

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 44 OF 2018

GABRIEL GICHERU MURIUKI.....CLAIMANT

VERSUS

BATIAN SECURITY COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking recompense for the dismissal by the Respondent's supervisor Mr. Maina. The Claimant averred that he was employed by the Respondent as a security guard on 1st August 2014. He averred that he earned Kshs. 7,522/- a month and that on 1st August 2016 his services were terminated verbally by the supervisor Mr. Maina. He averred that the dismissal was unfair, unprocedural, and illegal and/or unlawful. He sought compensation for the unlawful dismissal, 20 days for public holidays, pension dues for the years worked, unpaid leave for the 2 years the Claimant did not proceed on leave and one month's salary in lieu of notice. He also sought costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant was never dismissed as alleged but that rather, he deserted his duties from 1st August 2016 and never came back to work despite several letters given to him by his employer to explain why he had deserted duty. The Respondent averred that there is no verbal dismissal at the Respondent as claimed by the Claimant. The Respondent admitted that it owed the Claimant for leave not taken for 1 year equivalent to 21 days plus pro rata leave for 7 months which it was ready to pay. It averred that the company does not operate a pension scheme but pays gratuity after 5 years of consecutive service per the 1998 Wages Order but the Claimant had only worked for 2 years. The Respondent averred that there was no unpaid sum for holidays and that the suit is fatally defective, lacks merit and is frivolous, vexatious and an abuse of the court process. The Respondent thus urged the dismissal of the suit with costs. In an amended defence the Respondent reiterated the above pleadings save to add that it averred that the prayer for leave was time barred as it was filed more than 12 months after the alleged date of termination.

3. The Claimant as well as Mr. Bernard Wanjohi Muguku for the Respondent testified. The Claimant testified that he worked as a guard in Gaikuyu and was guarding premises. He stated that the Respondent dismissed him on 1st August 2016. He stated that he filed suit on 31st January 2018 about 16 months later. He denied that he abandoned his employment with the Respondent. He stated that he was told not to go to work. He testified that he did not see the letter from the Respondent and stated that he could not be called for a disciplinary hearing if he was not at work. He stated that the letter from the Respondent indicated he did not go to work on 2nd August. He confirmed he stopped going to work on 1st August when he was dismissed.

4. The Respondent's witness testified that the Claimant was one of their best employees and he just left. He stated that the Claimant was engaged at a construction site and had no indiscipline issues. He said they did not know the reasons for the departure by Claimant as he just left and did not write. He stated that the Respondent wrote to the Claimant asking why he had absconded work. He speculated that perhaps the Claimant had found greener pastures. He stated that the letter was dispatched to the branch office at Karatina where the Claimant worked. He testified that he later learnt that the Claimant was hired at a construction site. In cross-examination he testified that the Claimant absconded duty on 1st August 2016. He stated that in the letter to the Claimant dated 15th August 2016 they said that the Claimant had absconded on 2nd August 2016. He said that the letter had a typo as the Claimant did not report to work on 1st August. He testified that Gitonga at the Karatina office would state how the letter was delivered as it was sent to him to dispatch to the Claimant. He referred to the muster roll and stated that the same showed when the Claimant worked. He admitted that the Respondent had not availed the muster roll for the period the Claimant was not there. In re-examination he testified that the Claimant did not come from 1st August onwards and the Respondent did not know the reasons why. He stated that Gitonga was the in charge at the Karatina office. That marked the end of oral testimony.

5. The Claimant filed written submissions and stated that the Claimant's testimony was unshaken. The Respondent's witness was accused of lying as he had testified about the Claimant's notice to show cause being served but could not prove how it was served. The Claimant submitted that relying on the case of **Crown Foods Limited v General Cargo Service [2019] eKLR** the Respondent should not be allowed to change their case midstream but instead should be bound by their pleadings. The Claimant submitted that the Respondent had failed to prove that there were valid reasons for termination in terms of Section 43 or that the Claimant was given a hearing in terms of Section 41(1) and (2) of the Employment Act. He submitted that he had proved his case on a balance of probability and prayed for judgment in his favour.

6. The Respondent in its submissions submitted that the Claimant had failed to return the boots he had been issued with and absconded duty from 1st August 2016. The Respondent submitted that the Claimant had gone for greener pastures as he worked at a construction site after leaving its employ. The Respondent submitted that the suit was an afterthought and offended the provisions of law. The Respondent submitted that the issues for determination were whether the Claimant's employment was terminated by the Respondent and whether the Claimant was entitled to relief. The Respondent submitted that the Claimant was working at a site that was a short distance from the Respondent's Karatina office and that the proof delivery of the letter to him was neither here nor there. The Respondent submitted that the Claimant never went to the Labour Office to complain and that it was the norm for an aggrieved person to seek redress. The Respondent

submitted that it had no reason to terminate the Claimant's services as he was one of its best employees. The Respondent submitted that the Claimant simply found greener pastures and left without notice. The Respondent submitted that he who alleges must prove. It cited the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** in support of its submissions. The Respondent submitted that the Claimant had not proved his case and that he filed the claims out of the limitation period under Section 90 of the Employment Act.

7. The Claimant asserted oral termination while the Respondent asserts desertion. The Claimant stated that the manager Mr. Maina terminated him orally. No evidence was led as to the alleged desertion as the letter stated to have been delivered to the Claimant was demonstrated to have been sent to the Karatina office of the Respondent and no proof was adduced as to its delivery to the Claimant. Whereas the Claimant filed the claim a year and some months later, it was in line with Section 90 of the Employment Act as claims on termination can be filed within 3 years. In respect of underpayments and the like there is a bar of 12 months. As such, the Claimant would not recover for unpaid holiday etc. even if he proved the claim which in this case was not proved. As the Claimant proved on a balance of probability that there was unfairness in his termination, the Respondent would be liable to the extent that the Claimant was not given notice of the intention to terminate his services and worse still conducted unfairly by not being heard before his dismissal. He is thus entitled to relief as follows:-

a. One months salary in lieu of notice – Kshs. 6,500/-

b. 3 month's salary as compensation – Kshs. 19,500/-

c. Costs capped at Kshs. 20,000/-

d. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of February 2020

Nzioki wa Makau

JUDGE