



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 941 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

WASIKE HASHIM.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim on 23rd May 2016 alleging that he was illegally, and unlawfully dismissed by the Respondent without any warning or justifiable cause. He alleges that he was summary dismissed even after working diligently for 3½ years. He prays for:-

- (a) Declaration that the summary dismissal was wrongful, unfair and discriminatory
- (b) One month's salary in lieu of notice Kshs.10,500.00
- (c) The equivalent of 12 months' salary as damages for wrongful dismissal Kshs.126,000.00
- (d) Leave and severance pay for 3.5 years Kshs.65,973.00
- (e) Certificate of service
- (f) Costs of the claim

Total Kshs.202,473.60

2. The Respondent filed its memorandum of response and counter claim on 8th March 2019, alleging that the Claimant was not dismissed but left work on his own accord by failing to report to his work station from 18th February 2015.

3. It denies that the Claimant is entitled to the reliefs sought and counter claims one month's salary in lieu of notice and unreturned boots, raincoat, the baton and staff pass.

4. Finally, the Respondent prays that the Claimant's suit be dismissed with costs and the counter claim upheld.

Claimant's Case

5. The Claimant avers that he was employed by the Respondent on 16th August 2011 and worked until 17th February 2015 when he was unlawfully summarily dismissed without any valid or justifiable reason. He further avers that the dismissal is oppressive, malicious and unconstitutional. That he had served the Respondent diligently and the Respondent did not pay his dues. That at the time of termination, he was earning Kshs.10,500.

Respondent's Case

6. The Respondent avers that Claimant absconded duty, he failed to report to his place of work without any explanation or permission from

18th February 2015. That on 16th February 2015, the Claimant was found by his Supervisor watching football in the restroom during working hours contrary to the rules and regulations of the Company. It further avers that the Claimant was issued with a warning letter on 18th February 2015 and had previously received other warnings for not taking his work seriously and was not a diligent employee.

7. Finally, the Respondent avers that the Claimant is not entitled to any of the reliefs except certificate of service.

8. The Respondent's counter claim prays for one month's salary in lieu of notice since the Claimant left without notice. It also prays for the return of its property which the Claimant did not return as well or costs of the suit and counter claim.

Evidence

9. The Respondent employed the Claimant on 16th August 2011 as a security guard and by February 2015 his salary was Kshs.10,500 per month. The Claimant was a member of the NSSF and NHIF. In the course of his employment, the Claimant received several warnings for instance on 6th May 2012, he was found asleep at his work place, and was cautioned.

10. On 9th February 2014, he absented himself from duty at JCC Mlolongo. He apologised in writing on 11th February 2011. On 31st March 2014, he was found asleep at his place of work. He promised in writing not to repeat the same.

11. In 2012, 2013 and 2014, the Claimant proceeded on annual leave for 25 days. He applied for the leave on the three occasions.

12. The Claimant's clearance certificate indicates that he was discharged in 17th February 2015 and did not return boots, rain coat, tie, baton and the staff pass. The Claimant denied knowledge of the warning orders, leave days taken, warning letter dated 18th February 2015 and the clearance certificate dated 25th February 2015. He testified that he was terminated but had no document to show the date of termination. He appeared to suggest that he was dismissed on 17th February 2015, the alleged date of clearance.

13. He told the Court on cross examination that all the signatures attributed to him were fake though he had previously not contested any of the documents.

14. His response to the counter claim was that the supposedly unreturned items were added by the Respondent after the alleged clearance.

15. There is no evidence on record that the Claimant was taken through any disciplinary process and the Respondent led no evidence to show that it attempted to contact him after the alleged desertion of duty.

Claimant's Submissions

16. The Claimant raised and responded to several issues. Counsel submitted that the Claimant was terminated unfairly in that he was neither given a termination notice nor accorded a hearing before termination. Counsel raised the issue of the warning letter dated 18th February 2015 issued after the Claimant had allegedly cleared with the Respondent on 17th February 2015. That the letter had no letter head of the Respondent. That the Respondent's witness was uncertain whether the Claimant had cleared with the Respondent or absconded duty. It was further submitted that the Respondent's witness was not credible.

17. On the counter claim, it was submitted that the Respondent's witness admitted that no demand for the items had been made.

18. On invitation for a disciplinary hearing, Counsel submitted that RW1 provided no evidence of any invitation. That the allegation that the Claimant was invited on the 17th February 2015 was not supported by any evidence.

