



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1203 OF 2015**

**JOSEPH ONDIEKI AKUMA.....CLAIMANT**

**VERSUS**

**TANDU ALARM SYSTEMS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant was employed by the respondent on 19.6.2007 as a security guard for a basic monthly salary of Kshs. 19600/= and worked for the Respondent with due diligence until 30<sup>th</sup> March, 2015 when the Respondent terminated the Claimant's services on allegations of negligence on duty. He therefore brought this suit on 9<sup>th</sup> July, 2018 seeking the following prayers: -

- a) A declaration that the termination of the Claimant's employment was unfair and wrongful.
- b) The Claimant be paid his terminal dues as set out in paragraph 14 of the statement of claim amounting to Kshs. 394,304.15/=.
- c) Compensation for wrongful dismissal equaling to twelve (12) months gross salary.
- d) The Respondent to pay the costs of the suit plus Interest.
- e) Certificate of service

2. The Respondent filed defence on 20<sup>th</sup> December, 2018 denying the alleged unfair termination of the claimant's employment. She averred that the Claimant was terminated after he failed to search motor vehicle registration number KBQ 346V which was exiting the Delamere main gate where he was assigned to perform that duty. She further averred that the claimant was afforded an opportunity to defend himself before the dismissal.

3. The matter was heard on 3<sup>rd</sup> July, 2019, 24<sup>th</sup> September, 2019 and 31.10.2019 when both parties tendered evidence and thereafter filed submissions.

**Claimant's case**

4. The claimant testified as Cw1 and briefly stated that he was employed by the Respondent as a security guard on 19<sup>th</sup> June, 2007 earning Kshs.19251 per month and worked for the Respondent with due diligence and faithfulness until 30<sup>th</sup> March, 2015 when the Respondent dismissed him for alleged negligence of duty. He further stated that, he was not given any notice prior to his termination and was never given a fair hearing contrary to the provisions of Section 41 of the Employment Act, and the principles of natural justice.

5. He denied the allegation that he failed to search motor vehicle registration KBQ 346V at the Delamere gate and contended that the vehicle came to the gate while he was inspecting a motor bike and another guard for Delamere swiftly opened the gate for the vehicle and it left before he could search it as required. He therefore denied any wrong doing in the circumstances. He therefore prayed for the reliefs sought in his Claim and contending that he served the respondent for 8 years. He also prayed for costs.

6. He however admitted that on he was invited for a hearing on 25.3.2015 and defended himself. He denied that he admitted the offence during the disciplinary hearing and contended that he appealed against the dismissal but he was never heard on his appeal. He however admitted that after the hearing he was given the proceedings to sign and also make copy.

7. On cross examination he contended that there was no previous complaint against him during his long service. He further contended that it was the first time two vehicles arrived at the gate at the same time. He admitted that he was served with a show cause letter and responded and then he was heard the same day. He further admitted that the letter inviting him to the hearing gave him the option of being accompanied by a fellow employee of his choice.

8. However, he contended that due to the hurried hearing, he was denied the chance to call a witness from Naivasha to support his case because he was required to respond to the show cause letter by 12 noon after which he was summoned for the hearing at 3 pm the same day. He admitted that in his response to the show cause letter he stated that he was serving visitors from Wetam Farm and then went to look for phone network while the KBQ 346 V was hooting for him to open the gate and his counterpart from Robinson Security opened the gate swiftly. He maintained that he denied the offence during the disciplinary hearing but admitted that he signed the proceedings after the hearing. He contended that he was not given a chance to read the proceedings before signing the same.

9. He denied ever taking his leave for his last year of service and contended that he is entitled to 21 leave days as at March when he was dismissed. He denied that his terminal dues were paid after the dismissal.

#### **Defence case.**

10. Mr. Frankline Simiyu Wekesa, Respondent's Operations Manager testified as Rw1. He confirmed that the claimant was employed by the respondent before his dismissal for the gross misconduct of performing his duties negligently. He contended that the claimant failed to search motor vehicle registration number KBQ 346 V which was his duty and that caused the respondent's client, KEN CHIC to lodge a complaint about the manner of his performance of duty.

