



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. 24 OF 2021

(Being an appeal from part of the judgment and decree given on 11.03.2021 by Honourable Albert Lesootia,

Principal Magistrate, in CMC, ELRC No. 897 of 2019 at Mombasa)

XFOR SECURITY SOLUTIONS (KE) LTD.....APPELLANT

- VERSUS -

SAMUEL TSIMBA NDONGA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th December, 2021)

JUDGMENT

The respondent filed a memorandum of claim in the lower Court on 16.10.2019 through C.O. Tolo & Company Advocates. The respondent (claimant) claimed against the appellant:

- a) One-month salary in lieu of termination notice Kshs. 17, 000.00.
- b) Unpaid house allowance from December 2012 to February 2019 Kshs. 188, 700.00.
- c) Unpaid leave-pay for December 2012 to December 2018 Kshs. 82, 385.10.
- d) Unpaid pro-rata leave for January 2019 to February 2019 Kshs. 1, 144.24.
- e) Unpaid salary for January 2019 Kshs. 17, 000.00.
- f) Unpaid public holidays for December 2012 to January 2019 Kshs. 39, 231.00.
- g) Compensation for unfair termination 17, 000 x 12 months Kshs. 204, 000.00.
- h) Total Kshs. 549, 460.34.

The respondent prayed for judgment against the appellant for:

- 1) Payment of Kshs. 549, 460.00.
- 2) Costs of the claim and interest thereon at Court rates.
- 3) A declaration that the dismissal of the claimant from work was unfair and unjust.
- 4) The claimant be issued with a certificate of service.
- 5) Any other or further relief as the Honourable Court may deem just.

The appellant filed the response to the memorandum of claim on 20.11.2019 in person. The amended memorandum of response was filed for the appellant on 28.08.2020 and through Mulama & Company Advocates. The appellant admitted the contract of service between the parties. The appellant pleaded that the gross monthly salary of Kshs. 17, 000.00 included house allowance. The appellant further denied the alleged

unfair termination. The appellant admitted that the respondent had accrued leave days, 26 in 2016, 26 in 2017 and 14 in 2018. The appellant further pleaded that respondent's salary for January 2019 was paid into his bank account on 15.02.2019. The respondent prayed that the claimant's suit be dismissed with costs.

The trial Court delivered judgment on 11.03.2021 and found that the procedure leading to termination was unfair rendering the termination unfair for want of compliance with section 41 of the Employment Act, 2007 on notice and hearing. The trial Court awarded the respondent as follows:

- a) The declaration that the claimant's employment was unfair.
- b) One-month salary in lieu of notice Kshs. 17, 000.00.
- c) Accrued leave days Kshs. 48, 221.15.
- d) Unpaid salary for January 2019 Kshs. 17, 000.00.
- e) 3 months' compensation for unfair termination Kshs. 51, 000.00.
- f) Total sum Kshs. 133, 221.15.
- g) Respondent to bear costs of the claim.
- h) Interest on sum awarded at court rates from the date of judgment until payment in full.

The appellant filed the memorandum of appeal on 09.04.2021. The appellant appealed against:

- a) The award of Kshs. 17, 000.00 unpaid salary for January 2019.
- b) Award of one-month salary in lieu of notice Kshs. 17, 000.00.
- c) Award of three months' salary compensation for unfair termination Kshs. 51, 000.00.

The appellant appeals upon the grounds that the learned trial Magistrate erred in law and fact as follows:

- a) In awarding unpaid salary for January 2019 when the respondent had not sufficiently demonstrated that salary had not been paid by the appellant.
- b) In arriving at contradictory findings on desertion of duty by the respondent by on the one hand finding that the the respondent had deserted his duties while on the other faulting the appellant for failing to make reasonable attempts to contact the respondent once he had deserted his duties and thus ultimately arriving at a wrong conclusion that the respondent was unfairly terminated from employment by the appellant.
- c) In failing to appreciate that no factual evidence had been tendered by the respondent that sufficiently demonstrates that he was procedurally and unfairly terminated from employment on 18.04.2019 and the learned magistrate found.
- d) In finding that the respondent was unfairly and unlawfully terminated from employment by the appellant and making an award of one-month's salary in lieu of notice and 3 months' salary compensation.

The appellant prayed for:

- a) The appeal be allowed.
- b) That part of the judgment delivered on 11.03.2021 making an award for unpaid salary for the month of January 2019, one-month's salary in lieu of notice, and three months' salary for compensation for unfair termination and decree herein be set aside in their entirety and substituted with an order for dismissal of those three awards with costs to the appellant.
- c) Costs of the appeal be borne by the respondent.

Submissions on the appeal were filed for the parties.

