



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE 444 OF 2015

JOSEPH OLUOCH OMUNG'WESO..... CLAIMANT

VERSUS

OLYMPIC MAISONNETTES RESIDENT'S ASSOCIATION..... RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein was employed as a Night Guard from December 2010 to 1st February 2015 at a monthly salary of Kshs. 7,000. He claims that his termination was unlawful and has brought this suit seeking orders for payment of his terminal dues and damages.

2. The Respondent did not enter appearance or file a statement of response to the Claimant claim herein, consequently this matter proceeded undefended.

Claimant's Case

3. The Claimant herein, instituted this claim against the Respondent, vide a memorandum of claim dated 20th March 2015, wherein he has sought a galaxy of orders and reliefs to wit; unpaid public holidays for five years, payment in lieu of notice, compensatory damages for unlawful termination, gratuity, compensation for untaken leave days during the period of five [5] years all amounting to Kshs. 142,100, costs and interest.

4. Together with the statement of claim, the Claimant filed a witness statement dated 18th March, 2015 and a list of documents dated 1st April 2019. When the matter came up for formal proof, the Claimant chose to adopt the statement as part of his evidence in chief and the documents as his documentary evidence in this matter. The Claimant testified in court, when he gave a brief oral testimony, clarifying on a few matters of his statement of claim, and the documents.

5. The Claimant avers that he was employed orally by the Respondent as a night guard. His starting salary was Kshs.5,000 which gradually rose to Kshs. 7,000. His work station being a residential estate that he stated had 3 sections. He was working at section A. The Respondent at some stage decided to collapse the sections, and hinted that they wanted to employ security guards afresh.

6. Through his letter dated 14th January 2014, the Claimant brought it to the attention of the Respondent Association that, with effect from the time of his employment, 6th December,2010, he had been earning a salary that was below the prescribed minimum wage. He in the said letter went ahead to remind them that despite numerous meetings between them and him, over the said matter, and promises by them that his salary was to be increased from Kshs.7000 to Kshs. 15000, effective October 2013, there had been no increment.

7. In the letter, the Claimant also invited them to note that during the period; he had not had any off duty, annual leave, his house allowance had not been considered, and NSSF and NHIF remittances had not been made for him.

8. The Claimant stated in his testimony that the Respondent did not respond to his letter or take any action in line thereof. He decided not to pick his salary for the January 2014 until the Respondent acted. The Respondent remained adamant.

9. The Association was correcting Kshs. 300 from tenants and offices within the estate for purposes of taking care of the guards' salary, but in turn they could not pay him appropriately.

10. He stated that following the adamancy of the Respondent in acceding to his demand, he got constrained to instruct a lawyer to agitate for his entitlements. The lawyer did a demand letter dated 6th February 2015. Upon this demand, the Respondent decided to terminate the Claimant's employment and consequently engaged the services of another guard.

11. The Claimant contends that prior to the termination of his employment, he was not given any warning or notice. As such, he considers that the termination to be unlawful, wrongful and unfair as it was abrupt and traumatizing. He also states that the Respondent had not paid his salary for the months of January and February 2015.

Claimant's submissions

12. In his submissions, counsel for the Claimant puts forth the following issues as the issues he considers issues that emerge for determination in this matter, namely;

(i) **Whether the procedure for termination of the Claimant's employment was fair.**

(ii) **Whether the Claimant was paid his terminal dues and if not whether he is entitled to payment of any terminal dues.**

(iii) **Who should pay costs?**

13. On the issue as to whether or not the termination of the employment of the Claimant was procedurally fair, Counsel submitted that in his testimony the Claimant stated that he was not given the reasons that led to the termination, and that he was not given any hearing to defend himself of any allegations against him. That the reason for his termination was his complaint of underpayment in regard to his salary.

14. Counsel submitted that section 41 and 43 of the Employment Act provide for the procedure for termination of employment and proof of the reason for the termination, respectively.

15. It was further submitted that the action of the Respondent's actions to verbally terminating the Claimant's services was unfair as it contravened the provisions of Section 45 of the Employment Act. He relied on the case of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR** to highlight the fairness test in termination of the provision.

16. He further placed reliance on the case of **Swaleh David vs- premier Cookies Limited [2021] eKLR** where the court held;

“Under section 45 of the Employment Act, termination of an employee's contract of service is unfair and therefore unlawful if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operation requirements.

on the other hand, procedure is fair if the employer accords the employee a fair hearing in the presence of another employee of his choice and the representation made by the employee and his companion are considered before making the decision to terminate.”

17. On the reliefs sought by the Claimant Counsel submitted that where a court finds termination of an employee's contract as unfair, it has the authority under section of the Employment Act, to award compensation to an extent of 12 months' gross salary. In this case Claimant is entitled to compensation.

18. On the unpaid leave, it was submitted the Respondent did not controvert the evidence of the Claimant that he never proceeded for leave. Same submission was extended in regard to his submissions on the claim on holidays worked but not compensated for. In a sum up, Counsel submits that therefore, the claim under the two heads is unchallenged and should be granted. He relied on the case of **Lukas Samarwa Kondo vs Njuca Consolidated Company Limited (2020) eKLR**.

19. Counsel also relied on the case of **Jackson Amondi Anyango & Another vs G4S Security Services Limited (2017) eKLR** to support his claim for payment for public holiday. In this matter the Court held;

“The Claimants testified that they worked on all public holidays except those which fell on his rest day. There are 11 public holidays a year. The Respondent did not adduce to prove either that the Claimants were paid overtime for work done on public holidays. Work done on public holidays are payable double the normal hourly rate of pay. The claimant is therefore entitled to I award him Kshs. 18,750.”