11. He further testified that the claimant was served with a show cause letter and respondent after which he was summoned to a hearing before a disciplinary committee for the failure to search KBQ346V while exiting the premises. He further stated that the claimant admitted the offence and as such he was dismissed. He contended that the offence of willful neglect of duty was very serious because it compromised client's security and threatened respondent's loss of business.

12. He denied the claim for unpaid salary and contended that the claimant was paid all his salary upto 30.3.2015 when he was dismissed. He also denied the claim for leave contending that the claimant took 19 days leave in April 2014, 14 days in October 2014. He contended that as at October 2014, the claimant had only 8 leave days which was paid to him. He further denied the claim for gratuity contending that the employee who works for over 5 years is enrolled to a Provident Fund with the ICEA. He therefore contended that he claimant is a beneficiary of the Provident fund and not entitled to gratuity. He further denied the claim for uniform levy refund contending that the kshs 8000 refundable was used to offset his loan of kshs.19000 at with the Sacco.

13. On cross examination, he contended that the reason for the terminating the claimant's employment was failure to perform his duty. He contended that the claimant failed to open the gate for the client, failed to search the vehicle and walked away. He contended that it was possible to serve two vehicles at the same time because the gate is one. He maintained that the claimant admitted offence when he stated that the gate was opened by another person.

14. He further contended that the claimant was given sufficient time to prepare his defence and that he did not call anyone from Naivasha to accompany him to the disciplinary hearing. He contended that the procedure followed was fair because he was invited to a hearing and agreed to proceed the same time citing cost of travelling back to Nairobi from Naivasha. He further contended that the reason for the dismissal was valid.

15. He maintained that the claimant had been paid his salary for March 2015 before the dismissal and after the dismissal his dues were tabulated at Kshs 3461 for accrued leave. He further reiterated that the claimant was paid his Provident Fund Benefits cleared under a separate cover.

#### **Issues for determination**

16. There is no dispute that the claimant was employed by the respondent for 8 years until 30.3.2015 when he was summarily dismissed. The issues for determination are: -

- a) Whether the Respondent had a valid and fair reason for dismissing the Claimant from his employment.
- b) Whether the Respondent followed a fair procedural before dismissing the Claimant.
- c) Whether the Claimant is entitled to the terminal dues sought in the statement of claim.

#### **Whether the Respondent had a valid and fair reason for dismissing the Claimant from his employment.**

17. The Respondent's case is that the Claimant was dismissed for his negligence of duty contrary to Section 44 (4) (c) of the Employment Act. The Section gives the particulars of the offence as "***where and employee willfully neglects to perform his work...***" The Claimant denied that he willfully neglected to perform his duty and contended that report that he was in the process of searching a motor vehicle from Wetam farm when motor vehicle registration number KBQ 346V approached the main gate to exit and another security guard from Robinson Security opened the gate before the Claimant could search the said motor vehicle.

18. I have carefully considered the evidence and the rival submissions by both parties. It was admitted by the claimant that he saw KBQ 346V approach the gate while he was inspecting a motor bike and then walked away to look for Phone Network as the

KBQ346 V hooted to him to open the gate. He never bothered to explain to the driver why he was walking away prompting another guard to open the gate and the car exited without being searched. Such manner of performing duty was improper and unacceptable to the client and she lodged a complaint to the claimant's employer who investigated and verified from the claimant in writing that in deed he failed to search, and open the gate for KBQ346V. The claimant admitted herein that it was his duty to search the said vehicle and open the gate for it.

19. Under section 44 of the Employment Act, the employer is entitled to summarily dismiss his employee for failure or neglect to perform or for negligent or careless performance of work that was his duty under the contract of service to have performed carefully. Consequently, I find and hold that the respondent has proved on a balance of probability that there are valid and fair reason related to the claimant's conduct that justified her to terminate the claimant's employment.

20. Although the Claimant alleged that she was serving another vehicle when the KBQ346 V approached the gate, the manner in which he performed his responsibilities as the gate keeper amounted to gross misconduct in the assessment of the client and his employer.

