



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1658 OF 2016**

**(Before Hon. Justice Dr. Jacob Gakeri)**

**JOHN MWASHI ASHANJI.....CLAIMANT**

**VERSUS**

**MSHAMBA HOUSING CO-OPERATIVE SOCIETY.....RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this suit by a statement of claim dated 17<sup>th</sup> August 2016 and filed in Court on 18<sup>th</sup> August 2016. The Claimant alleges that he was unlawfully terminated on 4<sup>th</sup> June 2015 and prays for –

- (a). Pay in lieu of notice..... Kshs.7,000.00
- (b). Service pay for 9 years..... Kshs.36,346.00
- (c). Pay in lieu of leave 2015..... Kshs.7,000.00
- (d). Damages..... Kshs.84,000.00
- (e). Payment for services rendered for 9 years..... Kshs.493,631.40
- (f). Terminal dues..... Kshs.627,977.40
- (g). Interest on amount not paid..... Kshs.95,243.24

**Total..... Kshs.723,220.64**

2. The Respondent filed its statement of defence on 27<sup>th</sup> October 2016. The Respondent denied that the Claimant was its former employee but admitted that he was a casual employee and was lawfully terminated after absconding duty and was afforded an opportunity to appear before the Respondent's Board on 4<sup>th</sup> June 2015 but did not and was therefore dismissed. It denied liability for payment of dues to the Claimant and prayed for dismissal of the suit with costs.

3. The Claimant filed a response to statement of defence on 4<sup>th</sup> November 2015.

**Claimant's Case**

4. The Claimant avers that he was employed by the Respondent as a casual security guard in September 2005 until December 2005 when his terms changed to permanent effective 1<sup>st</sup> January 2006 until 4<sup>th</sup> June 2015 when he was dismissed.

5. It is also averred that the Claimant rendered services dutifully and with fidelity 9 years, 6 months. That at the date of termination he was entitled to -

- (a) Payment in lieu of notice and leave bonus
- (b) Overtime worked not paid

(c) Unremitted service pay for 9 years

(d) Pay of any outstanding pay.

6. It is further averred that at the hearing, the Claimant would seek records from the Respondent relating to his employment and termination practice.

### **Respondent's Case**

7. The Respondent avers that the Claimant was not a permanent employee but a casual. That the Claimant was lawfully terminated after he absconded duty and failed to appear for a hearing slated for 4<sup>th</sup> June 2015.

### **Evidence**

8. Both witnesses (CW1 and RW1) adopted their written statements on record and were cross examined.

9. CW1 confirmed that he was given letter of employment but did not file a copy in Court. That he did not abscond duty and did not receive an invitation for the meeting on 4<sup>th</sup> June 2015. He testified that when he reported to work on a day he could not remember, the Secretary told him that there was no work for him. He denied having signed any document from the Respondent.

10. On re-examination the Claimant testified that he served from 2006 – 2015 and received no warning letter from the Respondent and was not invited for any meeting.

11. RW1 testified that the Claimant was not terminated but absconded duty and attempts to trace him were unsuccessful because he did not pick calls which culminated to a dismissal. He told the Court that the Claimant was employed as casual in 2015 because the new board found no records on his previous employment if any.

12. On cross examination, he confirmed that the Claimant worked for only two months and absconded duty in June 2015. That attempts to reach him through his phone were unsuccessful. The Secretary's attempt to reach him were also unsuccessful. Consequently, the Respondent was forced to hire another guard. He also confirmed that the Claimant had not worked for the Respondent for 9 years as alleged and was employed as a casual.

13. On re-examination, the witness testified that the Claimant did not collect his dues and he refused to attend the meeting with the board even after being notified of the same.

### **Claimant's Submissions**

14. The Claimant identified three issues for determination namely:

- i) Whether the Claimant's termination by the Respondent was fair and in compliance with the Employment Act;
- ii) Whether the Respondent heard the Claimant's representations before terminating him;
- iii) Whether the Claimant is entitled to the remedies sought.

15. On termination, the Claimant submitted that he was not questioned over the said allegations of negligence and improper performance of duty neither was he heard before termination. That he reported to work on 4<sup>th</sup> June 2019 and was sent back at the gate. That he was told to claim his dues for the three days worked for the month but was never paid.

16. The Claimant relies on Section 45 of the Employment Act, 2007 on the validity of the reason for termination and fair procedure. Reliance is also made on Section 41 on the opportunity to be heard.

17. It was submitted that the Respondent did not comply with Sections 41 and 45 of the Act. That the Respondent failed to prove the reason for termination of the Claimant.

