



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. NO. CAUSE NO 305 OF 2015

BERNARD OKELLO OOKO.....CLAIMANT

-VERSUS-

MBAGATHI VIEW ACADEMY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant was employed by the respondent as a guard from 2.6.2006 to 23.10.2014 when he was summarily dismissed. He thereafter brought this suit seeking the following reliefs :

- (a) A declaration that the claimant's summary dismissal 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 totaling to Kshs. 1,715,599/-.**
- (d) Interest on (c) above from the date of filing suit till payment in full.**
- (e) Cost of this suit plus interest thereon.**

2. The respondent filed defence on 15.4.2016 denying that she unfairly dismissed the claimant. She averred that she dismissed the claimant for gross misconduct after according the claimant a hearing. She contended that the claimant was disobedient and violent. She further contended that she paid the claimant all his rightful dues after the dismissal and urged the court to dismiss the suit because he is not entitled to the reliefs sought.

3. The suit was heard on 3.6.2019 when the claimant gave evidence but the respondent did not. However, after the hearing both parties filed written submissions.

Evidence

4. The claimant testified as CW1 and he basically adopted his written statement filed on 25.2.2019 and produced his 4 documents annexed to the claim as exhibits. In brief he stated that he was employed by the respondent as a security guard from 26.6.2006 and his salary was Ksh. 12000 per month.

5. On 23.10.2014, he was summarily dismissed by the respondent from service. He contended that on the said day he reported to work as usual at 6 a.m. and at 6.20 a.m. the grounds man Mr. Mulei who was also the night guard served him with dismissal letter dated the same date. The reason cited for the dismissal was disobedience and being violent and other forms of misconduct which were still under investigation.

6. He denied the alleged misconduct and averred that he was not given any chance to defend himself before the dismissal. He contended that he called the Director Mr. Danson Pere to seek audience but he refused to talk to him. He stated that the dismissal was summary and without any prior notice to show cause letter despite his long service of 8 years. He therefore contended that the dismissal was unfair and prayed for the reliefs sought in the claim. He clarified that the only payment made to him after the dismissal was Kshs. 9000 which was salary of the days worked in the last month.

7. He testified that he was never given any annual leave for the 8 years he served the respondent and he never rested during public holidays

or the required one off day per week. He further contended that he was never paid double pay for working during public holidays or rest days. He further contended that since his dismissal he has never secured another job despite several attempts.

Issues for determination

8. There is no dispute from the evidence and submissions that the claimant was employed by the respondent from 2.6.2006 to 25.10.2014 when he was summarily dismissed. The issues for determination are however that:

(a) **Whether the dismissal was unfair**

(b) **Whether the claimant is entitled to the reliefs sought.**

Unfair termination

9. Under section 45 (2) of the Employment Act, termination of employee’s services is unfair if the employer fails to prove that it was grounded on a valid and fair reason(s) and that a fair procedure was followed. In this case the respondent averred in her defence that she dismissed the claimant for gross misconduct including disobedience and violence among other offences that were under investigations. She further averred that she accorded the claimant a hearing before the dismissal.

10. The claimant tendered evidence denying the said averments made by the respondent in her defence. The respondent did not tender any evidence to rebut the claimants evidence and to support her defence. I therefore find and hold that the respondent did not discharge her burden of proof as envisaged under section 43 and 45 of the Employment Act and that rendered the dismissal unfair.

Reliefs

11. In view of the foregoing, I make a declaration that the dismissal of the claimant was unlawful and unfair and he is therefore entitled to compensatory damages under Section 49 of the Employment Act.

12. Accordingly, I award him one month salary in lieu of notice plus 8 months salary compensation for the unfair termination.

13. In awarding the said compensation I have considered the fact that he served for 8 years without any warning letter and further that he did not contribute to the dismissal through proven misconduct.

14. I further award the claim for 8 years leave at the rate of 21 days per year. The claim was not disproved using leave records.

15. The claim for public holidays and overtime is dismissed for lack of particulars and evidence of how the same was arrived at.

16. The claim for gratuity for one year is declined also for lack of particulars and evidence.

Conclusion and determination

17. I have found that the dismissal of the claimant was unfair and unlawful and proceed to enter judgment for him in the following terms:

(a) **NoticeKshs. 12000**

(b) **CompensationKshs. 72000**

(c) **Leave Kshs. 7753.46**

TOTALKsh. 161538.46

The award is subject to statutory deductions but in addition to costs and interest at court rates from date hereon.

Dated, signed and delivered in open court at Nairobi this 20th day of January, 2020.

ONESMUS MAKAU

JUDGE