20. On the claim for service gratuity, it was submitted that the Claimant testified that he was never paid any service pay despite having worked with the Respondent for over Five (5) years. To buttress this Counsel cited the case of **George Mborogo Obangi vs Board of Management Omoyo Secondary School [2019] eKLR** the court awarded Service Gratuity for 14 years and 3 months Kshs. 74,356.50 to the Claimant who was employed by the Respondent as a night guard.

Analysis and Determination

21. From the evidence and material placed before me, I consider the following broad issues as the issues for determination in this matter.

(i) *Whether the termination of the Claimant's employment was procedurally fair.*

(ii) *Whether the termination of the Claimant's employment was substantively fair.*

(iii) What reliefs can be availed to the Claimant, if any in the circumstances of this matter?

(iv) Who should bear the costs of this suit?

Whether the termination of the Claimant's employment was procedurally fair.

22. In a matter where an employee is challenging a termination of his contract of service on an account that the termination was unfair, the court handling the dispute has two broad aspects to consider in weighing whether the termination was unfair. First is the aspect of procedural fairness. Second, substantive fairness of the decision to terminate.

23. Section 41 of the Employment Act, 2007 is the fountain where the procedural fairness aspect flows from. The provision requires of an employer contemplating to terminate an employee's contract of service or summarily dismiss an employee, to do three things; inform the employee of the contemplated action and the grounds forming basis for the intended action, accord the employee and a colleague of his choice [where he is not a member of the union] or a shop steward [where he is a member of a union] to make representations on the intended action and the grounds stirring it, lastly to consider the representations before making a decision to summarily dismiss the or terminate the contract of employment.

24. The Claimant stated, and it was not challenged that the Respondent did not take him through any disciplinary process, informing him that they intended to terminate his employment, giving him an opportunity to make representations, and the Respondent giving a considered decision.

25. By reason of the foregoing, premises, I am of a considered view that procedural fairness was absent in the termination of the Claimant's employment. The termination was therefore unfair in terms of Section 45 of the Act.

Whether the termination was substantively fair.

26. Section 43 of the Act as stated here before, puts an obligation on an employer to prove the reason that prompted a termination or summary dismissal. As regards the reason(s), Section 45 imposes a further duty on the employer, to demonstrate that the reasons[s] was valid and fair, relating to the employee's conduct, capacity or compatibility, or based on the employer's operational requirements.

27. Where an employer has not filed any opposition to the employee's case and or in any manner placed evidence and or material before a court of law seized with the matter, it is not possible for the court to find that the burden was discharged. The default consequence under section 45 of the Act will definitely set in with the termination or summary dismissal deemed unfair.

28. The Claimant testified that his employment was terminated not because he had misconducted himself, but because of his push for his rightful entitlement. There was no evidence tendered before court by the Respondent to controvert this.

29. To terminate an employee for a reason of his /her agitating for his/her legally recognized rights or entitlements cannot be said to be an act which is in accord with justice and equity. This as it were in this case. Consequently, the termination was unfair in terms of section 45 [4] of the Act.

30. The termination was substantively unfair therefore.

Of what reliefs are available to the Claimant.

31. Having found that the termination was procedurally and substantively unfair, I now turn to consider whether the reliefs sought by the Claimant or any of them, can be availed to the Claimant.

32. The Claimant has sought for compensation pursuant to the Provisions of Section 49[1] [c] of the Act to an extent of 12 [twelve] months' gross salary, Kshs. 84,000. I am conscious that an award of the compensatory relief under this provision, and the extent of the award if granted is discretionary awarded in the circumstances of each case. Looking at the manner of and reason for, the termination of the Claimant's employment, I am inclined to grant a compensatory relief under the provision. In the circumstances, I hereby make an award to an extent of 8 months' gross salary, therefore, Kshs. Kshs.63,000.

33. The Claimant testified that all through the time he was in the employment of the Respondent, he worked during public holidays without being compensated for the same. I am persuaded by the holding in **Jackson Omondi Anyango & Another vs G4s Security Services Limited [2017] eKLR**, and make an award under this head as sought by the Claimant, Kshs. 5600.

34. By parity of reasoning, I award the Claimant Kshs.35,000 as compensation for the unpaid leave, as sought by the Claimant.

35. There is no prove that the Claimant was a member of one of those entities or schemes mentioned in section 35 [6] of the Employment Act. He is therefore legally entitled to service pay. I award him 15 days for each of the year worked, Kshs. 17,500.

36. In the Upshot, Judgement is hereby entered for the Claimant in the following terms;

(a) A declaration that the termination of the Claimant's employment was both procedurally and substantively unfair.

(b) Compensation pursuant to section 49[1] [c] of the employment Act, 8 months' gross salary, Kshs. 63,000.

(c) Compensation for Holidays worked but not paid, Kshs. 5600.

(d) Compensation for unpaid leave, Kshs. 35000.

(e) Service pay, Kshs. 17,500.50

(f) Interest at Court rates with effect from the date of filing suit till full payment.

(g) Costs of the suit.

READ AND DELIVERED VIRTUALLY THIS 3RD DAY OF DECEMBER, 2021.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms Kerubo for the Claimant.

No appearance for the Respondent.