



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 338 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

JULIUS MUTANA NGIGI

CLAIMANT

VERSUS

COBRA SECURITY COMPANY LIMITED

RESPONDENT

JUDGMENT

1. By a memorandum of clam dated 13th February 2017 and filed in Court on 20th February 2017, the Claimant sued the Respondent alleging unlawful and unfair termination and prays for –

- (a) A declaration that the Claimant's termination from employment was unlawful and unfair
- (b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded
- (c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages as tabulated below –
 - i. One month's salary as per the minimum wage
in 2015 Kshs.12,221
 - ii. Leave days for 3 years Kshs.26,663
 - iii. House allowance for 3 years Kshs.65,993
 - iv. Off days for 3 years Kshs.117,321
 - v. Overtime of 4 hours per day for 30 days a month for 3 years Kshs.327,045
 - vi. Salary underpayment for the period between 1st July 2013 to 30th April 2015 being (Ksha.10,912 – 8,000) Kshs.2,912 x 22 months Kshs.64,064
 - vii. Salary underpayment for the period between 1st May 2015 to May 2016 being (Kshs.12,221 – 8,000) Kshs.4,421 x 12 months Kshs.53,052
 - viii. Unpaid public holidays Kshs.26,886
 - ix. Compensation for unlawful termination
 - x. for 12 months Kshs.146,652

Total Kshs.849,897

(d) Interest on (c) above from the date of filing suit till payment in full

(e) Costs of this suit plus interest thereon.

2. The Respondent filed its response to the memorandum of claim on 30th August 2017 and prayed that the suit be dismissed with costs.

3. The Claimant amended the memorandum of claim on 14th January 2020 and changed the allegations on what transpired on the day he was allegedly dismissed.

Claimant's Case

4. The Claimant avers that he was employed by the Respondent as a night guard on 1st July 2013 and was a diligent employee. That he never proceeded on leave from 2013 to 2016 and the Respondent did not provide house allowance or housing. Had no off days and worked four extra hours every day for the entire period of employment and worked every day including weekends and public holidays at a monthly salary of Kshs.8,000 per month.

5. It is further averred that on 18th May 2016, some timber was stolen by an unknown person at Green City Gardens, the Claimant's work station and he was informed by the then Supervisor Mr. Mutuku to report to the Respondent's office in South B which he did. That he and his colleagues on duty on that day were accused of selling firewood and sealing the same to nearby hotels a claim they denied but were ordered to surrender their uniforms and leave the employer's premises.

6. It is also contended that the Claimant's efforts to have the Respondent pay his dues have been unsuccessful.

7. He was not given a dismissal letter. The Claimant avers that

the Respondent's actions on 18th May 2016 amounted to an unlawful and unfair summary dismissal.

Respondent's Case

8. The Respondent avers that it employed the Claimant on 19th July 2014 to render services on a shift basis as assigned by the Transport Manager, for a 12 hours' shift per day and was entitled to one rest day every 7 days. The contract was terminable by a 7 days' notice of either party or salary in lieu of notice. That the Claimant willingly signed the contract.

9. It is further averred that on 18th May 2016, the Claimant absconded duty after claims by the Respondent's client that some construction material had been stolen at the Green City Gardens. That the Claimant refused to report to the workplace which amounted to gross misconduct under the Employment Act.

10. The Respondent also avers that the Claimant took all his off days and public holidays, was not entitled to any overtime, and if any way payable, it was paid with the following month's salary, was not entitled to pay in lieu of notice since he had absconded work and had not been underpaid.

Evidence

11. The Claimant adopted his statement filed on 20th February 2017. He told the Court that he was employed on 1st July 2013 as a night guard at Kshs.8,000 per month and his last assignment was at the Green City Gardens.

12. That on 18th May 2017 Mr. Mutuku, the Supervisor informed them that there had been a theft at their work place and they were required to report to the office. That he was unaware of the theft. That he was dismissed without termination letter or disciplinary hearing.

