



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 264 OF 2018

HAMISI CHAKA KENGO.....CLAIMANT

VERSUS

GUARD FORCE GROUP LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 24th April 2018 and filed in court on 25th April 2018, the Claimant has sued the Respondent for unfair termination of employment. The Respondent filed a Response on 14th June 2018.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Senior Supervisor, Kenneth Douglass Otieno. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Security Guard in 2016. He worked as such until February 2018, when he was summarily dismissed. At the time of dismissal, the Claimant earned a monthly salary of Kshs. 6,000.
4. The Claimant claims that his dismissal was without justifiable cause and in violation of due process. He therefore claims the following:
 - a) 12 month's salary in compensation.....Kshs. 72,000
 - b) 1 month's salary in lieu of notice.....6,000
 - c) Compensation for unutilised leave
 - d) Service pay for 2 years
 - e) Certificate of service
 - f) Costs plus interest

The Respondent's Case

5. In its Response dated 14th June 2018 and filed in court on the same date, the Respondent denies that the Claimant's dismissal was wrongful.
6. The Respondent states that the Claimant was not entitled to annual leave because he was employed on contractual basis.
7. The Respondent's case is that it had engaged the Claimant to provide security on contractual basis hence the issue of dismissal and/or unfair termination does not arise. The Respondent maintains that the contract of employment terminated after the agreed contractual term

came to an end.

8. The Respondent avers that it was under no obligation to issue the Claimant with a certificate of service because the Claimant had never been a permanent employee of the Respondent.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case wrongful dismissal;
- b) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

10. The Claimant told the Court that he worked for the Respondent from 2nd February 2016 until 28th February 2018 when he was wrongfully dismissed.

11. In denying this claim, the Respondent states that the Claimant was employed on a fixed term contract to provide security services at the Kenya Railways Corporation. The Respondent’s Senior Supervisor, Kenneth Douglass Otieno referred the Court to an employment contract dated 29th January 2016 which the Claimant admitted having signed. Otieno also made reference to a contract for provision of security guarding services between Kenya Railways and the Respondent.

12. Clause 7 of the employment contract provides that the Claimant’s employment was dependent on the subsistence of the contract between the Respondent and the assignment client. The Claimant told the Court that he was assigned to guard Kenya Railways premises. It is therefore logical to conclude that the client referred to in Clause 7 of the Claimant’s employment contract is Kenya Railways.

13. The contract with Kenya Railways was to run for two years from 1st February 2016. This period coincides with the Claimant’s employment period. It seems to the therefore that the Claimant was employed on a fixed term contract of two years, which he fully served. As held by **Rika J** in **Margaret A. Ochieng v National Water and Pipeline Corporation [2014] eKLR** an employee serving on a fixed term contract should not expect automatic continuation of employment after the contract term.

14. Having served his full term, the Claimant cannot complain about wrongful dismissal. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

15. The Claimant also claims leave pay. On its part, the Respondent admits that the Claimant was not granted annual leave but cites Clause 3 of the Claimant’s employment contract dated 29th January 2016, which provides that the Claimant was not entitled to any additional benefits, including leave or rest days.

16. There is no doubt that Clause 3 of the Claimant’s contract flies in the face of the minimum terms and conditions set by the Employment Act. For this reason, this part of the contract cannot survive and is struck out.

17. It follows then that the Claimant was entitled to 21 days’ leave per year and because he did not go on leave, he ought to be paid in lieu thereof.

18. Similarly, because the Claimant was not a contributing member of the National Social Security Fund (NSSF) he is entitled to service pay.

19. In the end, I enter judgment in favour of the Claimant as follows:

- a) Leave pay for 2 years (6,000/30x21x2).....Kshs. 8,400
- b) Service pay for 2 years (6,000/30x15x2).....6,000
- Total.....14,400**

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

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

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF MAY 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 15th 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.

LINNET NDOLO

JUDGE Appearance:

Mr. Wachenje for the Claimant

Miss Nyagah for the Respondent