**Whether the Respondent followed a fair procedure before dismissing the Claimant.**

21. The Claimant contended that he was not afforded a fair hearing by the Respondent before the dismissal because he was served with a show cause letter on 25<sup>th</sup> March, 2015 and asked to respond on the same day by 1230 hours, and then invited to attend hearing on the same day. He contended that the purported disciplinary hearing was a sham because he was not given adequate time to respond to the show cause and was not given a chance to be represented.

22. The respondent contended that the hearing was fast tracked at the claimant's request in order to save on travelling costs from Naivasha and back. She further contended that the claimant never protested against holding of the hearing on the material date and added that he did not need to choose a companion from Naivasha. She therefore urged that the procedure followed was fair.

23. After careful consideration of the material before the court, I agree with the respondent that the procedure followed was fair. The claimant was served with show cause letter which he responded to in writing. Thereafter he was invited to hearing and he admitted the offence and thereafter signed the typed proceedings and made a copy. Such conduct is proof that the claimant did not have any issues with the proceedings until he was served with a dismissal letter.

24. Section 41 of the Employment Act, 2007 provides that: -

***“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.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”***

25. The foregoing provision notwithstanding, the claimant herein waived his right to the all his rights when he accepted to proceed with the hearing on 25.3.2015 and even signed the proceedings voluntarily. If at all he had been coerced to signing the proceedings, he would have raised the matter with the police, Labour office or the court. He also did not indicate to the disciplinary committee that he had a witness to call from Naivasha. I therefore, find that the alleged witness from Naivasha was an afterthought.

**Whether the Claimant is entitled to the terminal dues sought in the statement of claim.**

26. Having found that the respondent has proved valid fair reason for dismissing the claimant and that she followed a fair procedure, I decline to make declaration that the dismissal was unfair and wrongful as prayed. Accordingly, I dismiss the prayer for salary in lieu of notice and compensation under section 49 of the Employment Act.

27. The claimant prayed for service gratuity for 8 years. Under the provisions of rule 17(1) of the Regulations of Wages (Protective security) services order 1998 it is provided that: -

***“After five years' service with a n employer the employee shall be entitled to eighteen days' pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.”***

28. The foregoing regulation, in my view, should not be used as a basis for double benefit. In this case the claimant did not rebut the respondent's contention that he was paid pension from her staff Provident Fund. In addition, the pay slips and other documents produced by the respondent show that the claimant is also a beneficiary of the NSSF. The claimant did not produce any evidence to dispute the contention that the employer made NSSF contribution for him. Consequently, I dismiss the claim for service gratuity.

29. The claim for salary for March 2015 is allowed as prayed. Although, Rw1 contended that the same was paid before the dismissal, he admitted that he had no evidence to prove the alleged payment.

30. The claim for leave lacks particulars and as such I grant what the employer has admitted being 8 days valued at kshs. 3,010. I also grant

the claim for kshs. 6,000 being uniform levy refund because the said sum was admitted by the respondent. However, payment of the said uniform levy is subject to the claimant returning the uniform to the respondent.

31. Although, respondent alleged that the cash for the outstanding leave and uniform levy was applied to pay Sacco loan, the respondent did not prove that the claimant had given authority for the money to be used as such. There is also no counter claim by the respondent and as such the respondent must pay to the claimant his lawful terminal dues.

32. The claim for overtime lacks particulars and evidence and as such it is dismissed. I however grant the prayer for Certificate of Service under Section 51 of the Employment Act, 2007.

### **Conclusion and disposition**

33. I have found that the dismissal of the claimant herein was substantively and procedurally fair. I have however also found that he is entitled to some terminal dues. Consequently, I enter judgment for him as follows:

Salary for March 2015.....	Kshs 19,251
Leave.....	Kshs 3461.04
Uniform refund.....	<u>Kshs 6000</u>
<b>Total.....</b>	<b><u>Kshs 28712.04</u></b>

The said award is subject to statutory deduction but in addition to cost and interest at court rates from the date of filing the suit.

**Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> of April 2020**

**ONESMUS N. MAKAU**

**JUDGE**