13. On cross examination, he confirmed that there was a construction site at the Green City Gardens and that he did not arrest anyone. He recanted his written statement even though he had adopted it. That he was on duty on 18th May 2016. The Claimant feigned ignorance of Kiswahili and English but admitted that he amended his claim.

14. He denied that he absconded duty, asserted that he served for 3 years and was unaware of the minimum wage.

15. In re-examination, he testified that he recorded a statement and the signature was his and that the Supervisor, Mr. Mutuku had informed them that there would be no work for them after the theft.

Respondent's Evidence

16. RW1 adopted his statement. He testified that in 2013 he was the Human Resource and Administration Manager of the Respondent and employed the Claimant on 19th July 2014, gave him a contract and he signed the same. That the Claimant's salary was Kshs.9,000 per month.

17. He further testified the Claimant and his colleagues were summoned to the office in connection with a theft at the Green City Gardens but

the Claimant did not show up. The Claimant did not record a statement on the incident and the Respondent had to pay the Client Kshs.24,000 for the lost items.

18. He told the Court that the amended memorandum of clam gave a different story. He confirmed that the story about the theft was true. That the Claimant was not dismissed but had absconded duty. He was not dismissed by word of mouth.

19. That the Claimant took all his off days as the Master Roll on record shows, for instance, in March 2016 he was off duty for 4 days (16th – 19th March). That he did not work overtime or on public holidays.

20. On cross examination, he confirmed that the Claimant was stationed at the Green City Gardens. That he absconded duty and attempts to contact him were unsuccessful. He had shifted residence. That they also tried to call him and did not report the desertion to the Labour Office.

21. He further testified that he did not issue a show cause letter to the Claimant because he was not there. that the Supervisor was not Mr. Mutuku but Daniel Heraniah. That the Respondent issued the Claimant with payslips every month.

Claimant's Submissions

22. The Claimant submitted that the issues for determination were –

- (i) Whether there was a valid reason for dismissal of Claimant;
- (ii) Whether the Claimant was accorded fair process;
- (iii) Whether the Claimant is entitled tot the reliefs sought;
- (iv) Costs.

23. On validity of the reason for termination the Claimant relies on Section 43 of the Employment Act, 2007 on the employee's duty to prove the reason(s) for termination. Reliance was also made on Section 45 of the Act.

24. That the Claimant had gone to the Respondent to report the theft but the Respondent instead dismissed him and no valid reason was given.

25. On procedure, the Claimants submitted that the Respondent did not issue a show cause letter or take the Claimant through a disciplinary hearing on the allegations against him nor were the reasons of termination explained to him. Section 45 of the Employment Act was relied upon on the requirement of a fair procedure.

26. It was contended that RW1 confirmed that no show cause letter was issued to the Claimant and there were no minutes of a disciplinary hearing and no police investigation was conduct on the alleged theft. That without a disciplinary hearing, the termination was unfair.

27. It was further submitted that Section 44(1) of the Employment Act mandated an employer to presume desertion if an employee absents him/herself from duty without leave or lawful cause. That the employer must prove that the employee has absconded duty by showing that he/she did not report to work, efforts to trace the employee have been futile and notice to the Claimant to show cause has been issued.

28. That failure to avail concrete evidence of the desertion and attempts to contact the person render the defence of absconding duty hollow. The Claimant relies on the decisions in **Simon Mbithi Mbane v Inter Security Services Ltd [2018] eKLR** by Abuodha J., **Joseph Nzioka v Smart Coatings Ltd [2017] eKLR** and **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd [2020] eKLR** for the proposition that if absconding duty is pleaded by the employer, it must demonstrate that reasonable efforts to contact the employee were made but were unsuccessful and a show cause letter was issued as a consequence calling upon the employee to show cause why his services should not be terminated for absconding duty.

