Has the claimant proved his case for work place injury benefits?**

21. As I did indicate hereinabove, the factual contents of the claimant's pleadings and subsequently his evidence, were not controverted. The claimant presented evidence that a work place accident occurred on the 19<sup>th</sup> October 2015, thereby sustaining injuries.

22. From the medical report dated 12<sup>th</sup> August 2016, the claimant suffered: -

a) Deep cut wound – right mid fore-arm.

b) Cut tendon.

c) Pain and bleeding.

The medical report categorizes the injuries as grievous harm and soft tissue injuries.

23. The claimant did put forth particulars of breach of statutory duty and/or negligence attributed to the respondent. When one keenly looks at the witness statement, he cannot discern any evidence therefrom pointing towards the negligence and for breach of statutory duty. Pleadings have never been a substitute for evidence. The claimant wants to throw the Court into the realm of speculation. The Court is not ready for this, and hereby finds that the claimant has not proved on a balance of probabilities that the respondent was the author of the accident courtesy of a breach of statutory duties and or negligence.

**(iv) What are the reliefs if any available to the claimant.**

**(i) One month's salary in lieu of notice.**

Under this head I award the claimant one month's salary in lieu of notice, amounting to Kshs. 17,000. Section 49 (1) of the employment Act states: -

*“where in the opinion of the labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay the employee any or all of the following: -*

*Wages which the employee would have earned had the employee been given notice which he was entitled to under this Act or his contract.”*

24. This read together with section 36 of the Act forms basis for the award. In the circumstances the dismissal was without notice.

**(ii). Compensation.**

25. The claimant seeks for compensatory relief pursuant to the provisions of section 40 (1) (c), of the Act. Having found that dismissal was without procedural and substantive fairness, and having considered the circumstances under which the dismissal occurred, which I hold amount to an unfair labour practice, I award the claimant compensation under the provision to an extent of 6 month's gross salary, therefore Kshs. 102,050.

**(iii) Overtime not paid, house allowance, untaken leave days and public holidays worked on but not paid for.**

26. For these, I am not seeing any basis or evidence upon which I can make an award.

**(iv) severance pay at 20 days for every year worked.**

27. There is no evidence that the claimant was a member of any of those schemes brought forth in section 35 (6) of the Employment Act to disentitle him a relief sought under section 35 (5) of the Act. I subsequently award him service pay for each year worked at the rate of 15 days pay for each completed year. Therefore Kshs. 19,615.30.

**(v) General damages for pain and suffering.**

28. Having found that the claimant neither proved breach of statutory duty nor any act of negligence on the part of the respondent, I hereby decline to make an award under this head.

**(vi) Certificate of service.**

29. The respondent should issue a certificate of service pursuant to the provisions of section 51 of the Employment Act.

**(vii) Costs.**

30. As costs follow the event, costs in this matter shall be in favour of the claimant.

31. In the upshot, Judgment is hereby entered in favour of the claimant for: -

- (i) A declaration that the dismissal was substantively and procedurally unfair.
- (ii) One month's salary in lieu of notice – Kshs. 17,000.
- (iii) Compensation pursuant to the provisions of section 49 (1) (c) of the Employment Act, Kshs. 102,000.
- (iv) Service pay – Kshs. 19,615.30.
- (v) The respondent to issue the claimant with a certificate of service within 30 days of this Judgment.
- (vi) Costs of this suit are in favour of the claimant.
- (vii) Interest at Court rates from time of filing suit till full payment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

Delivered in the presence of

Wangira for the claimant.

No appearance for the respondent.