The **1st issue** is whether the respondent was entitled to January 2019 salary as awarded by the trial Court. The appellant submits that the appellant testified that by 15.02.2019 he noted that his salary had not been deposited in his bank account as expected. The further respondent's submission is that the respondent's witness Lenus Mwakio testified that the salary had been paid per the payslip for January 2019 which was exhibited. It is further submitted for the appellant that in considering the issue the trial Court found that the exhibited payslip was for January 2020 and not January 2019. The appellant submits that it agrees with that finding by the trial Court but adds that the claimant had failed to discharge his burden of proof as required of him under section 107 of the Evidence Act, Cap. 80 Laws of Kenya. Further the

respondent had not exhibited his bank statement to show by 15.01.2019 the salary had not been credited in his bank account. The award should therefore be set aside as the trial Court erred in shifting the burden of proof to the appellant.

For the respondent, it was submitted that section 10 of the Employment Act, 2007 required the appellant as the employer to keep records on payment. The respondent failed to provide evidence of the payment.

The Court has considered the submissions and finds that in so far as the appellant relied on the exhibited January 2020 payslip to establish payment of the January 2019 salary, the trial Court did not err in finding that devoid of any other evidence of payment and remittance of salary for the said month the pay-slip before the Court was suspect and did not prove payment of the salary in issue. The Court finds that the trial Court did not shift the burden of proof to the appellant because at paragraph 11A of the amended response to the memorandum of claim, the appellant had pleaded and alleged that the claimant's salary for the month of January 2019 was paid to his bank account on 15.02.2019 and the Court returns that having made such allegation, the appellant acquired the burden to establish the allegation but had failed to do so as found by the trial Court. DW2, the Human Resource Manager had testified thus, “ **I don't have evidence of payment of the claimant's January salary.**” The trial Court did not err in awarding the January 2019 salary and the Court returns that ground of appeal will collapse.

The **2nd issue** is whether the trial erred in finding that the termination was unfair for want of due procedure and after finding that the respondent had indeed deserted duty. The respondent's evidence was that his last day at work was on 31.01.2019 and on 01.02.2019 he did not report at work. He further, testified that he did not inform the appellant that he was not going to report on duty. While testifying that he went to the respondent on 03.02.2019 he resumed duty on 18.04.2019. In re-examination the respondent again in a contradictory manner stated that he had an event on 31.01.2019 and got terminated verbally when he resumed duty on 02.02.2020. DW2 had testified that the respondent deserted duty from 01.02.2019 and resumed work in April 2019. The trial Court found (in this Court's findings, correctly so) that the respondent had deserted duty effective 01.02.2019 and had failed to inform the respondent about his predicament – and that it was doubtful that the respondent had failed to work effective 01.02.2019 due to injuries he alleged he had sustained. The Court finds the respondent's contradictory and incoherent testimony cannot be trusted and that the trial Court rightly found thus, “... **The evidence point to the fact without authority or good reason the claimant indeed deserted duty on the 01.02.2019 and only returned to the respondent on the 18.04.2019.**”

The trial Court further correctly found that the appellant attempted to reach the respondent by telephone but the calls were unanswered or disconnected. The Court finds that in such circumstances, the appellant was entitled to consider the contract of service terminated effective 01.02.2019 when the respondent deserted duty, the desertion essentially amounting to resignation by conduct of the respondent's absence without leave, authority or reasonable and lawful cause.

The Court finds that the trial Court erred in finding that even if the claimant had absconded duty, he ought to have been given a notice and a hearing when he purported to resume duty on 18.04.2019. The evidence was that the parties considered the contract of service to have lapsed effective 01.02.2019 when the claimant absconded and indeed, the claimant had not purported to claim payment for the period 01.02.2019 to 18.04.2019. The Court finds that on 18.04.2019 there existed no employment relationship and the trial Court had erred in finding that the appellant had to subject the respondent upon the procedure of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007 whereas the contract had long been terminated on 01.02.2019 by the respondent's resignation by his conduct of desertion. The appellant's submission that there was no unfair termination on account of procedural unfairness (as found by the trial Court) is therefore upheld. Consequently, the award for 3 months' salaries in compensation and one-month salary in lieu of termination notice will be set aside as prayed for the appellant.

To answer the **3rd issue** for determination the Court returns that considering the parties' margins of success each will bear own costs of the appeal.

In conclusion, the appeal is hereby determined with orders:

- 1) The judgment and decree by the trial Court given on 11.03.2021 is varied by setting aside the award of one-month salary in lieu of notice Kshs. 17, 000.00; and, compensation for unfair termination Kshs.51, 000.00; and the declaration that the termination of the claimant's employment was unfair.
- 2) The appellant to pay the respondent a sum of **Kshs. 65, 221.15** plus costs and interest as awarded by the trial Court's judgment and as varied in order (1) above.
- 3) Each party to bear own costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 10TH DECEMBER, 2021.

BYRAM ONGAYA

JUDGE