



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1016 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ALFRED MAMU ONDWARI.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. INTRODUCTION

The Claimant has filed a memorandum of claim dated 14th September, 2016 against the Respondent praying for declaration that the Claimant’s employment was unlawfully terminated.

2. He avers he was employed as a security guard on 1st August, 2006 and his gross monthly salary was Kshs.9,800/=. He says he was dismissed by the Respondent on 15th February, 2015 by being asked to return his uniform and refusal to pay his salary.

3. The Respondent filed his defence dated 4th July, 2017. In his defence he admits he had employed the Respondent since 2006 and at a salary of Kshs.10,500/=.

4. He says that on 11th February, 2015 a robbery took place where Claimant was assigned duties. He says the Claimant did not try to stop the said breakout in the said premises.

5. The guards including the Claimant were all arrested for failing to stop a felony.

6. CLAIMANT’S EVIDENCE

The Claimant prays that the court finds his summary dismissal was wrong and unlawful.

He prays to be awarded:-

- a. House allowanceKshs.141,120/=
 - b. Three months salary in lieu of notice .Kshs.29,400/=
 - c. Overtime at 4 hours at Kshs.116 per day x 77 days Kshs.77,452/=
 - d. Gratuity at Kshs.980 x 8 years Kshs.98,400/=
 - e. Compensation for wrongful dismissal equivalent to 12 months Kshs.117,600/=
- All Totaling.....Kshs.473,272/=**

7. RESPONDENT’S EVIDENCE

The Respondent's evidence is that the Claimant was arrested with other guards for failing to prevent a felony in the premises where they were guarding. He was charged in court.

8. The Respondent further states that the Claimant never reported back to work after that and he never informed the Respondent the outcome of the case.

9. That the Claimant was aligned in court vide Criminal Case No.550 of 2015. That the Respondent dismissed the Claimant under Section 44 (4) (f) of the Employment Act.

10. The Claimant further according to the Respondent's evidence was paid a consolidated salary including house allowance and the days worked in February, 2015 as well as payment in lieu of notice.

11. The Respondent also says the Claimant went for his off days to cover for overtime. Also the Respondent avers that they remitted his NSSF and NHIF deductions. The Respondent prays therefore the claim be dismissed with costs.

12. The parties were to have filed their respective submissions by 8th November, 2021. The Claimant did not comply by that date and so the submissions are now overtaken by events.

13. The Respondent filed their submissions dated 29th October, 2021.

In their submissions they state that the Claimant was not dismissed but failed to report back to work after he was arrested together with the other guards for an offence of failing to stop a felony.

14. The Respondent attached several letters showing they tried to reach out to the Claimant. In their letter to Mlimbiine & Mungai Advocates apparently in response to their letter of 4th December, 2015 they pointed out that they were not aware whether the Claimant was cleared of the allegations.

15. They further stated that they would normally re-deploy their employees upon being cleared by the police or the court.

They told the said advocate to advise their client. This was by their letter dated 14th December, 2015. They reiterated the same advice, to yet another Claimant's advocate by the name Onyango Ndolo Advocates by their undated letter annexed to the Respondent's list of documents.

16. By the Respondent's letter dated 3rd September, 2018 they repeated to Onyango Ndolo Advocates that they expected the Claimant to inform them if he was cleared by the police or the court and also to return the company uniforms.

The Respondents contention is that the Claimant left employment on his accord as he never reported back to work after he was discharged by the court.

They relied on the case of **RUSIAH MISESI VS EAGLE HEIGHTS AFRIKA (K) 2019 eKLR** where it was held that the Claimant did not prove she was summarily dismissed by the Respondent as she did not produce any termination letter or other form of evidence to prove that she was dismissed by the Respondent on 4th August, 2014.

17. The Claimant was arrested and aligned in court in a criminal case.

He thereafter did not report back to work and did not inform his employer that he had been cleared by the court.

In his evidence in chief the Claimant said he went to office and was asked to return the uniform. He did not specify when he was discharged by the court and when he went back to the Respondent's office.

18. He does not say who took his uniform and what exactly was communicated to him. He however says he never got any termination/dismissal letter.

In contradiction to the evidence given in examination in chief the Claimant says he never went back to the Respondent's premises since his uniform was taken away.

19. The Respondent wrote several letters to the Claimant through his advocates dated 4th December, 2015 and another undated and a third one dated 3rd September, 2018 all intimating that the Claimant needed to go inform the Respondent if he was cleared of the criminal charges.

The Respondent stated they would deploy their employees in similar situations once they reported they were cleared of any charges by police or the court.

20. The Claimant admitted in cross examination that a letter was written to his advocates by the Respondent but he was not sure if they responded.

21. The court has considered critically the evidence and the facts of the case as adduced by both parties as well as the Respondent's

submissions.

On balance of probability the Claimant did not adduce evidence that he was terminated by the Respondent. He admitted once he was charged in court and was later discharged he did not go back to work.

He also did not inform the employer that he had been cleared by the court. He said the case took about one year.

22. Obviously the Respondent had in the meantime to get other employees to discharge the duties. The Claimant had a duty to inform the Respondent that he had been discharged and to seek re-deployment.

Otherwise the Respondent may not have had means of knowing if he was discharged or not and if he was willing to go back to work or not.

The fact that he never tried to find out the position from the Respondent all that time shows he was disinterested in going back to work.

23. The court has noted that the Respondent tried to reach out to the Claimant several times through his advocate but there was no response.

That shows that the Respondent did not intend to terminate the Claimant's employment but rather it was the Claimant who did not report back to his employer once his case was finalized.

24. In the case of **OMAR NDARO ZUMA VS MODERN COAST EXPRESS** it was held the import of Section 47(5) of the Employment Act that an employee alleging wrongful dismissal must lay before the court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say "my employment was unlawfully terminated". They must prove ingredients of the unfair termination or wrongful dismissal.

25. As in the above case in this instant case the court is unable to draw any ingredients of unfair termination. In fact the Claimant just simply sat put after he was discharged from the criminal case and was somehow waiting for the Respondent to call him back to work.

There was no way the Respondent was to know the status of the Claimant and recall him back to work unless the Claimant informed him.

26. In conclusion the Claimant failed to prove his claim as required in Section 47 (5) of the Employment Act and his claims for compensation for wrongful dismissal and pay for three months in lieu of notice fails as one without basis.

OTHER CLAIMS

Even if the Claimant did not prove he was unlawfully terminated, however he was entitled to the rights under Employment Act. One such right is house allowance. The house allowance is not consolidated in the Claimant's letter of appointment as provided in Section 31(2)(a) where exemption to housing or house allowance is where provisions is consolidated as part of employees salary and is stipulated in the letter of appointment. This is not provided in the Claimant's contract. Even though the pay slip shows house allowance was Kshs.1,575/=. The same was also below the minimum wage for a security guard and so house allowance is also not adequately provided.

So I award him house allowance as prayed of Kshs.141,120/=. The overtime and gratuity are not proved and are both declined.

CONCLUSION

I enter judgement in favour of the Claimant for house allowance of Kshs.141,120/= plus interest till payment.

The court is aware that costs follow the events but because the Claimant failed to prove his case no costs will be awarded.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF NOVEMBER, 2021

ANNA NGIBUINI MWAURE

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE