



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAKURU

CAUSE NO.1214 OF 2015

FRANCIS MADEGWA SHITEMI CLAIMANT

VERSUS

CORPORATE SECURITY SERVICES LIMITED..... RESPONDENT

JUDGEMENT

On 21st August, 2012 the claimant was employed by the respondent as operations officer at a wage of ksh.15, 000 per month.

On 23rd October, 2014 the claimant went on leave and on 17th November, 2014 he was issued with notice of termination of employment with effect from 23rd December, 2014.

The claim is that the respondent alleged that the claimant was of unsatisfactory work performance which was false and without evidence. The claimant knew the underlying reasons for his termination of employment arose from his persistent claim for compensation for work injury on 5th October, 2012. The termination of employment was therefore unfair and without due process. The claimant was not issued with notice; there was no hearing or any reasons.

The claimant is seeking the following dues;

- a) Payment for 10 days unpaid in 2014 at ksh.7,143;
- b) Overtime pay for 4 hours each day Ksh.272,160;
- c) Payment of unpaid public holidays ksh.22,000;
- d) Payment of off days ksh.48,000;
- e) Compensation for unfair and unlawful termination of employment ksh.180,000; and
- f) Costs of the suit.

The claimant testified that upon employment he worked diligently until 23rd October, 2014 when he went on leave after two years and before completing leave he was served with letter terminating employment on the grounds that his work was poor. That his work related to supervising the night security guards and checking on them and file returns. The check lists for guard on duty were signed and filed by the respondent.

For the two years of work he had earned 42 days of leave and he took 52 days of annual leave. Each day he worked for 4 hours overtime and without compensation.

On public holidays he would be at work and in the year 2013 he did not take off days. The rest days were not uniform and in the year 2014 he would rest on Saturday or Sunday since there was a reliever.

The defence is that the claimant was employed on contract from 21st August, 2012 at a wage of ksh.15, 000 per month and he was entitled to a rest day each week and required to perform his duties as directed which he failed to do.

On 13th November, 2014 the claimant was summarily dismissed vide notice dated 7th November, 2014 and taking effect on 23rd December, 2014 on the grounds of negligence and careless performance of duty contrary to his employment contract. The claimant refused to visit all night spots allocated to him and on the few he attended he failed to supervise the guards leading to negative reports by clients. This resulted in poor work performance and justified summary dismissal.

On the claims made, the claimant enjoyed annual leave of 52 days over and above what was due at 42 days, there was no overtime work and on the public holidays at work he was given a leave or off day and the claims made should be dismissed with costs.

The respondent called James Owala Ngwalla the human resource and administration manager and who testified that the claimant failed to perform his duties as a supervisor, he left the work sheets blank and without the night guards signing leading to loss of funds and clients. He did not visit some sites and the returns filed would be used to pay the guards. Due to complaints by clients, he was issued with notice of summary dismissal.

That the claimant went on annual leave and exceeded his days as due. The claimant worked for fewer hours as shown on the work sheets and no overtime pay is due. No notice pay is due as the notice terminating employment gave notice and termination of employment was justified due to poor work performance.

Both parties filed written submissions.

By notice dated 7th November, 2014 the respondent terminated the claimant's employment on the grounds that he was of *unsatisfactory service*. Such notice was to take effect from 24th November to 23rd December, 2014 a period of one month.

Termination of employment due to unsatisfactory service or poor work performance is regulated under the provisions of section 41 of the Employment Act, 2007;

(1) 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 this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The employer must issue notice to the employee giving the reasons and intention to terminate employment and allow the employee to attend and show cause why such employment should not be terminated. The employee should be allowed to attend with another employee of his choice.

In **Jane Samba Mukala v Ol Tukai Lodge Limited Cause Number 823 of 2010** the court held that;

a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. ...

It is therefore not sufficient to cite poor or unsatisfactory work performance or service. The employer must do more before terminating employment on such grounds.

In this case, while the claimant was on annual leave he was issued with notice terminating employment without the respondent taking any due process and contrary to section 41 of the Act which resulted in unfair termination of employment contrary to section 45 of the Act and is entitled to compensation pursuant to section 49 of the Act.

The claimant was last earning Ksh.15, 000 and had served for two years and compensation of two (2) months is found reasonable and appropriate all at ksh.30, 000.

The claimant is seeking 10 days of untaken leave days. Termination of employment was during the claimant's annual leave. He had worked for the respondent for 2 years and under section 28 of the Act he had earned 42 days in total. He enjoyed 52 days over and above what was due and cannot claim more.

On the claim for overtime pay, the claim is that the claimant worked for 4 hours each day beyond the normal work hours. The claimant has taken a multiplier of 30 days each month for 2 years.

The claimant testified that he took his annual leave of 52 days. He enjoyed an off day each week on Saturday or Sunday. To claim for

overtime pay for each day of the months and without taking into account the annual leave and off/rests day is dishonest and not justified. Such negates the claim.

On the claim for pay for untaken public holidays for 11 days for 2 years, the public holidays taken in this regard are not particularised. Public holidays are specific and certain.

The claim for off days is not justified as the claimant enjoyed such rest days.

Accordingly, judgement is hereby entered for the claimant against the respondent for payment of compensation of 30,000 and 50% of his costs.

DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

.....and.....