



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 613 OF 2015

JOSEPHAT MAKHOHA

CLAIMANT

v

KLEEN HOMES SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. On 27 March 2013, the Medical Superintendent of Provincial General Hospital Kakamega wrote to Kleen Homes Security Services Ltd (Respondent) reporting the loss of foodstuffs from the hospital and alleging that security guards assigned by the Respondent had been colluding with kitchen staff to steal the foodstuffs.

2. The Hospital sought compensation from the Respondent to the tune of Kshs 500,000/-.

3. The same day, the Respondent issued summary dismissal letters to some of the guards it had assigned to the hospital, including Josephat Makhoha (Claimant).

4. The Claimant appealed against the dismissal, and on 16 July 2013, the Respondent's General Manager indicated in a Memo of even date to the Operations Manager that he agreed with his recommendation to reinstate the Claimant to employment.

5. The Claimant was not reinstated and on 17 April 2015, he commenced these legal proceedings against the Respondent alleging unfair termination of the contract.

6. The Respondent filed a *Response* on 16 June 2015 and the Cause was heard on 11 November 2019 (the Court reinstated the Cause on 4 June 2019 after it had been dismissed on 3 April 2019 when the Claimant failed to attend the first hearing).

7. The Respondent did not attend the hearing on 11 November 2019 despite having accepted and acknowledged service of a hearing notice on 9 July 2019.

8. The Claimant testified and thereafter filed submissions on 28 November 2019.

9. The Court has considered the pleadings, evidence on record and the submissions.

Unfair termination of employment

10. The Claimant was engaged by the Respondent as a security guard in 2004, and by the time of separation in March 2013 had risen to the position of a Supervisor.

11. The Claimant's testimony as set out in the filed witness statement which was adopted was that he was summoned to the Respondent's head office in Nairobi and upon arrival on 6 April 2013 he was informed he had been dismissed.

12. The summary dismissal letter was dated 27 March 2013 while the Claimant was summoned and went to the Respondent's offices on 6 April 2013.

13. It is clear to the Court that the decision to summarily dismiss the Claimant had been taken before he was afforded an opportunity to be heard as required by section 41(2) of the Employment Act, 2007.

14. The Court also notes that after the Claimant's appeal, the Respondent's General Manager agreed with a recommendation from the Operations Manager to reinstate the Claimant. The decision to reinstate suggests that the Respondent found the Claimant blameless. The

Respondent did not explain or disclose in Court why the decision to reinstate was not implemented.

15. It is also not lost to the Court that the Respondent acknowledged in the dismissal letter that the theft had been going on from 2012, while by the time of dismissal, the Claimant had only been at the Hospital for 5 months.

16. The Respondent did not attend Court to discharge the burden placed on employers by sections 43 and 45 of the Employment Act, 2007. The Respondent also failed to file witness statements as directed by the Court on 15 March 2019, an indication that it had no witnesses to call.

17. The Court finds that the dismissal of the Claimant was both procedurally and substantively unfair.

Compensation

18. The Claimant served the Respondent for about 9 years, and in consideration of the length of service, the Court is of the view that compensation equivalent to 9 months' salary would be fair (salary was Kshs 15,000/- per month).

Pay in lieu of notice

19. Since the Respondent did not give the requisite notice in terms of section 35(1) of the Employment Act, 2007, the Court finds the Claimant is entitled to the equivalent of 1-month salary in lieu of notice.

Uniform refund

20. The Claimant sought Kshs 2,000/- being uniform refund and since there was no contrary assertion/evidence, the Court will allow the head of the claim.

Accrued leave

21. Annual leave of 21 days on full pay is a statutory entitlement. The Claimant sought Kshs 120,000/- being untaken leave for 8 years.

22. A copy of the leave application form filed in Court shows that the Claimant went on leave in 2012.

23. Section 28(4) of the Employment Act, 2007 circumscribes the number of leave days which can be carried forward, and since there was no evidence that the Claimant applied for and was denied annual leave, the Court declines to grant this relief.

Certificate of Service

24. A *certificate of service* is a statutory entitlement, and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

25. The Court finds and declares that the summary dismissal of the Claimant was unfair and awards him

(a) Compensation Kshs 135,000/-

(b) Pay in lieu of notice Kshs 15,000/-

(c) Uniform refund Kshs 2,000/-

TOTAL **Kshs 152,000/-**

26. Respondent to issue Certificate of Service within 21 days.

27. Claimant to have costs on a half-scale.

Delivered, dated and signed in Nairobi on this 31st day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Leting instructed by Mulanya & Maondo Advocates

For Respondent Fatuma Mungoni & Co. Advocates

Court Assistant Judy Maina