



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1236 OF 2015**

**SIMON LIANDA MAKHETI..... CLAIMANT**

**VERSUS**

**WELLS FARGO LIMITED..... RESPONDENT**

***(Before Hon. Justice Byram Ongaya on Thursday 30<sup>th</sup> July, 2020)***

**JUDGMENT**

The claimant filed the statement of claim on 15.07.2015 through Khalwale & Company QAdvocates. The claimant prayed for judgment against the respondent for:

- a) Salary for 9 days worked in April Kshs. 6, 998.00.
- b) One-month salary in lieu of notice Kshs.20, 218.00.
- c) Under payment of wages Kshs.472, 000.00.
- d) Working public holidays & weekends Kshs.612, 341.00.
- e) 12 months' compensation Kshs.242, 616.00.
- f) Grant total Kshs.1, 354, 173.00.
- g) A declaration that the dismissal of the claimant was wrongful and unfair.
- h) In alternative, the respondent to reinstate the claimant forthwith.
- i) The respondent to pay costs of the suit.
- j) The respondents to pay interest.

The claimant's case is as follows. The respondent employed him as a security guard in 1991 at Kshs.6, 000.00 per month but which increased over time. The claimant worked 6.00am to 6.00pm every day including in public holidays. For the 25 years of service the claimant served honestly and with due diligence as assigned. On 09.04.2015 the claimant reported on duty at about 4.00pm and police officers arrived and asked him to accompany them to the Parklands Police Station. He was subsequently arraigned in court in criminal case No. 747 of 2015 and was released on bond. Thereafter he resumed duty but the respondent informed him verbally that he had been placed on suspension without pay till the final determination of the case.

It is the claimant's case that the suspension was malicious in view of his 25 years of service and the suspension without pay amounted to termination of employment. His last monthly salary was Kshs.20, 218.00. he had served for 300 months. His termination was contrary to rules of natural justice and section 41 of the Employment Act, 2007.

The respondent filed the memorandum of response on 09.09.2016 through Walker Kontos Advocates. The respondent admitted employing the claimant in 1991 at a monthly salary of Kshs.6, 000.00. The respondent admitted that the claimant worked 6.00am to 6.00pm but he was paid for the overtime. The respondent admitted that the claimant was arrested about 09.04.2015 on account of suspected theft at the bank the claimant had been assigned the guard and the bank made a complaint to the police against the claimant. The respondent was not privy to the criminal case and the respondent's officers were not witnesses in that case. The respondent's further case was as follows. The claimant

returned to work once he was released and he was never suspended until the purported determination of the criminal case against the claimant. The respondent had elaborate internal disciplinary procedures and did not depend on the outcome of the criminal proceedings to reach a decision to discipline its employees. After release, the claimant reported to work and requested for 10 days off in order to attend to a funeral. His leave commenced from 27.04.2015 and was ending on 09.05.2015 so that he was to resume duty on 10.05.2015 without fail. The off duty leave pass was as exhibited for the claimant. The claimant failed to resume duty on 10.05.2015, he was treated as a deserter and his employment with the respondent ended forthwith. Thus the respondent never suspended the claimant but he ended his employment when he deserted duty effective 10.05.2015. The demand letter was written on 28.04.2016, one day after the claimant had been given 10 days off to attend a funeral. The claimant is therefore undeserving of the prayers made. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Stephen Kang'ethe, the respondent's Human Resource Manager. The parties filed their respective submissions. The Court has considered all the material on record and makes findings as follows:

- 1) There is no dispute that the respondent employed the claimant in 1991 as a security guard. The Court finds that parties were in a contract of service.
- 2) The claimant admitted that after he was released, he reported at the respondent's office and requested for permission to attend a funeral. He also testified that he was not verbally suspended on 24.04.2015. He testified that the off duty was from 27.04.2015 to 10.05.2015. While testifying that he reported back on 24.04.2015 and verbally suspended that date, he again contradicted himself and testified that after the 19 days off ended, he was suspended on 11.05.2015. He was cross-examined by learned counsel Mr. Omino Advocate for the respondent about the demand letter dated 28.04.2015 which stated that upon release on bail he reported to resume duty but he had been told he was on suspension to await outcome of the criminal case. The claimant testified that the demand letter was misleading in stating that he had been suspended as at 28.04.2015 but that the demand letter was at a time he was on off duty for 10 days. He stated, "**Demand letter was at a time I was on leave. Leave started 27.04.2015. Demand letter was on 28.04.2015. I had no reason to instruct lawyer to do the demand notice.**" RW testified that the claimant could not have been suspended and at the same time have been on 10 days' off. The Court has considered the evidence. The contradictory account by the claimant cannot be trusted. The Court finds that the claimant resumed duty after the release and was allowed back at work and he immediately asked for 10 days of off duty which were granted. That was on 27.04.2015. A day thereafter he instructed his advocates to issue the demand letter which was at variance with the respondent's position that the claimant was still at work. In view of the demand letter, there is no reason to doubt the respondent's case that after 10 days of off duty the claimant failed to resume duty but instead moved to initiate a misconceived legal battle per the demand letter. In the circumstances the Court returns that the respondent did not dismiss the claimant from duty, the alleged constructive termination never took place as he was never suspended as he alleged and, the issue of unfair termination does not arise in the present case. The prayer for compensation for alleged unfair termination will fail. The claimant deserted duty and the Court returns that he is not entitled to pay in lieu of one-month notice as prayed for.
- 3) The pay slips exhibited for the claimant show he was paid normal overtime and stopped overtime. In the circumstances the Court finds that the respondent paid overtime and work on public holidays and weekends as testified by RW. The prayers for work on public holidays and weekends and underpayment will therefore fail.
- 4) The claimant prays for Kshs. 6, 998.00 for 9 days worked in April 2015. There is no dispute that the 10 days of off duty were ending on 10.05.2015. The arrest was on 09.04.2015. The respondent admits that the claimant worked 9 days in April 2015 and is entitled to the pay. However, the respondent submits that the claimant having deserted without notice, the respondent was entitled to withhold one-month salary in lieu of termination notice the claimant was required to serve. Parties are bound by their pleadings and the respondent having not pleaded and prayed for a set off or counterclaimed for one month pay in lieu of notice, the respondent will pay the **Kshs. 6, 998.00** as prayed for.
- 5) The Court has considered the parties' margins of success and returns that each party shall bear own costs of the suit.

In conclusion the suit is hereby determined with orders:

- 1) The respondent to pay the claimant **Kshs. 6, 998.00** by 01.09.2020.
- 2) Each party to bear own costs of the suit.

**Signed, dated and delivered by the court at Nairobi by video link this Thursday, 30<sup>th</sup> July, 2020.**

**BYRAM ONGAYA**

**JUDGE**