



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 523 OF 2017**

**JORAM KIDIGA AYIGA .....CLAIMANT**

**VERSUS**

**PATRICK MWANGI T/A BANANA LEAF HOTEL.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent his erstwhile employer and sought relief for the alleged unfair and unlawful termination of employment. The Claimant averred that he was employed by the Respondent as a security guard on 16<sup>th</sup> October 2016 and that he was earning Kshs. 8,000/- a month. The Claimant averred that before the termination of his services the Respondent did not prove any alleged misconduct nor was the Claimant served with a reasonable notice to show cause before his services were terminated via phone from Mr. Maina asserting there was no work for the Claimant. The Claimant averred that for the foregoing reasons his termination was unfair, unprocedural and illegal and/or unlawful. The Claimant thus sought compensation for the termination, arrears of salary – Kshs. 3,200/- for the month of November 2017 and one month's salary in lieu of notice. The Claimant averred that he issued a demand and the same was ignored hence the suit. He thus sought the relief sought together with the costs of the suit.

2. The Respondent on its part filed a defence in which it admitted that the Claimant was employed as a security guard on 16<sup>th</sup> October 2016. The Respondent averred that it was not aware that the Claimant earned Kshs. 8,000/- as salary and put him to strict proof. The Respondent denied that the Claimant suffered any damage and loss and that he was therefore not entitled to any of the reliefs he had sought in his claim. The Respondent admitted that there has not been any previous suit between the parties but denied that any demand or notice of intention to sue was served. The respondent denied that the Claimant was entitled to the reliefs sought and averred that the suit was an abuse of the court process and that it ought to be dismissed with costs.

3. The Claimant and the Respondent's 3 witnesses Patrick Mwangi Karubiu, Darius Maina Kimani and James Gachuiya Ndirangu testified. The Claimant stated that he wished to adopt his statement as his evidence. His statement was that he was employed at Banana Leaf Hotel and was dismissed by the supervisor Mr. Maina on 6<sup>th</sup> December 2017. He stated that he was informed there was no work for him and that he was at liberty to look for alternative employment. The Claimant stated that he was paid Kshs. 4,800/- leaving arrears of the November salary unpaid amounting to Kshs. 3,200/-. He stated that he was dismissed without notice and as traumatized as a result as he lost the only source of his livelihood. In cross-examination he testified that the termination occurred in 2017 and he did not go back to ask why the salary was deducted. He stated that he just called and was told that there was no work.

4. The Respondent's first witness was Patrick Mwangi Karubiu the proprietor of Banana Leaf Hotel. He testified that the Claimant was a security personnel at his establishment and that he lost some property under his charge. He stated that the security manager informed him of the loss of a skirt and that the Claimant admitted that he was responsible. He said that the second incident involved the DVD and the loss was reported and the Claimant was called for disciplinary action but he never showed up. In cross examination he testified that there were 2 incidents and on the first one the Claimant was fined Kshs. 370/- for the skirt and he paid. He stated that the DVD was never found. He said that they never knew who stole it but it was stolen under the Claimant's watch. He testified that the Claimant was called for disciplinary upon discovery of the loss but he never came back. He stated that the Claimant deserted but conceded that the issue of desertion was not raised in the defence. He testified that the Claimant was summoned verbally by Mr. Maina and though he had the Claimant's number he never bothered to call the Claimant. He stated that the Claimant used to sign on attendance at the security manager's office but the book had not been produced and therefore he could not tell when the Claimant deserted. In re-examination he stated that the Claimant never reported after the DVD went missing. He said that the Claimant just left and never called and that he had seen the Claimant in court since November 2017.

5. The Respondent's second witness was Darius Maina Kimani the security manager of the Respondent's businesses at Banana Leaf Hotel and Mountain Top. He stated that the Claimant was a watchman from 2016 and worked as a night watchman. He stated that the Claimant was not diligent and while at Mountain Top there was a skirt that was lost and when the complaint was raised the Claimant was asked to come with the day guard and together with the other guard and there was deduction of Kshs. 370/- from each. He testified that there was an incident on 8<sup>th</sup> November 2017 when he received a call at 9.30pm that the Claimant was watching TV and the DVD was missing. He stated that he called the Claimant and told him not to leave and that they would meet at the premises. He stated that the next morning he found

Kiongo and the other guard but the Claimant was missing. He stated that he called the Claimant and the Claimant did not show up and when he reached him on phone the Claimant said that he forgot. He testified that he summoned the Claimant on the 10<sup>th</sup> and the Claimant did not show up yet again. He stated that the Claimant never came back and absconded his employment. In cross-examination he testified that the sum of Kshs. 2,600/- was deducted for the loss of the DVD from all the 3 guards. He stated that failure to prevent a theft is a felony. He stated that no one had complained when the sums were deducted even when the deduction for the skirt was made the Claimant did not complain. He testified that the sums deducted was Kshs. 2,600/- and not the Kshs. 3,200/- in his statement. He said the Claimant went on leave and never reported back to work. He testified that the Claimant did not complain when the deduction was made. He said that the DVD was lost while under the care of the Claimant. He stated that no letter of dismissal was given and that the Claimant did not come to work.