18. As to whether the Respondent heard the Claimant's representations, it is submitted that he was not given an opportunity to explain himself. That the Respondent had not filed evidence on how it attempted to contact the Claimant. That the Claimant provided an application of leave filled out in 2007, an NSSF contribution return form for 2006 and 04/2013 and NSSF member contribution for the period between 5/2006 and 4/2013 (not on record).

19. It is contended that the Claimant was terminated without knowledge of the reason(s) for termination. That the Claimant worked faithfully for 9 years and had no reason to abscond duty.

20. That the Respondent's claim that it invited the Claimant for a meeting on 4<sup>th</sup> June 2015 was not supported by evidence of the invitation. The decision in **Loice Otieno v Kenya Commercial Bank Limited [2013] eKLR** issued to urge the Court to find that the Claimant was not afforded an opportunity to be heard.

21. Similarly, the decision in **Shankar Saklani v DHL Global Forwarding Ltd [2013] eKLR** is relied upon to buttress the submission that the termination was procedurally unfair.
22. On remedies, it was submitted that since the Claimant was unfairly terminated, he was entitled to the reliefs prayed for in the statement of claim. The total sum of **Kshs.723,220.64**.
23. Finally, Section 49 the Employment Act was relied upon to urge the Court that the Claimant is entitled to maximum compensation of 12 months' salary. The decision in **Harrison Meshack Lusimbo & another v Mareba Enterprises Limited [2013] eKLR** was relied upon to reinforce the submission. The Court in that case awarded 12 months' salary as compensation.
24. On costs, the decision in **Nixon Mandala Malongo v Clifford Okello Rachuonyo & another [2014] eKLR** was cited to urge the Court to award costs. In the case the Court had found the termination of the Claimant was substantively and procedurally unfair.
25. The Respondent did not file submissions

### **Analysis and Determination**

26. After due consideration of the pleadings, evidence on record and submissions, the issues for determination are: -
- (a) Whether the Claimant was a casual or permanent employee of the Respondent and for how long;
  - (b) Whether the Claimant was unfairly terminated or absconded duty;
  - (c) Whether the Claimant is entitled to the reliefs sought.
27. The Claimant alleged that he was employed by the Respondent in September 2005 as a casual security guard until December 2005 and transitioned to permanent terms on 1<sup>st</sup> January 2006 and remained in employment until 4<sup>th</sup> June 2015 when he was unlawfully terminated. The Claimant adduced no evidence on his employment by the Respondent in September 2005 and its transition on 1<sup>st</sup> January 2006. He tendered no documentation at all including his salary or other entitlements if any.
28. RW1 on the other had testified that the Claimant was employed as a casual security guard in 2015. That the Respondent had no record on his employment from September 2005 as claimed and had worked for a short time before he absconded duty in June 2015. On salary, RW1 was not sure of the actual amount the Claimant was earning.
29. The Claimant has no documentation to show or associate him with the Respondent as an employee. No payslip, letter of appointment or receipt, NSSF statement, complaint or warning letter.
30. RW1 denied that the Claimant had served the Respondent for 10 years and confirmed on cross examination that he had worked for about two months before he absconded duty. He confirmed that the Claimant was employed by the new Board of Directors in 2015 and there was no indication that he had worked there earlier.
31. The Court finds it inconceivable that the Claimant was employed in 2005 at a salary of Kshs.7,000 and was earning the same amount in June 2015 and nothing transpired between 2005 and 2015 in their employment relationship.
32. From the foregoing, the Court is neither persuaded that the Claimant was employed by the Respondent in 2005 nor satisfied that he was a permanent employee as claimed.
33. From the evidence on record, the Court is satisfied that the parties had an employer/employee relationship in 2015 before the alleged termination or absconding of duty.
34. As regards termination of employment, the Claimant testified that when he reported to work on 4<sup>th</sup> June 2015, he was informed by the Respondent's secretary that he had been dismissed. He further testified that he did not receive any invitation to appear before the Board of Directors of the Respondent. That the Respondent did not explain to him why he was dismissed. He denied having absconded duty.
35. RW1 testified that the Claimant was not terminated but absconded duty. That he was summoned to appear before the Respondent's Board of Directors but did not respond. That their calls were not responded to. That the Respondent had to hire another person because it could not do without a security guard.
36. On cross examination, he confirmed that the Secretary had been requested to contact him but he did not respond.
37. It is noteworthy that the Respondent led no evidence of how it summoned the Claimant for the Board meeting though calls may have been made by the Secretary. The Respondent did not avail any evidence of the charges it had against the Claimant.
38. As submitted by the Claimant, a fair termination must be conducted in accordance with the provisions of Section 41, 45 and others of the Employment Act. The Respondent may have had a valid reason to terminate the Claimant but the procedure employed was flawed. (See **Loice Otieno v Kenya Commercial Bank Limited (supra)** where Radido J. tabulated the burden an employer must discharge to establish compliance with Section 41 of the Employment Act. See also **CMC Aviation Limited v Mohammed Noor [2013] eKLR**.)