29. It also contended that the termination did not meet the fairness test as elaborated by judicial decisions. Reliance was finally made on the decision in **Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR** to buttress the essence of Section 41 of the Employment Act on notice explanation, hearing and consideration of the employee's representations if any.

30. On reliefs, the Claimant submitted that it was entitled to payment in lieu of notice, unpaid leave days, house allowance, off days, overtime, public holidays, overtime and damages for unfair termination.

31. On public holidays, Counsel urged the Court to be guided by the decision of Nderi Nduma J. in **Edwin Odhiambo Sinolala v Samba Enterprises Limited & Another [2018] eKLR** where the Court awarded Kshs.22,000 for public holidays worked and not paid.

Respondent's Submissions

32. On the date of employment, the Respondent submitted that the Claimant had confirmed that he had no appointment letter yet he insisted

that he was employed by the Respondent on 1st July 2013. That RW1 confirmed that the Respondent engaged the Claimant on 19th July 2014 and provided a contract to that effect. The Claimant signed the contract. That the exhibit was not challenged by the Claimant.

33. On pay, the Claimant had testified that he was earning Kshs.8,000 per month but had no documentary evidence to show. That RW1 produced documentary evidence of the Claimant's monthly salary at Kshs.9,000 per month and not Kshs.8,000.

34. It is further submitted that the Claimant adopted his statement

filed on 20th February 2017 but on cross examination, he denied having signed it but admitted he had done so on re-examination. That in the statement the Claimant stated the reasons for dismissal. That he had arrested a thief at the working site and was subsequently dismissed by the owner of the building he was guarding. That the thief turned out to be the Supervisor's relative and the Claimant was later accused by the Supervisor of stealing firewood and was dismissed.

35. The Respondent submits that the statement adopted by the Claimant and the oral testimony given in Court are contradictory which diminish the probative value of the evidence.

36. That on the other hand RW1 gave cogent evidence that the Claimant absconded duty after he and others were summoned to the office on the alleged theft at the construction site at his workplace for fear of police arrest.

37. That attempts to trace the Claimant were unsuccessful. It is submitted that the Respondent's version is preferable compared to the Claimant's contradictory testimony.

38. It is contended that the computation of the Claimant's leave, house allowance and overtime on the basis of Kshs.12,221 was erroneous. That the Claimant was employed on 19th July 2014 as opposed to 1st July 2013 as alleged by the Claimant. That his monthly salary was Kshs.9,000 as opposed to Kshs.8,000.

39. The Respondent also submits that the Regulation of Wages (General) (Amendment) 2013 fixed the wages of a night guard at Ksh.10,911.70 per month. That the Kshs.12,221 was an exaggeration.

40. On overtime pay, the Respondent submits that the Claimant led no evidence to prove the claim and the same should be rejected.

41. On underpayment, it is submitted that the Court may wish to consider whether the Claimant is entitled to the difference of Kshs.1,911.70 per month.

42. Finally, the Respondent invites the Court to find that the claim is unmerited and dismiss the same with costs.

Analysis and Determination

43. I have considered the pleadings, evidence on record and submissions by Counsel for the Claimant and the Respondent. The issues for determination are:-

- (i) When was the Claimant employed by the Respondent and at what monthly salary;
- (ii) Whether the Claimant's termination was unfair;
- (iii) Whether the Claimant is entitled to the reliefs sought.

44. The Claimant testified that he was employed by the Respondent on 1st July 2013 at Kshs.8,000; per month. Regrettably, the Claimant provided no documentary evidence of the contract between him and the Respondent or payslip to prove how much he was earning.

45. The Claimant provided copies of Equity Bank ATM mini statements with no name or account number of the holder, showing deposits from Cobra Security which is not prove of a salary but a deposit possibly after deductions. In the same vein, the NSSF statement dated 6th July 2016 does not state who the employer was when the deductions were made and the date of employment is 1st October 2010.

