



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 727 OF 2017

BETWEEN

NEWTONE MUDAMBICLAIMANT

VERSUS

TEXAS ALARMS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Chamwada & Company Advocates for the Claimant

E.W. Munyari & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 7th September 2017. He states he was employed by the Respondent as a Security Guard on 1st November 2012. His last salary was Kshs. 11,400 monthly. His contract was terminated by the Respondent on 7th March 2016, on the allegation that he was involved in theft. He was charged alongside other Employees, in CM's Court Mombasa, Criminal Case No. 531 of 2016, and acquitted on 7th March 2017. Termination was wrongful and unfair because he ought to have been suspended pending the outcome of the criminal case. He states, the Respondent did not avail him any opportunity to resolve the matter internally before dismissal.

2. The Claimant pleads that he was not able to present this Claim to Court in time, because he had pending criminal case. He had to wait for the outcome of that case. He prays for Judgment against the Respondent for: -

- a. 1 month salary in lieu of notice at Kshs. 11,400.
- b. Compensation for unfair termination at Kshs. 136,800.
- c. Unpaid house allowance at Kshs. 82,080.
- d. Leave at Kshs. 11,400.
- e. Certificate of Service.
- f. Costs.
- g. Any other orders.
- h. Interest at the rate of 14% per annum.

3. The Respondent filed its Statement of Response on 16th October 2017. It is conceded that the Claimant was employed by the Respondent as a Security Guard, but not on regular basis. His contract was not terminated by the Respondent; he abandoned his post on 7th March 2016.

He was guarding premises belonging to Respondent's Client- Tiles and Carpets, Mbaraki – when goods worth Kshs. 800,000 were stolen. He was arrested and charged in Court. He was warned and asked to resume duty pending the outcome of the criminal case. He declined resumption, saying he would only resume after the case was finalized. The Respondent prays the Court to dismiss the Claim with costs.

4. The Claimant gave evidence and closed his case on 23rd September 2019. Human Resource Manager Bernard Odhiambo Aduda, gave evidence for the Respondent, closing the hearing, on 5th February 2020. Parties subsequently filed their Closing Submissions, and the file couriered to the undersigned Judge for preparation of Judgment outside the Court Station, a course informed by the limitations on travel and physical congregation imposed by the currently ranging, and novel, coronavirus.

5. The Claimant restated that he was employed on 1st November 2012. His contract was terminated by the Respondent on 7th March 2016. There was a pending criminal case. It was alleged that Tiles and Carpet, a Client of the Respondent, lost some goods from the premises the Claimant was guarding. The Claimant was acquitted on 7th March 2017. He was told by the Operations Manager, after he posted bail at the beginning of the criminal case, that he was a criminal. He was not issued a notice or a letter of termination. His last salary was Kshs. 11,400. He did not leave employment of his own volition. He was not recalled even after acquittal. He did not see the warning letter exhibited by the Respondent.

6. Cross-examined, the Claimant agreed there was allegation of theft at Respondent's Client. He guarded the premises. He had done so for 4 months. He was bailed after 11 days in custody. He reported to the Operations Manager on bailment. The Operations Manager told the Claimant that he was a thief. This is not captured in Claimant's Witness Statement. The Respondent did not write a letter of termination. There was no letter of warning issued upon the Claimant, at the time he reported back. He reported back on 23rd April 2016. The Respondent and its Client, did not turn up for the criminal trial. The Claimant never went on annual leave.

7. Aduda told the Court that the Claimant worked with the Respondent until 7th March 2016. He was arrested by Police Officers, and charged, on allegations of theft at a Client's premises. He reported back on 20th April 2016. The criminal case was ongoing. He was advised by Aduda to go back home and wait for the outcome of the criminal case. Claimant's co-accuseds received warning and continued to work pending the outcome of the criminal case. The Claimant declined the warning. He declined to resume duty until the case was determined. His Claim has no foundation. His salary was consolidated. The Respondent concedes the Claimant merits salary for 7 days worked from 1st to 7th March 2016. Pro-rata leave from 1st November 2015 to 7th March 2016 is payable. The Respondent concedes also, the prayer for Certificate of Service.

8. Cross-examined, Aduda confirmed to the Court that the Claimant was Respondent's Employee. Operations Manager witnessed the Claimant's arrest. The Client, not the Respondent, made a complaint to the Police. Employees of the Respondent were not lined up as Witnesses in the criminal case. Aduda did not remember what day it was on 20th April 2016. The Claimant refused to receive the warning letter. Aduda did not have evidence to show loss occasioned to Respondent's Client. The Claimant was supposed to work until the criminal case was finalized. The warning letter did not advise the Claimant to resume duty. Aduda did not know when the criminal case ended. He did not advise the Claimant to stop working. The Respondent has not exhibited Claimant's leave forms or his pay slips. Disciplinary hearing was to take place after the criminal trial.

The Court Finds:-

9. There is an issue that is raised by the Claimant at paragraph 12 of his Statement of Claim, which must be addressed by the Court from the outset.