6. The Respondent's third witness was James Gachuiya Ndirangu a watchan at Mountain Top and Banana Leaf Hotel. He stated that he reported to work at 6.00pm with the Claimant and they sat outside the gate and at about 7.00pm the Claimant went for supper and did not return until 9.00pm. He stated that when he went looking for the Claimant he found the Claimant watching TV and asked the Claimant where the DVD was. He said that he called his colleague named Kiongo who said that he too had left the DVD there when he left. He testified that the Claimant left at 5.00am and that they had been told to meet at 6.00am. He said that they were charged for the loss and that after that he got an off and the Claimant was on leave and the Claimant never resumed. In cross-examination he denied falsely accusing the Claimant. He asked why the Claimant feared coming for the interrogation when they were summoned. He said that he did not see the Claimant taking the DVD and that the Claimant denied taking it. He wondered why he would report the loss if he had taken it and testified that he was outside while the Claimant stayed inside for 3 hours and he found the DVD missing. He stated that he asked the children and they said they left the Claimant watching TV and the DVD was there. He testified that there was salary deduction for the lost item.

7. The Respondent's fourth witness was Samuel Kiongo Muthui who stated that he was a guard at the Respondent. He stated that on 8<sup>th</sup> November 2017 he was working for the Respondent and that he was at the gate on that day. He stated the other watchmen came and checked that everything was okay at 6.30pm. He said that at 9.00pm he was asked where the DVD was and that it had been looked for and was found missing. He stated that he told them he had no knowledge of its whereabouts. He said that he was called by his boss asked to meet and all the other guards showed up except the Claimant. He stated the Claimant went on leave and did not return despite being called. In cross-exam he stated that he did not call the Claimant and that they were to meet the next day. He stated that the Claimant did not come. He testified that they were to meet and talk about the DVD and the Claimant did not come. He stated that the Claimant was called and did not come. He stated that the Claimant was called on 9<sup>th</sup> November 2017 and did not show up. He said that there was a deduction of Kshs. 2,500/- for the lost DVD and that he accepted that the DVD was lost. He stated that all the guards had deductions. He stated that when he handed over the DVD was there and that he did not see the Claimant stealing it. He said that the students complained about the Claimant. In re-exam he stated that the call was at 9.30pm and not 9.00pm. That marked the end of oral testimony and parties were to file submissions.

8. The Claimant submitted that the Respondent's witnesses never saw the Claimant stealing the DVD and that the Claimant was never found in possession of the DVD. The Claimant submitted that no criminal charges were preferred against him for the suspected theft of the DVD. He submitted that the Respondent's first witness did not know when the Claimant left employment and that there was no evidence the Claimant deserted employment as alleged or that he failed to resume work as required. It was submitted that a copy of the attendance register would have been sufficient to prove that the Claimant failed to resume work after his leave as alleged. The Claimant submitted that the Respondent failed to controvert the Claimant's case for which the Claimant is entitled to the prayers sought in his memorandum of claim.

9. The Respondent submitted that the issues for determination were whether the Claimant was unfairly terminated and whether the Respondent needs to compensate the Claimant. The Respondent submitted that the evidence before the Court shows that the Claimant was never unfairly terminated. The Respondent submitted that the Claimant had a history of bad behaviour and when the DVD player went missing there were deductions and the Claimant never showed up the following day to defend himself. The Respondent cited the case of **Anthony Nguta Munywoki & 2 Others v County Supermarkets Limited [2019] eKLR** where the court dismissed the case because the Claimant failed to prove their case as they failed to show up for the disciplinary panel. The Respondent submitted that the Claimant was not entitled to be compensated as he failed to show up for the disciplinary panel and that he failed to prove that his employment was unfairly terminated. The Respondent urged the dismissal of the suit with costs.

10. The Claimant was suspected of theft when the DVD in one of the establishment's rooms went missing. It was stated that the Claimant was watching TV for 2 hours or so and when the other guard when to check on the Claimant that guard found the DVD missing and on enquiry the Claimant denied knowing of the whereabouts. The guard then called his colleague who confirmed that at the time of handing over the DVD was in the TV room. The supervisor asked the guards to meet him the next morning including the day guard and the Claimant was somehow the only one who failed to show up. He was summoned again the next day and he failed to show up. He is stated to have failed to take advantage of the opportunity to defend himself. Under Section 41 of the Employment Act, an employer is bound to accord an employee a fair hearing. Section 41 of the Employment Act provides as follows:-

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Whereas this was to be the case, the Claimant never appeared for the hearing contemplated. He cannot therefore turn around and accuse the Respondent of dismissing him unfairly or not hearing him by allegedly failing to safeguard his rights under Section 41. The suit by the Claimant is thus unmerited only fit for dismissal as I hereby do with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 18<sup>th</sup> day of February 2020**

**Nzioki wa Makau**

JUDGE