



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1760 OF 2017**

**JOASH NYONGESA MAKOKHA.....CLAIMANT**

**VERSUS**

**AMBOSELI COURT LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The cause herein was commenced by way of a statement of claim dated 30<sup>th</sup> September, 2017 through which the claimant alleges that he was unfairly terminated whilst engaged as a security guard by the respondent. He claimed several reliefs including compensatory damages for unlawful termination, salary in lieu of notice, overtime worked, unpaid leave and underpayment for the duration worked.
2. On its part, the respondent opposed the claim vide a response dated 5<sup>th</sup> February, 2018 through which it alleged that the claimant deserted duty with effect from 2<sup>nd</sup> September, 2015 hence left employment on his volition.
3. The employment relationship is not disputed. The contest is the manner and the reasons for which the same was severed.

**Claimant's case**

4. During the hearing, the claimant adopted his witness statement and list of documents to constitute part of his testimony in chief. It was the testimony of the claimant that he was employed by the respondent with effect from 31<sup>st</sup> May 2014 as a security guard and his last monthly salary was Kshs 10,000/=. He produced pay slips to evidence as much.
5. He averred that on 5<sup>th</sup> September, 2015, he was ordered by one of the respondent's supervisors, one Mr. Njuguna, to complete a leave Application form whereafter he was asked to proceed on mandatory leave. That he was asked to await to be recalled back to duty. He states that he was never recalled back to duty and upon enquiry, he was informed by the said Mr. Njuguna that his services were no longer required. He averred that he was summarily dismissed at that juncture.
6. It was his testimony that he was not accorded a fair hearing by the respondent prior to his termination. On cross examination, the claimant admitted that he was living in a house within the compound of the residence where he was stationed.

**Respondent's case**

7. The respondent called Ms. Margaret Gathoni Mbugua its Human Resource Manager who testified as RW1. She referred to her witness statement before court and prayed that the same be adopted as part of her testimony in chief. She stated that the claimant was terminated on account of insubordination and gross misconduct. That he was called in for a disciplinary hearing by his supervisor and he was given an opportunity to defend himself. It was thereafter that his services were terminated.
8. During cross examination, the respondent's witness admitted that no record of the disciplinary hearing was filed before Court though she averred that some notes were taken during the claimant's disciplinary hearing.

**Submissions**

9. Both parties filed written submissions. On his part, the claimant submitted that the claimant did not have valid reasons to terminate his services as stipulated under section 43 and 45(2) of the Employment Act. He further submitted that the respondent failed to subject him to fair process prior to dismissing him from service as required under the Employment Act.

10. The claimant further discounted the respondent's allegation that he absconded duty and averred that there was no evidence that the respondent made efforts to contact him. The claimant relied on several authorities including **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers vs Mombasa Sports Club, Mombasa ELRC Cause No. 440 of 2013, Simon Mbithi Mbane vs Inter Security Services Limited (2018) eKLR** and **Joseph Nzioka vs Smart Coatings Limited (2017) eKLR**.

11. The respondent in its submissions, maintained that the claimant deserted duty and prior to that, he had been accused of being rude to his superiors and had failed to obey orders. The respondent further submitted that it issued the claimant with warnings in respect of his behavior but he failed to heed the said warnings. The respondent further submitted that the claimant's desertion, made it impracticable for him to be accorded procedural fairness.

### **Analysis and determination**

12. Having considered the pleadings on record, the evidence on record and rival submissions by parties, the issues for determination can be distilled as follows;

- a) Whether the claimant deserted duty or was terminated?**
- b) If the claimant was terminated, was the termination unfair and unlawful?**
- c) Is the claimant entitled to the reliefs sought?**

### **Desertion or termination?**

13. The claimant alleges that he was sent on compulsory leave whereafter he was summarily dismissed without being accorded a hearing. The respondent on the other hand has submitted that the claimant failed to obey orders from his superiors at work and that he deserted duty.

14. RW1 in her written statement admitted that the claimant was dismissed for gross misconduct for failure to follow orders from its Managing Director. She further confirmed this fact during cross examination.

15. The employment relationship lasted for about 1 year 3 months, hence the parties had established contact and ordinarily, the channels of communication between them were well known.

16. The respondent did not state that it attempted to reach the claimant through his known and disclosed contacts.

17. It was only reasonable and prudent in the circumstances, for the respondent as an employer to contact the claimant using the known and disclosed channels of communication prior to dismissing him.

18. The Court in the case of **Mary Mumbi Kariuki v Director, Pamoja Women Development Programme [2015] eKLR**, found as follows;

**“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence...In the instant case, the respondent has not disclosed any action it took, in its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”**

19. The respondent in this case did not produce any evidence to demonstrate that it attempted to contact the claimant upon noting his desertion. The respondent ought to have ascertained the claimant's whereabouts and commenced the appropriate disciplinary process on account of the said desertion if at all.

20. In the circumstances, I find that the respondent has not proved that the claimant deserted duty.

21. Having found that the respondent has failed to establish that the claimant deserted duty, I now turn to determine whether the claimant's termination was unfair and unlawful.