19. Counsel submitted that no disciplinary hearing took place. Reliance was made on the decision in **Kenya Union of Commercial Food and Allied Workers Union v Meru North Farmers Sacco Ltd [2017] eKLR** where the Court held that –

“Whatever reason or reasons that arise to cause an employer to terminate an employee that employee must be taken through the mandatory process outlined under Section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrants summary dismissal.”

20. Reliance was also made on Section 41 of the Employment Act coupled with the submission that the Section is couched in mandatory terms *“The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by hearing in due cognisance of the fair hearing principles as well as natural justice tenets”* Counsel submitted.

21. Further reliance was made on the equally relevant Court of Appeal decision in **CMC Aviation Ltd v Captain Mohammed Noor [2015] eKLR** on the difference between unfair and wrongful termination.

22. On leave, Counsel submitted that the Claimant had disputed having taken leave on the three occasions documented by the Respondent and filed in Court. That the Claimant had established his case on a balance of probabilities that this termination was unfair and should be declared as such and the reliefs sought granted.

23. Reliance was also made on the decisions in **Hosea Akunga Ombwori v Bidco Oil Refineries Limited [2017] eKLR** and **Milicent Adede v International Child Support Africa [2014] eKLR** where courts invoked Section 41 to find the terminations procedurally flawed.

Respondent's Submissions

24. The Respondent commenced its submissions by responding to the Claimant's submissions on the facts and mistake by the Respondent's witness on the incident dated 16th February 2015.
25. On termination it was submitted that the Claimant deserted the workplace after receiving the warning letter on 18th February 2015. That the Claimant reported back on 25th February 2015 to clear with the employer and was not dismissed since the clearance form does not indicate so. That the Claimant did not prove the allegation of dismissal or unlawful termination that he deserted work. Reliance was made on Section 47(5) of the Employment Act on the burden of proof as well as the decision in **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**.
26. That the Claimant did not prove that he was terminated by the Respondent as he who alleges must prove as provided by Section 107 of the Evidence Act, it was submitted.
27. On the reliefs sought, it was submitted that the claim for payment in lieu of notice is only sustainable where Sections 49 read together with Section 45 of Employment Act apply. In other words where there is a finding of unfair or unjustified termination.
28. That the Claimant had to prove that he unfairly dismissal. The decision in **Peyiai Nkoitoi v Aruba Mara Camp Safaris Ltd [2021] eKLR** where the Court cited with approval the decision in **CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR** was relied upon to underscore the importance of proof in evidence. Lastly reliance was made on the holding in **Rudolf Shitandi Daraja v Zablon Juma Atulo t/a Z.J. Atulo & Company Advocates [2016] eKLR**.
29. That the Claimant was not entitled to a declaration of unlawful dismissal or the one month's salary in lieu of notice.
30. On leave and severance pay for 3.5 years, it was submitted that the Claimant led no evidence on the number of leave day or the portion of severance pay. On severance pay it was submitted that the Claimant was neither declared redundant nor terminated on the account of redundancy. The decision in **Irene Mweni Kimeu v Mercy Makena t/a Court Yard Garden Hotel [2021] eKLR** was used in support of the proposition.
31. Words to same effect were expressed in **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR**. It was submitted that the two heads were without merit and should be dismissed.
32. On the counter claim it was submitted that the clearance certificate indicated the items not surrendered by the Claimant by the time he deserted work.
33. On salary in lieu of notice it is contended that since the Claimant left without notice on 18th February 2015, the Respondent was entitled to invoke Section 36 of the Employment Act and claim one month's salary in lieu of notice.

Determination

34. After careful consideration of the pleadings, evidence on record and submissions, the issues for determination are
- (a) Whether the Claimant's termination was unlawful;
 - (b) Whether the Claimant is entitled to the reliefs sought.
35. Section 34, 40, 41, 42, 43, 44, 45, 46 and 47 of the Employment Act provide the statutory infrastructure on termination of employment at the instance of either party and courts have on innumerable instances reiterated that for a termination to be deemed lawful, it must meet the threshold for substantive and procedural fairness as provided by the law. (See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**).
36. In particular Section 45 of the Employment Act sets out the substantive and procedural requirements to be satisfied for a termination to pass the fairness test.
37. In the instant case, the Claimant testified that he was terminated by the Respondent but was not given a termination letter. He further testified that he was unlawfully dismissed on 17th February 2015. The clearance certificate indicates that the Claimant as discharged on 17th February 2015 though he purportedly received a warning letter dated 18th February 2015. The copy on record has an acknowledgment signature which resembles that of the Claimant which he denied.
38. Further, the Claimant testified that before termination he had not been issued with any warning or invitation to appear for disciplinary hearing. Although the Claimant denied having received the warning letter dated 18th February 2015, he had at least three (3) previous warning orders for misconduct at the workplace which he denied in Court but apologised in writing in two instances.
39. On leave, the Claimant testified that he proceeded on annual leave once, yet documentary evidence on record is clear that he applied and was granted 24 days annual leave in 2012, 2013 and 2014. He told the Court that the leave application forms were fake.
40. In sum, the Court found the Claimant economical with the truth.