39. As regards the claim of absconding duty, the Respondent's witness testified that attempts were made to establish contact with the Claimant through the secretary but he did not respond. This allegation by the Respondent appears credible for the following reasons –

- i) The Claimant did not deny that attempts were not made to contact him through his mobile phone.
- ii) The Claimant did not testify he ever returned to the Respondent's offices after the alleged termination.
- iii) The copies of excerpts of minutes of the Board of Directors of the Respondent reveal that there were issues the Board wanted clarified by the Claimant although he did not appear for the meeting held on 4<sup>th</sup> June 2015 (Minute 2.1. security). The issue was also discussed at the Board meeting held on 11<sup>th</sup> June 2015, five days after the alleged dismissal. Min: 1 security states that –

*“The Board met and discussed about the security guard misconduct and agreed that since Mr. Esanji had been summoned to appear before the Board twice and had not communicated in anyway, the Board resolved to hire security services from a reliable firm because the temporary one was expensive for the society. Kinga force was put into perspective.”*

40. The above statement confirms that the Claimant had not been dismissed by 4<sup>th</sup> June 2015 as he alleges. He was dismissed on 11<sup>th</sup> June 2015 when he did not appear before the Board for the second time.

41. Finally, although the Respondent appear to have made reasonable attempts to establish contact with the Claimant on account of having absconded duty as required it did not discharge its obligations fully to bring the matter to closure. (See: **Boniface Francis Mwangi v B. O. M. Iyego Secondary School [2019] eKLR** and **Simon Mbithi Mbane v Intersecurity Services Ltd [2018] eKLR**)

42. The Respondent should have prepared and issued a notice to show cause and serve the Claimant and have a copy on its records. (See: **Joseph Nzioka v Smart Coatings Ltd [2017] eKLR**)

43. Thereafter, it was required to prepare and serve the Claimant with a dismissal letter. See: **Joseph Nzioka v Smart Coatings Ltd (supra)** or at least notify the Labour Office that its employee had absconded duty. See **Julius Kyalo Malonza v Ruth Osolo T/A Eraeva Catering Services Nairobi Cause No. 301 of 2016**.

44. The foregoing would have demonstrated that the Respondent cared about its employee and had taken reasonable steps to bring the matter to closure.

45. RW1 was emphatic that the Claimant was not here to be terminated. That he had already left on his own accord. Undoubtedly, documents tell a story better than volumes of oral testimony which may be false and is amenable to alteration by witnesses.

46. For the above reason, it is the finding of the Court that the Claimant's termination in June 2015 was unfair for want of procedural propriety.

47. On reliefs, the Claimant prayed for

**a). Pay in lieu of notice**

48. The Respondent did not contest this claim and the Court awards the sum of **Kshs.7,000/-** as prayed.

**b). Service pay at 15 days' salary for 9 completed years of service**

49. The Claimant led no evidence of entitlement to this claim. He did not show that he was not a member of the NSSF. The prayer is **declined**.

**c). Pay in lieu of leave 2015 Kshs.7,000.00**

50. Annual leave is a statutory entitlement and since the Claimant worked for about 5 months in 2015, he is entitled to leave pay of **Kshs.2,042/-**.

**d). Damages**

51. Having found that the Claimant's termination was procedurally unfair, the Claimant qualifies for the discretionary relief provided by Section 49(1)(c) of the Employment Act subject to the Court exercising its jurisdiction in accordance with the provisions of Section 49(4) of the Act. In determining the level of compensation, the Court has considered the following: -

- i). The Claimant served the Respondent for a relatively short period and there is no indication he wished to continue
- ii). The Claimant substantially contributed to the termination
- iii). The Claimant did not visit the Respondent's office to demand his dues before he sought legal advice almost one (1) year later.

52. In the totality of the foregoing, the Court is satisfied that the equivalent of two months' salary is fair compensation.

**e)... Payment for services rendered for 9 years**

53... The Claimant led no evidence of what this prayer constitutes or its legal basis under the employment law in Kenya. The claim is distinguishable from service pay payable under Section 35(5) of the Employment Act. The prayer is **declined**.

**f)... Interest on amount not paid**

54. The Claimant has provided no justification for interest at 14%. The prayer for interest at 14% is **declined**.

55. **Accordingly, judgment is entered for the Claimant for the sum of Kshs.23,042/- with costs.**

56. Interest at Court rates from the date of judgment till payment in full.

57. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF DECEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**