



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RALTIONS COURT

AT NAIROBI

CAUSE NO. 1098 OF 2015

JAMEN EDIGOI LUVAI.....CLAIMANT

VERSUS

COBRA SECURITY SERVICES LIMITED.....RESPONDENT

J U D G M E N T

1. The claim before me was instituted by the Claimant on 26th June 2015 vide a Memorandum of Claim dated 24th June 2015. The Claimant pleaded that in the period between June 2012 and 14th August 2014, the Claimant was an employee of the Respondent, earning a monthly salary of ksh.9,127.

2. The Claimant further pleaded that on 14th August 2014, the Respondent unilaterally and unjustifiably terminated the Claimant’s services without giving the Claimant any notice, reason or an opportunity to defend himself before dismissal.

The Claimant claimed Ksh.60,000 against the Respondent, which he tabulated as follows:-

- a. One month salary in lieu of noticeksh.6000
- b. Unpaid leave for years worked.....ksh.18,000
- c. Severance charge.....ksh. 18,000
- d. Three(3) months salary for wrongful dismissal.....ksh.18,000

Total ksh.60,000

3. The Claimant also filed a witness statement dated 23rd June 2015 and signed by himself, and a list of documents (dated 25th June 2015) listing two documents; these being a demand letter dated 13/5/2015 and a bundle of bank statements.

4. On 15th September 2016, the Respondent filed a Reply to the Memorandum of Claim. The Respondent:-

- a. admitted having employed the Claimant as a security guard on 12th May 2012 vide an employment contract that contained the terms thereof.**
- b. that some of the critical terms of the employment contract were that deployment to any assignment would strictly be at the Respondent’s discretion, and that the Claimant’s failure to report on duty would be tantamount to breach of contract.**
- c. that on 14th August 2014, the Claimant refused re-deployment and absconded duty, thus breaching both his employment contract and provisions of the Employment Act.**

5. The Respondent also filed two witness statements and a list of documents listing three documents, these being the Claimant’s contract of employment dated 21st May 2012, and Dispatch Note Nos. 5051 and 5056 dated 14th August 2014.

6. Clause 8(11) (a) of the Claimant’s employment contract provides:-

“8) the employment of the employee may be terminated:-

ii) by the company summarily without notice in the event of gross misconduct, neglect of duty, or in any of the circumstances enumerated hereunder:-

a. If without leave or other lawful cause, an employee absents himself from the place proper and appointment (sic) for the performance of his work.”

7. When the trial opened on 5th August 2021, the Claimant adopted his recorded and filed statement and produced the documents listed on his list of documents as exhibits. The Claimant stated in his statement that he was being paid ksh.6000 at the time of his employment and worked upto 14th August 2014 without leave. That on 14th August 2014, he took fourteen days leave but was not able to return to work as he was not remunerated for the days he was on leave. That when he returned to work after leave he found that his services had been terminated.

8. Cross examined by counsel for the Respondent, the Claimant testified that he was working at Kens Metal in Industrial Area and was on 14th August 2014 given Dispatch Note No. 5051 to report to Bruce Trucks, but refused to go as he was angry. That he went to his house in Nairobi and afterwards to Vihiga where he lives todate. The Claimant further testified that even before the transfer (re-deployment), he had written a letter to the Operations Manager telling him that he did not want to work. No such letter was, however, produced in Court. The Claimant confirmed having signed the employment contract.

9. The Respondent called two witnesses, Stephen Mutuku (DW1) and James Ngwalla (DW2). DW1 testified that he was the Claimant's Zone Manager and that the Claimant used to work under him. That around August 2014, the Claimant had been deployed to work at Kens Metal along Enterprise Road in Industrial Area in Nairobi. That following a request by the said customer that the Claimant be replaced, the Claimant was re-deployed to work at Bruce Trucks vide Dispatch Note No. 5051 dated 14th August 2014. That on receiving the said Dispatch Note from DW1 on 14th August 2014, the Claimant became furious and walked away and did not report at the new work station. That this amounted to breach of the Claimant's employment contract, and particularly paragraph 8(11) (a) thereof, and could lead to summary dismissal. That the Respondent did not hear from the Claimant until he brought the suit herein.

10. DW2 told the Court that he is the Respondent's Human Resource and Administration Manager. That the matter of the Claimant's refusal to accept re-deployment from kens Metal to Bruce Trucks was brought to his attention by the Claimant's immediate supervisor (DW1) and that refusal by the Claimant to take up re-deployment amounted to breach of contract of employment, and particularly paragraph 8(11) (a) thereof. That the Claimant was not heard of again by the Respondent until he brought the claim herein.