41. On the other hand, the Respondent alleged that the Claimant absconded duty from 18th February 2015. It led no evidence of the actions it took to establish contact with the Claimant or serve a show cause or dismissal letter or even notified the Labour Office for the purpose of closure of the Claimant's employment. See **Boniface Francis Mwangi v B.O.M Iyego Secondary School [2019] eKLR**, **Simon Mbithi Mbane v Inter Security Services Ltd [2018] eKLR** and **John Nzioka v Smart Coatings Ltd [2017] eKLR** on sustainability of the defence that an employee absconded duty. The employer is required to demonstrate that it made reasonable attempts to contact the employee and subsequently issued a show cause and/or termination letter.

42. It is the finding of the Court that the Claimant's allegation that he was terminated on 17th February 2015 without compliance with the prescribed procedure remain uncontroverted.

43. In addition, the Respondent has not led any evidence that the Claimant was taken through the procedural precepts of a fair termination as prescribed by the Employment Act, 2007.

44. I now turn to the reliefs sought by the Claimant

(1) A declaration that the summary dismissal was wrongful, unfair and discriminatory

45. The Claimant led no evidence to demonstrate that the dismissal was discriminatory though it was unfair. It is so declared.

(2) One month's salary in lieu of notice Kshs.10,500

46. This claim is merited and the Court awards the sum of **Kshs.10,500** as prayed.

(3) The equivalent of 12 months' salary as damages for wrongful dismissal Kshs.126,000

47. It is not in dispute that the Claimant served for 3½ years and desired to continue serving. It is also important to note that the Claimant had three warning orders and though he denied them he apologised in writing for two of them. He did not contest any of them as unjustified. Finally it is evident that the Claimant substantially contributed to his termination. All circumstances considered, the Court awards the equivalent of 3 months' salary under Section 49(1)(c) of the Employment Act, the sum of **Kshs.31,500**. This award is comparable to the three (3) months awarded in **Liz Ayany v Leisure Lodge Ltd [2015] eKLR** where the Claimant had served for 4 years.

48. In **KUCFAWU v Kisii Bottlers Ltd [2020] eKLR** where the Claimant had served for 12 years, the Court of Appeal awarded the equivalent of 3 months because of the employee's conduct among other considerations. In **Daniel Kiplagat Kipkeibo v SMEP Ltd [2016] eKLR** the Court awarded the equivalent of 6 months' salary where the Claimant served for about 6 years.

(4) Leave and severance pay for 3.5 years Kshs.65,973

49. This is an amorphous claim which the Claimant was unable to substantiate in Court when re-examined on it. It is unclear how the two separate claims are apportioned. The claim presupposes that the Claimant was declared redundant which is not the case. The claim is declined.

(5) Certificate of service

50. The Claimant is entitled to a certificate of service.

(6) Costs of the claim

51. The Claimant is awarded costs of the suit.

Counter claim

52. The Respondent prays for two reliefs namely –

- (i) One month's salary in lieu of notice Kshs.10,500
- (ii) Unreturned items namely boots, raincoat, tie, baton and staff pass;
- (iii) Costs for the counter claim.

53. Having found that the Respondent has failed to establish that the Claimant absconded duty, the claim for one month's salary in lieu of notice is unsustainable and is declined.

54. On unreturned items, the discharge certificate shows that the Claimant was discharged on 17th February 2015 but the certificate is dated 25th February 2015, almost eight days after the Claimant left the organisation. In addition, the certificate is not signed by any person for authenticity and is thus unreliable. Finally, the Respondent led no evidence that it had demanded the items from the Claimant.

55. The prayer for the return of company property identified in paragraph 19 of the Respondent's memorandum of response and counter claim is declined.

56. Costs of the counter claim are declined.

57. In the final analysis judgment is entered for the Claimant in the sum of Kshs.42,000/= with costs. Interest at court rates from date of judgment till payment in full.

58. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE