



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 799 OF 2017**

**MACHOKA JARED OMACHE.....CLAIMANT**

**VS**

**BOB MORGAN SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by a Memorandum of Claim dated 6<sup>th</sup> October 2017 and filed in court on the same date is for compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Response on 18<sup>th</sup> September 2019.

2. When the matter came up for hearing the Claimant testified on his own behalf and the Respondent called its Coast Branch Manager, Patrick Ochieng. Both parties further filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a dog handler/night guard at a monthly salary of Kshs. 16,907 from 20<sup>th</sup> October 2010.

4. The Claimant worked for the Respondent until 26<sup>th</sup> May 2017 when he was dismissed.

5. The Claimant avers that on the night of 7<sup>th</sup> /8<sup>th</sup> May 2017 at around 2.15 am a group of men armed with machetes climbed over the perimeter wall at Bonfide Changamwe Yard where the Claimant and his colleagues were guarding.

6. The Claimant ran towards some containers and hid himself. He states that while at his hiding place, he heard the sound of smashing windscreens but was unable to call for help as he feared for his life. He was rescued by the Respondent’s response team after 30 minutes.

7. On 9<sup>th</sup> May 2017, the Claimant recorded a statement at the Respondent’s offices and on 10<sup>th</sup> May 2017 he recorded a further statement at Changamwe Police Station. He states that thereafter, he was not allowed to go back to work.

8. On 26<sup>th</sup> May 2017, the Claimant was issued with a summary dismissal letter dated 24<sup>th</sup> May 2017.

9. The Claimant’s case is that his dismissal was wrongful and unfair in that there was no genuine reason for it and he was not afforded an opportunity to be heard.

10. The Claimant now seeks the following:

- a) One month’s salary in lieu of notice.....Kshs. 16,907.00
- b) Unpaid salary for May 2017.....16,907.00
- c) 6 accumulated off days in May 2017.....3,901.60
- d) Un-refunded uniform money.....3,500.00

- e) Unpaid leave for 2013.....16,907.00
- f) 12 months' salary in compensation.....202,884,00
- g) Certificate of service
- h) Costs plus interest

**The Respondent's Case**

- 11. In its Response dated 18<sup>th</sup> September 2019 and filed in court on even date, the Respondent admits having employed the Claimant and adds that at the time of dismissal, the Claimant was working as a dog handler.
- 12. The Respondent concurs with the Claimant's narration of the events of 7<sup>th</sup> May 2017.
- 13. The Respondent avers that the Claimant was subjected to a disciplinary hearing during which he admitted having contravened the Standard Operating Procedures by failing to activate the emergency mechanism and to command the dog he was handling to attack the intruders.
- 14. The Respondent further avers that the Claimant admitted that the response to the attack was wanting and that his actions on 7<sup>th</sup> May 2017 occasioned loss for which the Claimant offered to be surcharged.
- 15. The Respondent maintains that the Claimant's dismissal was lawful and fair as he was clearly advised of the allegations against him and was allowed a proper opportunity to defend himself. Further, the Claimant was paid all his dues and was also issued with a certificate of service.
- 16. The Respondent adds that prior to dismissal, the Claimant had been issued with two warning letters on account of lateness and sleeping on duty.

**Findings and Determination**

- 17. There are two (2) issues for determination in this case:
  - a) Whether the Claimant's dismissal was lawful and fair;
  - b) Whether the Claimant is entitled to the remedies sought.