10. He states: “ *the Claimant avers that he was not able to file this Claim in time, because he had a pending criminal case, and he had to await its outcome.*”

11. The Claim was filed on 7th September 2017. Termination was on 7th March 2016. Section 90 of the Employment Act places a time bar of 3 years on filing of claims based on contract of employment. It is not clear why the Claimant pleads that he did not file his Claim in time. The Court is convinced the Claim was filed within the prescribed period, and must therefore assume jurisdiction and consider the merits of the Claim.

12. The issues are: whether the Claimant's contract was terminated by the Respondent; whether if so, termination was based on valid ground and executed fairly; and lastly, whether the Claimant merits the remedies sought.

13. The Parties do not contest the facts on the employment history of the Claimant; his terms and conditions of employment; and the fact that he was arrested and prosecuted over the allegation that goods belonging to Respondent's Client, were stolen from the premises guarded by the Claimant.

14. He was arrested on 7th March 2016. He was bailed, and reported back to work. He states he reported back on 23rd April 2016, while Aduda gives the date as 20th April 2016. Whichever the date, Aduda stated that he told the Claimant and his co-accuseds to go back home, and await the outcome of the criminal case. It is contradictory to say that he also advised the Claimant to acknowledge receipt of a warning letter and to continue working. First, the Claimant does not acknowledge receipt of any warning letter. Second, the exhibited letter does not instruct the Claimant to resume duty. Third, Aduda stated, the Respondent intended to hold disciplinary proceedings after the criminal trial. The letter of warning does not say so. It is on its own, punishment meted on the Claimant, for his alleged involvement in the incident at Tiles and Carpet business. He was advised that a repeat of the same conduct, would lead to summary dismissal.

15. The Respondent pegged further action on the Claimant, on the outcome of the criminal case, notwithstanding that punishment by way of warning, had already been administered. The letter states that “ *the Management has decided to give you a benefit of doubt, as they await the*

court ruling.”

16. Yet, even after the Claimant was acquitted, the Respondent does not seem to have recalled him, or even put him through the contemplated disciplinary proceedings, if the evidence of Aduda can be relied upon.

17. The Court is persuaded that the Claimant went back to work upon bailment and was asked to leave by the Respondent. He was not subjected to a disciplinary process. The allegations of his involvement in theft at Tiles and Carpet, were not established at the workplace, through internal investigation and disciplinary process. Although the Respondent was not in law bound to await the outcome of the criminal case to take action against the Claimant, the Respondent opted to go by that outcome in the letter of warning, but did not in the end, recall the Claimant.

18. There was no valid ground shown to justify termination and procedure was wanting. Termination was unfair under Sections 41, 43 and 45 of the Employment Act 2007.

19. The Claimant worked for 4 years. He is not shown to have had a poor disciplinary record. It was never established that he had any role, in circumstances leading to termination of his contract. Termination was unfair in substance as well as in its execution. **The Court allows his prayer for compensation at equivalent of 4 months’ salary, at Kshs. 45,600.**

20. Notice pay is granted at Kshs. 11,400.

21. The Respondent in its evidence offered to pay to the Claimant salary for 7 days worked in March 2016; pro-rata leave from 1st November 2015 to 7th March 2016; and to release his Certificate of Service.

22. The Claimant defined his salary in his Statement of Claim, paragraph 3, as ‘gross.’ The Respondent holds that what was paid included house allowance. If the Claimant was paid a gross monthly, rather than a basic monthly salary, the presumption in the view of the Court, would be that the housing element was included in his gross salary. The prayer for house allowance in arrears is declined.

23. Although he prays for annual leave at Kshs. 11,400, he does not plead annual leave in the rest of his Statement of Claim, neither did he give evidence to show the leave pay applies to what period. **The Respondent however concedes pro-rata leave of 4 months, which the Court grants, at Kshs. 3,800.**

24. The Claimant has not sought salary for days worked in March 2016, but the Respondent offered, and must be lauded for being forthright, that the Claimant merits 7 days’ salary for work done before his arrest on 7th March 2016. **He is allowed 7 days’ salary as offered through the evidence of Aduda, at Kshs. 3,069.**

25. Certificate of Service shall be released to the Claimant as offered by the Respondent, and mandated by Section 51 of the Employment Act 2007.

26. Costs to the Claimant.

27. Interest allowed at 14% per annum as prayed.

28. Considering the effects of coronavirus on businesses, the general economy and litigation as a whole, stay of execution of decree is allowed for 45 days.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation at Kshs. 45,600; notice at Kshs. 11,400; pro-rata leave at Kshs. 3,800; and 7 days’ salary at Kshs. 3,069 – total Kshs. 63,869.

c. Costs to the Claimant.

d. Interest allowed at 14% per annum as prayed from the end of 45 days of the date of this Judgment, till payment is made in full.

e. Certificate of Service to issue.

Dated, signed and released to the Parties, at Chaka, Nyeri County under Judiciary Covid-19 Guidelines and Rule 38 of the E&LRC [Procedure] Rules 2016, this 29th of June 2020.

James Rika

Judge