



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 945 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

WILSON OTIENO NGUTI..... CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED..... RESPONDENT

JUDGEMENT

The facts of this case are not contested. The claimant was employed by the respondent, a private security company, as a security guard on 21st June 2008. Due to his good conduct and diligence, he was awarded a certificate of recognition by the respondent, which is undated, and was also awarded a Certificate of Award as the Security Officer of the Month in July 2014.

Due to his good conduct, the claimant was seconded to the respondent's US Embassy contract and issued with a 5 year contract which was presumably superior to regular employment with the respondent, going by the contract the claimant signed which is appended as Appendix 1 of the claim and at page 1 of the respondent's bundle.

The claimant's salary per payslip of November 2014 was Kshs.17,722 (basic), Kshs.3,500 (house allowance), Kshs.450 (clearing allowance), Kshs.1,955 (night shift allowance), Kshs.300 longevity allowance, Kshs.3,080 meal allowance and overtime of Kshs.4,608 (1.5) and Kshs.1,890 (2.0).

It was the claimant's testimony that on 10th and 11th January 2015, he was off duty from his normal assignment. On 11th January 2015 he was called by the supervisor to go and stand in for a colleague Mr. Kianga who had a funeral of a cousin. That the assignment had two regular guards. Mr. Kianga whom he was covering for was a roving guard. There was another guard, Mr. Barasa, who was stationed at the gate. The claimant testified that when he reported to the assignment he found Mr. Barasa who had already reported on duty. Mr. Barasa introduced him to the compound and informed the claimant that he (the claimant) will be patrolling while Barasa will be at the gate.

The claimant testified that there is a supervisor who makes four (4) visits per night to ensure the guards were working. He testified that on all the 4 laps the supervisor found them at work. That at about 5.30 am in the morning, Wafula told him that the day guard was on the way. That since he was carrying his uniforms for his regular assignment, Barasa released him to take the uniforms to his regular station as Barasa would stay on until the day guard arrived.

The claimant testified that he was later informed that the client who had been on vacation arrived soon after he left and was compelled to wait at the gate for about 10 minutes before Barasa opened the gate.

The claimant testified that he was thereafter summoned to appear at the respondent's office on Monday 13th January as 12th was a Sunday. He appeared before the Deputy Human Resource Manager at US Embassy Project Office who was with two shop stewards. That instead of listening or giving him time to explain, the Deputy Human Resource Manager told him he had no say on the US Embassy project because the Project Manager had already endorsed on his file "to be dismissed". He stated that this is how he lost his job.

He testified that he was shocked by the dismissal as he was the best guard and had two recommendations from the same US Embassy Project Manager both dated July 2014. Secondly, that he was the one selected to work at the residency of the Regional Security Officer (RSO) of the US Embassy because of his good performance.

He testified that from the time he was employed he had no warning letter. He further testified that he was dismissed on an assignment that was not his regular duty.

He testified that he was paid salary for December 2014 and January 2015 after he filed suit. He was therefore praying for unexpired term of his US Embassy contract of 18 months, pending leave as he never took leave for the 3 years he worked on the Embassy project as there was shortage of guards and gratuity.

He further prayed for pay in lieu of notice and compensation. He testified that he was issued with a certificate of service after filing suit.

Under cross examination the claimant stated that the assignment in which he was standing in for his colleague was for the same Embassy Project.

He stated that at the Embassy project the security guards relieve each other at 5.30. He agreed with Counsel for the respondent that Barasa who released him from the assignment was not his supervisor. He however stated that he could not confirm that the client was kept waiting at the gate for about 15 minutes as he was not present when the client arrived.

He stated that he received notice of the disciplinary hearing and was notified of the grounds for disciplinary action. That he attended the disciplinary hearing on 13th January 2015 which was also attended by two shop stewards. He stated that the shop stewards were never given time to either defend him or defend the company.

The claimant testified that he was aware of the taking over and handing over requirements. He testified that in the statement he wrote after the incident, he stated that it was his counterpart to hand over. He admitted that he was involved in two incidents in a span of 7 days, the other incident having been failure to press the GMS button which alerts the office that the security guard is alert.

Under re-examination he stated that in the incident of 9th January 2015 he was given a verbal warning and went back to work after explaining the reason for not pressing the GMS button. That according to the respondent's incident summary the allegations against him was delay to open the gate for the client having returned from vacation. He stated this was not his work as it was Barasa who delayed to open the gate. He stated that he was paid leave for only two months, December 2014 and January 2015 but not for the previous 3 years.

On inquiry by the court, the claimant testified that he worked for the respondent from 2008 to 2015 continuously without a break in service.

For the respondent, RW1 ISHMAEL MAXMILLAN MURUNGA, Deputy Ground Force Commander testified that on the material day, the claimant left the assignment before the stipulated time and the client arrived when he was not in the compound. That the claimant was to be at work from 6 pm to 6 am while the client arrived between 5 am and 5.30 am. That it was reported at 5.30 am that the client had arrived and there was no one to open the gate. He testified that the client was US Embassy, a very sensitive client.

He testified that 2 days earlier the claimant had failed to press the GMS meaning that he was likely to have been absent from his post or he was committed to other works not related to his post.

He testified that in the second incident the claimant left his spot unmanned and when the supervisor was sent to ascertain what was happening the claimant took long to arrive and was not properly dressed in uniform.

That after the respondent received the report, the claimant was served with a notice not to report to work until his disciplinary hearing was held. That the disciplinary hearing was held on 13th January 2015 in the presence of the claimant. In attendance were Deputy Human Resource Officer Antony Odera and Cohen Kamitu, the Deputy Project Manager as well as two stewards, Abisalom Aswani and Geoffrey Otieno.

RW1 testified that he recorded the claimant's statement in which the claimant admitted making a mistake and apologised. That after hearing the claimant was dismissed and his terminal dues paid. He was also issued with a certificate of service.

He stated that the respondent was only serving its client and the claimant could not be taken to another assignment. That by leaving his assignment he exposed the client.

He urged the court to dismiss the claim.

Under cross examination he stated that there is only one warning captured in the claimant's record and it is a verbal warning.

He stated he was not present at the disciplinary hearing. He stated that the guard who opened the gate was Barasa and that it is Barasa who kept the client waiting at the gate. He stated that the client's complaint was that there was delay in opening the gate.

He stated he was not aware the claimant was relieving another officer. He stated the respondent did not give the claimant a hearing after his appeal in which the claimant requested the respondent to reconsider its verdict based on his good record.

He testified that the claimant was paid leave for 3 years, salary for December 2014 and January 2015, overtime but not salary in lieu of notice.

Under re-examination, RW1 stated that the claimant did not state he was going for another assignment after the one he was accused of leaving early.

Analysis and Determination

I have considered the pleadings, evidence and submissions filed by the parties. The issues for determination are whether the termination of the claimant's employment was fair and if he is entitled to the remedies sought.

In the written submissions, the claimant states that it was not him who opened the gate but Barasa. It is submitted that the claimant was dismissed for "... *act of negligence, poor work performance and lack of professionalism...*" which "... *contravenes the company's policies and is an intolerable gross misconduct.*"

In the hearing form at page 11 of the respondent's bundle, the charge against the claimant is that "*Having delayed to open for the client who had reported back to his residence from vacation.*"

In the "*Notice Not to Report For Duty*" which summoned the claimant for disciplinary hearing, at page 11 of the respondent's bundle, the charges are that "You absconded duties on 11th January 2015 without permission."

In the summary dismissal letter the grounds for dismissal are that "*You left your post unmanned by booking out early before being relieved by the incoming security officer. This brought the company's image into disrepute when the client arrived from vacation only to find one security officer at his residence.*"

From the foregoing, it is not clear what charges the claimant was defending himself against at the disciplinary hearing. It is also clear that the grounds for which the claimant was dismissed were not the same as those he was defending himself against as there are different charges in the notice for hearing, at the hearing and in the letter of dismissal. The charges which the claimant was defending himself against at the hearing was that he absconded duty.

Secondly, the claimant testified that at the disciplinary hearing,

neither himself nor the two shop stewards who attended the disciplinary hearing were allowed to speak. He further stated that at the hearing he was informed that there was already an endorsement on his file that he should be dismissed and the person who chaired the disciplinary meeting informed him that the respondent could do nothing about the already determined dismissal.

From the foregoing, I find that the dismissal of the claimant was both substantively and procedurally unfair.

Section 41 of the Employment Act is categorical that an employee ought to be represented by a shop floor official of his choice and that both the employee and the person representing him must be given an opportunity to present their explanation. Further, that a decision to dismiss the employee should be made after hearing and considering the presentations made by the employee and his representative.

In this case the claimant was not invited to attend the disciplinary meeting with a shop floor official of his choice. He was summoned to the hearing and found the shop floor officials there. He had not had any opportunity to confer with them and explain his case to them to enable them represent him. What the respondent did was to have the shop floor officials "*present*" at the meeting but not to represent the claimant.

The claimant sought the following reliefs –

i) A declaratory order that the claimant's summary dismissal is unfair.

ii) Unpaid salary for December 2014..... Kshs.32,162

iii) Unpaid salary for January 2015..... Kshs.32,227

iv) Gratuity pay for 3 years worked..... Kshs.53,166

v) 18 months' pay for remaining contract period.. Kshs.562,896

vi) Pending leave pay for 3 years..... Kshs.72,660

vii) One month's salary in lieu of notice.....Kshs.31,872

viii) 12 months' salary compensation for

unfair dismissal.....Kshs.379,380

Total **Kshs.1,163,763**

ix) Interest and costs of this suit.

x) Any other relief that this Court may deem fit to grant.

The claimant is entitled to one month's salary in lieu of notice which I award him at **Kshs.32,035**.

The claimant is further entitled to leave and leave travelling allowance for 3 years as no evidence was submitted by the respondent to controvert the averments of the claimant or evidence to show the claimant took leave or was paid in lieu thereof. According to the contract the claimant was entitled to 30 day leave and Kshs.1,250 leave travelling allowance. I award him **Kshs.61,345.40** for annual leave for 3 years (90 days) and **Kshs.3,750** for leave travelling allowance for 3 years. I have noted that the claimant was only paid leave and leave travelling allowance for 2 months in his terminal benefits which were for December 2014 and January 2015.

The salary for December 2014 and January 2015 have been paid as confirmed by the claimant. The claimant is not entitled to payment for the remainder of the contract term as there is no legal or contractual justification for payment thereof.

The claimant is entitled gratuity under the Regulation of Wages (Protective Security Services) Order which provides for gratuity after a minimum of 5 years' service. His contract also provided for the same at paragraph 10 thereof. The claimant's certificate of service produced at page 18 of the respondent's bundle of documents states he worked from 21st June 2008 to 10th January 2015, a period of 6 complete years. I thus award him gratuity at 18 days for each complete year of service being (x 18 x 6) **Kshs.73,615**.

Having been dismissed unfairly, the claimant is entitled to compensation which I award him at 7 months' salary taking into account his length of service, his clean record attested to by the two certificates of awards and the fact that he had no written warning in his record, the manner in which his disciplinary hearing was handled and the fact that he was only guilty of leaving work about 15 minutes early, which he explained was because he was taking his uniforms to his next assignment. I further take into account the fact that when the claimant reported to work he only found Barasa whom he worked with and the respondent's ground for termination that he left work before a reliever arrived was not true as he did not meet the guard he was relieving when he reported to work meaning that he could also leave before his reliever arrived provided there was a guard to hand over to the relieving guard. In view of this, I award the claimant the sum of **Kshs.224,245** being 7 months' salary based on gross pay of Kshs.32,035 as provided in Section 49(1)(c) of the Act.

In summary I award the claimant the following –

1. One month's salary in lieu of notice.....Kshs.32,035
2. Pay in lieu of annual leave for 3 years.....Kshs.61,345.40
3. Leave travelling allowance.....Kshs.3,750
4. Gratuity..... Kshs.73,615
5. 7 months' salary as compensation.....Kshs.224,245

Total Kshs.394,990.40

The respondent shall further pay claimant's costs for the suit and interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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 has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE