



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 882 OF 2017**

**STELLA AUMA ODUOR.....CLAIMANT**

**VERSUS**

**SOLVIT SECURITY SOLUTION.....RESPONDENT**

**J U D G M E N T**

1. Vide a Memorandum of Claim dated 21<sup>st</sup> November 2017 and filed in Court on 24<sup>th</sup> November 2017, the Claimant sued the Respondent claiming a total of ksh.386,500 made up of severance pay, unpaid salary, payment in lieu of notice, accrued leave pay and compensation for unfair termination. The Claimant also prayed for a declaration that the termination was unfair, costs of the suit and interest.
2. The Claimant pleaded that she was employed by the Respondent as a guard on 28<sup>th</sup> June 2013, earning a salary of ksh.8000 which was subsequently increased to ksh.13,600.
3. The Claimant further pleaded that in January 2016, she was assigned by the Respondent to work at Kenya Medical Research Institute as a night guard and that on 30<sup>th</sup> June 2016, she received a call from the Respondent's office and was told not to report on duty but to wait for re-assignment by the Respondent. The Claimant was to be informed later by the Respondent that their client (KEMRI) had requested for another guard.
4. It was the Claimant's further pleading that the Respondent never communicated to her, though the Respondent send several letters to the Claimant's Union. That on 30<sup>th</sup> August 2016, the Respondent terminated the Claimant's services summarily, without notice and without paying her salary in lieu of notice and terminal dues.
5. The Claimant also filed a statement signed by her and a list of documents dated 21<sup>st</sup> November 2017.
6. The Respondent filed a Memorandum of Reply dated 15<sup>th</sup> May 2018, denying the Claimant's claim and accusing her of failure to report on duty after being rejected by the Respondent's client and of deserting duty. The Respondent also filed a witness statement signed by Charles Nyakoni on 15<sup>th</sup> May 2018 and a list of documents dated the same date.
7. When trial opened on 22/9/2021, the Claimant adopted her recorded and filed statement as her evidence in chief and produced the documents listed in her list of documents as exhibits.
8. The Claimant further testified that she stopped working because the Respondent telephoned her and told her not to go to work until she heard from them, but she went to her Union because she knew that after seven days the Respondent would declare her a deserter. That the Claimant never called her back to work although the Respondent corresponded with the Union severally.
9. The Claimant further testified that she wrote a letter to the Respondent on 8<sup>th</sup> August 2016 seeking to know why the Respondent never paid her July 2016 salary and why she had not been called back to work. The Respondent never denied receiving the said letter. The Claimant was summarily dismissed on 30<sup>th</sup> August 2016 on allegation of deserting duty.
10. The Respondent's witness adopted his recorded and filed statement as his evidence in chief and produced the documents listed in the Respondent's list of documents as exhibits.
11. Cross examined by counsel for the Claimant, the Respondent's witness (DW1) testified that:-

**a) the Claimant was called by the Respondent and told not to report to her work station at KEMRI.**

**b) that the Claimant never took leave.**

**c) that the Claimant was not paid her salary for July 2016.**

**d) that the Claimant was not given any notice.**

12. Parties did not file any statement of issues for determination prior to the trial, either jointly or separately.

13. From the pleadings filed and evidence adduced, issues for determination appear to me to be as follows:-

**a) whether the termination of the Claimant's employment was based on valid reasons.**

**b) whether termination of the Claimant's employment was fair.**

**c) whether the Claimant is entitled to the reliefs sought.**

14. On the first and second issues, Section 45(1) of the Employment Act provides as follows:-

**“no employer shall terminate the employment of an employee unfairly.”**

Section 45(2) states:-

**“termination of employment by an employer is unfair if the employer fails to prove:-**

**(a) that the reason for the termination is valid.**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee's conduct, capacity or compatibility or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure.”**

15. Section 43 of the Employment Act 2007 provides:-

**(1) “in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the service of the employee.”**

16. The Respondent did not dispute, and indeed confirmed, having called/telephoned the Claimant and having instructed her not to report to her work station at KEMRI, but to go and wait as the Respondent did rescheduling in order to fix the Claimant elsewhere.