**The Dismissal**

18. The Claimant was dismissed by letter dated 24<sup>th</sup> May 2017 stating as follows:

*“Dear Sir,*

**RE: SUMMARY DISMISSAL FOR GROSS MISCONDUCT**

*Reference is made in regard to the disciplinary hearing held on 20<sup>th</sup> May 2017 in regard to theft incident at Bonfide Changamwe.*

*It has been noted that on 8<sup>th</sup> May 2017 while assigned duties at Bonfide Changamwe you negligently performed your duties resulting to loss of client properties details which were discussed. Your actions are contrary to the company code of conduct.*

*In light of the above, you are hereby dismissed for gross misconduct in line with Employment Act 2007. Further you will be surcharged any resultant claims incurred.*

*To facilitate your clearance, arrange to return all the company property in your possession to enable your clearance.*

*Yours faithfully,*

**BOB MORGAN SERVICES LTD.**

*(signed)*

**JOHN OCHUKU**

**CHRO-ADMIN.**

19. This letter accuses the Claimant of negligent performance of duty thus occasioning loss to the Respondent's client. Negligence in the performance of duty, if proved, is a valid ground for termination of employment.
20. In order to determine whether an employee is guilty of negligence, the Court must inquire into the particular circumstances of each case. It is not in dispute that the Claimant and his colleagues were attacked while on night duty. The Respondent however accuses the Claimant of failing to act within Standard Operating Procedures.
21. This case turns on the question whether the Claimant acted reasonably in the circumstances. At the time of the incident, the Claimant was performing the duties of a dog handler. He told the Court that he did not have a panic button and he did not command the dog to attack because the intruders were too many and the Claimant feared for his life.
22. The question whether the Claimant acted reasonably could only have been determined at an internal disciplinary hearing at the shop floor as required under Section 41 of the Employment Act. The Claimant however told the Court that he was not allowed such an opportunity.
23. The Respondent's witness, Patrick Ochieng on the other hand, testified that the Claimant attended a disciplinary meeting on 20<sup>th</sup> May 2017 at which he agreed to be surcharged for the loss arising from the incident of 7<sup>th</sup> May 2017. Ochieng admitted that he was not at the meeting of 20<sup>th</sup> May 2017 and he did not avail any invitation to the Claimant to attend the meeting.
24. Moreover, according to the record of proceedings filed by the Respondent, the Claimant's name does not appear among those present at the meeting. Additionally, the Claimant's signature does not appear on the record. The Claimant's testimony that he was not subjected to any disciplinary hearing was therefore unchallenged.
25. More significantly, it is on record that the panel that sat on 20<sup>th</sup> May 2017 observed that the assignment at which the incident occurred was exposed due to inadequate lighting and fencing. There was no evidence that this material observation was taken into account before the decision to dismiss the Claimant was made.

26. I am aware of the '*reasonable responses test*' by which the Court is required to assess the decision made by an employer against the standard of a reasonable employer rather than by the preference of the presiding Judge (see *CFC Stanbic Bank v Danson Mwashako Mwakuwona [2015] eKLR*).

27. Applying this test to the present case, I find and hold that the Respondent having failed to establish negligence on the part of the Claimant cannot be said to have had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.

**Remedies**

28. In light of the foregoing findings, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and his employment record. I have further considered the Respondent's failure to follow the law in effecting the dismissal.

29. I also award the Claimant one (1) month's salary in lieu of notice.

30. The claims for salary for May 2017, accumulated off days and uniform refund are admitted and are payable.

31. Regarding the claim for leave pay for 2013, the only thing I will say is that any such claim would fall under '*continuing injury*' within the meaning of Section 90 of the Employment Act and thus beyond the twelve months' limitation period.

32. In the end, I enter judgment in favour of the Claimant in the following terms:

a) 8 months' salary in compensation .....	Kshs. 135,256
b) 1 month's salary in lieu of notice.....	16,907
c) Unpaid salary for May 2017.....	16,907
d) 6 accumulated off days in May 2017.....	3,381
e) Uniform refund.....	<u>3,500</u>
<b>Total.....</b>	<b>175,951</b>

33. This amount will attract interest at court rates from the date of judgment until payment in full.

34. The Claimant is also entitled to a certificate of service plus costs of the case.

35. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF APRIL 2020**

**LINNET NDOLO**

**JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the

COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Tolo for the Claimant

Mr. Njeru for the Respondent