11. DW2 denied the Claimant's allegation that he worked during public holidays. He further told the Court that by the time the Claimant left employment, he was being paid ksh.9,127 per month, and that what the Respondent deposited in the Claimant's account was the net pay. That during the month of August 2014, the Claimant worked for fourteen days and was not paid for those days.

12. DW2 further told the Court that for each year worked, the Claimant was entitled to twenty six (26) days leave, and that the Claimant took leave in June 2013 and May 2014, and that the Respondent had not filed in court any records in that regard.

13. It was DW2's further evidence that the Claimant was paid his salary and allowances for the months that he was on leave.

14. Parties never filed any statement of issues for determination, whether jointly or separately. In view of the pleadings filed, and evidence adduced, issues for determination appear to me to be as follows:-

a. Whether the Respondent terminated the Claimant's employment, and if so, whether such termination was fair.

b. Whether the Claimant is entitled to the reliefs sought.

15. On the first issue, the Claimant in his own words told the Court, under cross examination, that he was on duty on 14th August 2014 at kens Metal and that upon receiving Dispatch Note No.5051 to report at Bruce Trucks, he refused to go because he was angry, and that he went to his house in Nairobi and subsequently to Vihiga where he lives upto date. That prior to this, he had written a letter to the Respondent's Operations Manager telling him that he did not want to work. This testimony contradicts the Claimant's recorded, signed and filed witness statement whereby he states that he took fourteen days leave on 14th August 2014 and on returning back he found that his services had been terminated. The Court cannot tell which of these two versions is the correct position. The latter version, however, corroborates the Respondent's pleadings and evidence that the Claimant absconded and deserted duty as from 14th August 2014 by refusing to take up re-deployment as assigned by the Respondent and subsequently disappearing, never to be heard of by the Respondent until he brought the suit herein.

16. The Claimant has not demonstrated that his employment contract was in any way terminated by the Respondent, whether fairly or unfairly.

17. On the second issue, the Claimant's claim for compensation for wrongful dismissal and one month salary in lieu of notice must fail, in view of paragraphs 15 and 16 of this judgment.

18. The claim for unpaid leave days was equally not proved. On one hand the Claimant alleges not to have taken leave during the period that he worked in the Respondent company, and on the other hand he alleges to have taken leave in August 2014. DW2 testified that the Claimant took his leave in June 2013 and in May 2014, and was duly paid his salary and allowances for this period. This evidence was not rebutted by the Claimant.

19. On the claim for service (gratuity), the Respondent did not demonstrate that the Claimant was a member of a registered pension or provident fund or NSSF into which contributions were made during the period of employment.

20. Under Section 35 of the Employment Act, the Claimant is entitled to service pay for every year worked. The law is, however, silent and/or unclear on how service pay should be calculated and paid. Courts have, as a result, adopted different approaches in calculation of service pay. In the case of **Elijah Kipkoros Tonui –vs- Ngara Opticians t/a Bright Eyes Limited [2014] eKLR**, the Court ordered that the Claimant be paid service pay by using severance pay calculation as provided for under the Employment Act. The Court had the following to say:-

“decisions of the Hounarable Judges of the Industrial Court have in the recent past viewed the payment of service pay as a bare statutory minimum, and enforced the provision even in the absence of express fixed terms of service pay, based on the minimum 15 days salary for every completed year of service given under the redundancy law and which is also the floor in most industrial wage orders on severance, gratuity or service pay. Employees who hold terms and conditions of employment without fixed terms on service pay should not be discriminated, and the court fully embraces recent decisions which have adopted the 15 days salary for each completed year of service whenever such default is present.”

21. It is clear from the evidence adduced by both the Claimant and the Respondent that the Claimant worked in the Respondent Company from 21st May 2012 to 14th August 2014. Two completed years of service are not disputed.

22. The Respondent (DW2) testified (under cross examination) that the Claimant was earning ksh.9,127 per month as at the time he left employment. Fifteen days salary for each completed year of service is ksh.4,563.5 and for two completed years of service is ksh.9,127.

23. The Respondent (DW2) told the court that the Claimant was not paid for the fourteen days that he worked in August 2014. Unfortunately, the Claimant did not plead that issue, and has not claimed the said unpaid fourteen days salary. The court cannot therefore award the same.

24. Judgment is therefore entered in favour of the Claimant against the Respondent for ksh.9,127. The Claimant is also awarded costs of the suit and interest at courts rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND 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

Appearance:

Mr. Obuya for Claimant

No appearance for Respondent