17. The Respondent (DW1) testified that thereafter, the Respondent corresponded with the Claimant's Union (Kenya National Private Security Workers Union), but not with the Claimant. It was DW1's further evidence that the Respondent wrote a letter to the Union reinstating the Claimant, and thereafter started counting desertion days. That the Respondent wrote the reinstatement letter to the Union because the Claimant was not available and her phones were not going through. The Respondent did not, however, demonstrate that the Respondent tried to contact and/or call the Claimant in order to get her back to work as promised by the Respondent, when and how.

18. The letter of the Claimant's dismissal dated 30<sup>th</sup> August 2016 is addressed to the Claimant as follows:-

**“STELLA ODUOR**

**P/N0. 00262**

**C/O SOLVIK SECURITY SOLUTIONS**

**MOMBASA”**

The Claimant received this particular letter. The Respondent's allegation of the Claimant's unavailability and desertion of duty were therefore not proved.

19. The reason for the Claimant's summary dismissal was given in the dismissal letter dated 30<sup>th</sup> August 2016 as "DESERTION." The allegation of desertion was not proved. The Respondent has not proved that the reason for the dismissal was valid. The dismissal was therefore unfair, and I so declare.

20. Section 41 of the Employment Act provides:-

*1) "subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the ground of misconduct, poor performance or physical incapacity explain to the employee, in a language that 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 such 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 presentations 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."*

21. In the present case, the Respondent did not comply with the mandatory procedural requirements set out in Section 41 of the Employment Act. The Respondent did not explain to the Claimant the reasons for which the Respondent was considering terminating the Claimant's employment, and did not give her an opportunity to be heard on those reasons. Indeed, the letter of summary dismissal is dated 30<sup>th</sup> August 2016. The letter dismissed the Claimant summarily with effect from the date of the letter.

22. I find and hold that the Respondent contravened the provisions of Section 41 of the Employment Act 2007. Termination of the Claimant's employment was unfair and unprocedural, and was unlawful as well. The Court of Appeal held in the case of **National Bank of Kenya -vs- Samuel Nguru Mutonya [2019] eKLR**, as follows:-

*"...to move and terminate without giving regard to Section 41 of the employment Act and its provisions, giving the Claimant a hearing in the presence of this representative, the termination became procedurally unfair... where an employer fails to abide with the procedural requirements of Section 41 of the Employment Act, even where payment in lieu of notice is made immediately, such does not cure the procedural unfairness visited upon the Claimant..."*

*The Respondent failed to meet the provisions of Section 45 of the Employment Act. The Claimant is therefore entitled to remedies sought."*

23. On the third issue on the reliefs sought, the Respondent (DW1) testified and confirmed that the Claimant did not receive her salary for the month of July 2016, did not take leave during the period that she worked for the Respondent (three years) and was not given notice prior to termination of employment.

24. The Claimant is therefore entitled to ksh.13,000 being her salary for July 2016, ksh.13,000 being one month salary in lieu of notice, and payment in lieu of leave, calculated at twenty one(21) days per each completed year of employment against the Claimant's salary of ksh.13,000. The Claimant is also entitled to compensation for unfair termination of employment.

25. The claimant is not entitled to severance pay as termination of her employment did not result from redundancy. Had she claimed service pay, I would have awarded the same under Section 35(5) of the Employment Act for the three (3) years worked as it was not demonstrated that the claimant was a member of a registered pension or provident fund scheme under the Retirement Benefits Act, the National Social Security Fund or a service pay scheme established under a collective agreement.

26. Judgment is hereby entered for the claimant against the Respondent as follows:-

a) Salary for July 2016 .....	kshs.13,000
b) One month salary in lieu of notice.....	kshs.13,000
c) Payment in lieu of leave (3 years) .....	kshs. 27,300
d) Eight months salary being compensation for unfair termination .....	kshs.104,000
Total	<u>Kshs. 143,000</u>

27. The Claimant is also awarded costs of the claim and interest at court rates from the date of this judgment until payment in full.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF DECEMBER 2021**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**In the presence of**

Miss Nafula for Claimant

Mrs Ogoti for Respondent