



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2057 OF 2016**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT**

**VERSUS**

**VICKERS SECURITY SERVICES LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant is a registered union mandated to represent the industrial interests of employees in the private security industry.
2. The respondent is a duly registered security provider firm.
3. The Claimant filed his claim vide a statement of claim dated 5<sup>th</sup> October 2016 on behalf of the grievant Reuben Otsembo who is a member of the union in which he prays for the following remedies.
  - a) A declaration that the Respondents action of terminating the Grievant from employment was illegal, unlawful, unfair and inhumane’;
  - b) One month’s salary in lieu of notice Kshs. 12,221 in accordance to the Minimum wage Order 2015;
  - c) Terminal dues complied/computed in (Paragraph 10 annexure 5);
  - d) 12 month’s salary in compensation for unfair Dismissal;
  - e) Certificate of service;
  - f) Punitive damages;
  - g) An order for the Respondent to pay the Claimants costs of this claim plus interests thereon.
4. The Respondent did not enter appearance. The facts as pleaded in the statement of claim are therefore uncontested. The Court on 23<sup>rd</sup> September 2021 gave directions that the matter proceeds for formal proof.
5. The Claimant pleaded that the grievant who is its member was employed by the Respondent on the 15<sup>th</sup> November 2013 as a supervisor/rider with a salary of Kshs 12,000 per month.
6. The Claimant states that on 18<sup>th</sup> March 2014 the grievant was unfairly terminated when he fell sick and failed to report to work despite having informed the respondent that he was required to attend medical clinic and had been offered sick off for one week.
7. That when the grievant reported back to work on 24<sup>th</sup> March 2014 as per the doctors’ instructions, he was served with a suspension letter and on 31<sup>st</sup> March 2014 he was issued with a termination letter with the reasons that he was not ready to change and perform as per the required standards.
8. The matter was referred for conciliation but the respondent despite being served with letters calling for a meeting failed to respond or attend conciliation forcing the conciliator to issue a certificate referring the matter to litigation.

9. The Claimant union states that the Respondents' actions violate the constitution and the provision of the Employment Act on good labour practice and principles of natural justice as the grievant was denied an opportunity to be heard.

### **Evidence**

10. At the hearing of this matter the grievant, Reuben Otsembo asked the Court to adopt the contents of his witness statement dated 5<sup>th</sup> October 2016 as his evidence in chief. He produced the documents that were filed under the list of documents of same date as his documentary evidence. He then gave a brief oral testimony shedding light on some aspects of the statement, and the documents.

11. The totality of the grievant's testimony is largely a recitation of the factual contents of his pleadings. The summary of the pleadings as hereinabove brought forth suffices therefore. There shall not be any need to reproduce the same here.

12. At the time of writing this Judgment, the Claimant had not filed its written submissions. I will therefore proceed to do this Judgment minus the benefit of considering any submissions.

### **Analysis and Determination**

13. The Claimant asserts that the termination of the grievant's employment was unfair. The Employment Act on matters unfair termination is structured in a manner, revealing that two aspects must be considered by a Court faced with the claim. The procedural, and the substantive justification, aspects.

14. Section 43 of the Employment Act enjoins an employer, in a claim where termination of an employment contract is the subject matter, to prove the reason for termination of the contract. The stated provision of the law imposes a default implication. If the employer fails to prove the reasons, the termination shall be deemed unfair within the meaning of section 45 of the Act.

15. Under section 45 of the Act, the substantive justification for the termination can only be said to have been established where the employer is able to demonstrate that the reason(s) for the termination was valid and fair. This is a legal obligation placed on the shoulders of an employer.

16. In the instant matter, the Respondent did not place any material before Court from which it can be deduced what the reason(s) for the termination were, and that the reason(s) were valid and fair. In the upshot I find that the termination of the grievant's employment was substantively unfair.

17. On the procedural fairness aspect, section 41 of the Act is instructive. The employer must disclose to the employee in a manner that the latter can understand, his intention to terminate the employment contract, the grounds that informs the intention to, and subsequently give a chance to the employee to make a representation on that intention and the grounds. The employee should be allowed to be accompanied either by a colleague (where the employee is not a member of a union) or a shop steward (where the employee is a member of a union). This is not to say that an employee cannot choose not to be accompanied. Lastly the representation must be considered before the employer makes a decision on the termination.

18. The grievant testified and this was not controverted, that his employment was terminated without him being case taken through the process envisioned under section 41 of the Employment Act.

19. The Claimant placed before this Court a suspension letter dated 20<sup>th</sup> March 2014. Through this letter, the Respondent suspended the grievant from work for a period of 10 (ten) days, effective 20<sup>th</sup> March 2013 to 31<sup>st</sup> March 2014. The last paragraph of the letter read;

***“Please be reminded that the repeat of the same or any misconduct will attract a severe action from management team including termination of your service.”***

20. It is my considered view that for the alleged misconduct of absenteeism without authority, the grievant was punished.

21. It was the Claimant's case that when the grievant went back to work on the 31<sup>st</sup> March 2014, he was confronted with a termination letter dated 31<sup>st</sup> March 2014. A clear picture emerges from the letter, the termination was on account of poor performance and not the absenteeism that formed the basis of the suspension.

22. In this circumstance it is not difficult to conclude that the mandatory procedure provided for under section 41 of the Act was not adhered to, rendering the termination of the grievant's employment unfair in terms of section 45 of the employment Act, 2007.

23. Now I must turn to the reliefs sought by the Claimant. The Claimant sought one month's salary in lieu of notice. The termination letter purported to give the grievant a one week's notice, of its intention to terminate the contract. It is only in a summary dismissal situation that a lesser notice can be given, less than statutorily provided for, or as provided for in an employment contract. The situation here was not a summary dismissal one. The Respondent did not have any justification to issue a lesser notice than that contemplated in section 35 of the Employment Act. Consequently, I find that the grievant is entitled to a one month's salary in lieu of notice, pursuant to the provisions of section 36 of the Act. I award Kshs. 12,000 (Twelve Thousand).

24. The Claimant further claimed that the Court awards the grievant, a 12 month's gross salary, compensation for unfair termination. Having found that the termination was both procedurally and substantively unfair, and considered the circumstances like the manner in which it happened as hereinabove brought out, the extent to which the Respondent deviated from the law, and the length of period of employment that

were, I am inclined to grant the compensatory relief contemplated under section 49 (1)(c) of the Employment Act, to an extent of 5 month's gross salary, therefore Kshs. 60,000 (sixty two thousand).

25. Section 51 of the employment Act, places an obligation on an employer to issue the employee whose contract of employment he has terminated with a certificate of service. The Claimant's evidence that the same was not issued to him remains uncontroverted. The certificate of service should be issued to him.

26. Lastly, the Claimant has sought for punitive damages against the Respondent. No evidence or material has been placed before this Court to justify the claim, and form basis for the award sought. The Court cannot accept to be thrown into the realm of speculation. Consequently, I decline to award any punitive damages as sought.

27. Costs follow the event. The event here being a successful litigation, the Claimant gets entitled to an award of costs which I hereby grant.

28. In the upshot Judgment is hereby entered in favour of the Claimant for;

- a) One month's salary in lieu of notice - Kshs. 12,000;
- b) Compensation pursuant to section 49 (1)(c), 5 months' gross salary – Kshs. 60,000.
- c) A certificate of service to issue within 14 days of this Judgment;
- d) Costs of this suit.
- e) Interest at court rates from date of filing this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2021**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of;

Ms Wanyama for the Claimant.

No appearance for the Respondent.