46. The Respondent on the other hand testified that he was the Human Resource and Administration Manager of the Respondent in 2013 and employed the Claimant on 19th July 2014. He produced a copy of an agreement dated 19th July 2014. The Claimant did not contest the document which also provided his monthly salary as Kshs.9,000.

47. Although it is common ground that the Claimant was an employee of the Respondent, there was no agreement on the date of employment and the salary payable to the Claimant.

48. From the evidence on record, the Court is satisfied as submitted by the Respondent that the Respondent's version of the employment date and salary is more persuasive as regards the date of employment and salary.

49. On termination, Sections 41, 43, 44, 45 and 47(5) of the Employment Act, provides the statutory framework on termination of employment. Under these provisions, for a termination to be deemed lawful, it must be substantively and procedurally fair. Under Sections

41 and 45 of the Act, the reason(s) for termination must be valid and fair and the procedure adopted by the employer have been fair.

50. The decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** is often cited for the proposition that a termination must be substantively and procedurally fair. The Court of Appeal underscored the principle in **Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR**.

51. In addition, Section 47(5) of the Act allocates the respective obligations of the parties in case of unfair termination or wrongful dismissal.

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has accrued shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

52. In the instant case, the Claimant’s statement on record and the oral testimony given in Court are contradictory in material respects. He alleges that on 18th May 2016 he arrested a thief at the working site who turned out to be the Supervisor’s relative. The arrest infuriated the Supervisor and he was dismissed three days thereafter when he was instructed to return his uniform and other company apparel and clear which he did and was thereafter ordered to leave because his services were no longer needed.

53. The statement does not identify the Supervisor but identifies the alleged thief as one Mr. Gathuo.

54. That after dismissal he reported the matter to the Labour Office. A letter from the Ministry of East African Community, Labour and Social Protection dated 25th July 2016 to the Director of Cobra Security Limited was provided. The statement does not explain what transpired thereafter.

55. Whereas the statement does not mention what the thief had stolen, the amended memorandum of claim states that timber was stolen. RW1 stated that metal bars had been stolen and the client was compensated.

56. On cross examination, the Claimant disowned the statement on record dated 13th February 2017 and filed on 20th February 2017. He denied having arrested anyone. However, he admitted that he was the person named in the statement. He denied having signed the statement. He testified that his Supervisor on 18th May 2016 was one Daniel. His testimony in Court made no reference to being called upon to hand over company items at any point and denied having absconded duty. He did not testify about the letter from the Labour Office.

57. On re-examination, the Claimant told the Court that he recorded the statement on record and the signature was his and confirmed that he had amended his memorandum of claim on 14th January 2020. For unexplained reasons, the Claimant did to file another witness statement.

58. The evidence placed before the Court by the Claimant is too contradictory and has no probative value to establish that the Claimant was unlawfully or unfairly terminated. It is the finding of the Court that the Claimant’s evidence is not reliable.

59. On the other hand, the Respondent’s witness testified that on 18th May 2016, a theft occurred at the Green City Gardens and when the Claimant and other guards deployed there were summoned to the office for further investigation, the Claimant did not show up to record a statement and never returned to the Company offices. RW1 confirmed that the Claimant was not dismissed but absconded duty.

60. RW1 told the Court that the Respondent tried to trace the Claimant but he had changed his residence and could not be reached on his mobile phone. The Respondent did not close the Claimant’s employment record by a notice to show cause letter or dismissal letter or report the desertion to the Labour Office. See **Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR**, **Joseph Nzioka v Smart Coatings Limited [2017] eKLR** and **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd [2020] eKLR** on the obligations of the employer in cases of desertion.

61. Having found that the Claimant has failed to establish that

his termination was unfair or unlawful, the question of entitlement to reliefs does not arise.

62. In the final analysis, the Court is satisfied that this suit has no merit and is accordingly dismissed.

63. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH 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 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