### **Was the claimant's termination unfair and unlawful?**

22. The claimant has averred that he was summarily dismissed from service without any justifiable cause and without being subjected to due process.

23. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair.

24. In addition, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer.

25. Sub-sections 4 and 5 of section 45 stipulates the circumstances under which the termination would be unfair and also the factors to be

considered. On its part, section 46 stipulates the matters that do not constitute fair reasons for dismissal.

26. The respondent through its witness averred that the claimant was summarily dismissed for insubordination and gross misconduct. However, it did not adduce any evidence to support this assertion.

27. In the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, the Court of Appeal had this to say on the issue;

**“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45. The reason for termination of contract is the matter that the employer at the time of termination of the contract, genuinely believed to exist and which caused the employer to terminate the services of the employee...”**

28. Therefore, section 43 of the Employment Act placed a legal burden on the respondent to prove that there were reasons to dismiss the claimant and that it genuinely believed that such reasons existed at the time of the dismissal. In this case, no evidence was placed before court to prove that such reasons existed and as such, the respondent failed to discharge its burden as by law required.

29. That is not all. Besides, proving reasons for termination, an employer is further required under section 45 (2) (c) of the Employment Act to prove that the termination was in accordance with fair procedure. Section 41(1) of the Employment Act provides for an elaborate process that ought to be followed in achieving procedural fairness. It requires an employer to notify an employee of the intended termination. In this regard, the employee is to be notified the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

30. RW1 averred in her testimony before court that the claimant was taken through a disciplinary process but did not adduce any evidence to prove the same either in the form of an invitation to a disciplinary hearing or minutes of such a disciplinary hearing, if indeed one was conducted.

31. In the circumstances, I find that the respondent has failed to prove that it accorded the claimant procedural fairness and to that end, it failed to discharge the burden imposed by law.

32. The upshot of the foregoing, is that the respondent has failed to prove that the claimant's dismissal met the legal threshold hence I find that the same was unfair and unlawful.

33. I now move to consider the reliefs available to the claimant in the circumstances.

### **Reliefs**

34. The claimant has sought various reliefs against the respondent including salary in lieu of notice, overtime worked, unpaid leave, underpayment for the duration worked and compensatory damages for unlawful termination.

### **One month's salary in lieu of notice**

35. Section 44(2) of the Employment Act, prohibits an employer from summarily dismissing an employee without notice or with less notice. On the other hand, section 35 (1) (c) of the Act provides for a mandatory one month notice where an employee is on a monthly salary as the claimant herein. Subsequently, the court finds that the claimant is entitled to one month's salary in lieu of notice on account of the unlawful dismissal.

### **Unpaid leave**

36. The claimant has prayed for compensation for unpaid leave in the sum of Kshs 16, 295/=. However, no prove was tendered to substantiate this claim for instance, unapproved leave application forms and in absence thereof, this claim is denied.

### **House Allowance**

37. The claimant has prayed for house allowance in the sum of Kshs 29,330/= for the entire duration he was employed by the respondent. The respondent denied this claim and stated that the claimant was given accommodation at his station in Othaya. In cross examination, the claimant admitted being housed at the residence he was stationed to guard in Othaya. Accordingly, this claim therefore fails.

### **Unpaid public holidays**

38. The claimant has prayed for the sum of Kshs 11,406/= being unpaid holidays during the duration he worked for the respondent. He did not furnish evidence to prove that he worked during the said public holidays and was not compensated appropriately. Similarly, this claim fails for lack of evidence.

### **Underpayment of salary**

39. The claimant prays for the sum of Kshs 11,105/= being the sum of the underpayment due to him from May-September, 2015. He avers that the respondent paid him salary below that stipulated in the Minimum Wage Guidelines. The claimant's pay slips indicate that he was earning a monthly salary of Kshs 10,000/=.

40. The Regulation of Wages (General) (Amendment) Order (2015) provides for the minimum salary payable to a night watchman stationed in other areas as being Kshs 6,970.00. It is notable that Othaya where the claimant was stationed, falls under the category of "other areas" in the said Minimum Wage Order. Subsequently, I find that the claimant has not laid the basis for this claim as he was earning Kshs 10,000/= which is above the minimum wage for the said jurisdiction. This claim is therefore denied.

**Overtime**

41. The claimant prays for the sum of Kshs 146,885/= being unpaid overtime. There is no evidence adduced to confirm that the claimant worked overtime and was not compensated accordingly, hence the claim under this head fails.

**Compensatory damages**

42. The claimant has prayed for compensatory damages in the sum of Kshs 147,960/= which is equivalent to 12 months gross salary. Having found that the claimant's dismissal was unfair, I will award compensatory damages equivalent to two months' salary. This award has been informed by the length of the employment relationship which lasted for about 1 year 3 months.

**Orders**

43. In conclusion, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month's salary in lieu of notice 10,000.00  
Compensation equivalent to 2 months' gross salary 20,000.00  
Total **30,000.00**

44. The award shall attract interest at court rates from the date of Judgment until payment in full.

45. The respondent shall also bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For Claimant Mr. Namada

For the Respondent Mr. Nyaga

Court assistant Barille Sora

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**