



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2272 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ALEX SIBOI MASINDE..... 1ST CLAIMANT

OKEMWA PETER MAGARA..... 2ND CLAIMANT

VERSUS

K. K. SECURITY..... RESPONDENT

JUDGMENT

Vide their Memorandum of Claim dated 16th December, 2015 and filed in Court on 18th December, 2015, the claimants herein aver that their employment was unfairly and unlawfully terminated by the respondent, a registered limited liability company and further that the Respondent failed to pay their terminal dues at the time of separation.

The Claimants maintain that they were employed by the Respondent on 26th October, 2008 and 12th May 2007 respectfully in the position of Security Guards on contractual basis, which contracts were subject to renewal by mutual agreement between the parties. They further aver that they earned a monthly salary of Kshs.12,008 and Kshs.10,912 respectively.

The Claimants further maintain that they performed their duties diligently and to the Respondent's satisfaction until 18th July, 2013 when the Respondent unlawfully terminated their employment on account of desertion of duty and subsequently failed and/or refused to pay their terminal dues.

The Claimants contend that the Respondent's actions were unfair and in gross violation of their rights as protected under the Employment Act, 2007.

In their Memorandum of Claim the Claimants seek the following reliefs:

1. The sum of Kshs.297,960 comprising of the following:-
 - i. Salary for July 2013 Kshs.12,008 and Kshs.10,912
 - ii. Unpaid leave allowance
 - iii. One year compensation for unfair termination for both Kshs.275,040
2. Costs of this suit
3. Interest on 1 and 2 above
4. Any other relief that this Court may deem fit and just to award.

The Respondent in its Reply to the Memorandum of Claim dated 23rd June, 2016 and filed in Court on 24th June, 2016 admits having engaged the Claimants as alleged by the Claimants. It however denied their assertion that they performed their duties diligently, honestly and religiously as contended maintaining that the Claimants were not honest employees and were previously served with warning letters for

breach of the terms of their employment.

The Respondent further avers that the Claimants were guilty of deserting lawful duties and as a result were rightfully summarily dismissed from employment. The Respondent further averred that it was not possible for it to accord the Claimants a fair hearing as they were unavailable. The Respondent however insists that the Claimants were none the less informed of their rights to appeal against the decision to terminate their employment but failed to lodge their Appeals within the stipulated timelines.

The Respondent maintained that the failure to pay the Claimants their terminal dues was due to failure by the Claimants to release its properties in their possession and therefore it could not proceed to compute dues owed.

It is on this basis that the Respondent avers that the Claimants' Claim as against it is devoid of merit and therefore urged this Court to dismiss the same with costs to the Respondent.

The matter proceeded for hearing on 2nd April, 2019 October, 2019 and 5th November, 2019 with both Claimants testifying on their behalf and Mr. Moses Nyongesa, the Assistant Operations Manager – Industrial Area testifying on behalf of the Respondent. Parties thereafter filed and exchanged written submissions.

Claimants' Case

The 1st Claimant testified as CW1. He stated that on 11th July 2013 while he was on duty along Kampala Road the premises were robbed by thieves and as a result his employment with the Respondent was terminated without even being accorded any hearing.

CW1 further testified that following the robbery incident he was arrested alongside three of his colleagues and were taken to the Industrial Area Police Station where they all recorded statements and were detained in the police cells.

CW1 stated that they were subsequently charged in Makadara Law Courts and remanded in custody for a period of two weeks as they were unable to raise the bond to secure release as directed by the Court.

CW1 further testified that upon their release he reported back to work where he was served with a letter terminating his services on account of desertion. He further testified that the criminal charge leveled against him was dismissed.

CW1 urged this Court in the circumstances to allow the Claim as prayed.

On cross examination CW1 confirmed that he was arrested on 12th July, 2013 and that he was also not on duty for the period between 11th July, 2013 and 18th July, 2013 as he was remanded in the police cells. He contended that the Respondent was aware of his arrest and detention.

CW1 further testified that upon his release he did report back to work and took with him a copy of the charge sheet and bond but was issued with the letter of summary dismissal.

On further cross examination CW1 confirmed having received other warning letters for different reasons.

He testified that he was not paid his July salary and that he had worked up-to 11th July 2013 and that he was entitled to the same for the period between 16th June 2013 and 11th July 2013.

On re-examination CW1 confirmed that he reported back to duty immediately after his release although he was not sure of the date of release.

The 2nd Claimant testified as CW2. He adopted his witness statement dated 16th December 2016 as his evidence in chief. In his statement CW2 reiterates the averments made in the Memorandum of Claim.

He recounted the events of 11th July, 2013 when they were attacked by thugs. That as a result he was arrested, charged in Criminal Case No. 3234 of 2014 and was remanded in custody.

CW2 further testified that upon release they reported back to duty only to be issued with dismissal letters. He admitted having been issued with other warning letters not related to the robbery incident.

CW2 similarly maintained that his dismissal was unlawful and unfair as he was not accorded any hearing prior to termination. He therefore urged this Court to allow his Claim as prayed.

On cross examination CW2 confirmed that he was in custody from 11th July, 2013 to 25th July, 2013 and that he reported back to work immediately upon his release on 29th July, 2013. He further testified that he did release to the Respondent all the uniforms in his custody but the Respondent failed to issue them with clearance letters and/or pay their terminal dues.

He further testified that he did not desert duties as alleged by the Respondent herein and that he is entitled to the reliefs sought in his Memorandum of Claim.

Respondent's Case

RW1, **MOSES NYONGESA**, the Respondent's Operations Manager, adopted his witness statement filed in Court on 11th April, 2019 as his evidence in chief. In the statement RW1 reiterates the averments made in the Response to the Claimants' Memorandum of Claim.

On cross examination RW1 confirmed the robbery incident of 11th July, 2013 as recounted by the Claimants. He further testified that the Claimants were taken to the police station but insisted that they were witnesses and not suspects as alluded by the Claimants.

RW1 further testified that the absence of the Claimants from duty was not due to their alleged detention at the police cells. He further confirmed that the Claimants were not issued with any letters of intention to terminate their employment.

Claimants' Submissions

The Claimant submitted that their termination was unlawful and unfair as the Respondent maliciously served them with the termination letters dated 18th July, 2013 despite being aware of their arrest on 11th July, 2013 following a robbery incident at BIA Tosha Distributors where they were guarding.

The Claimants maintained that they did not desert lawful duty as alleged by the Respondent and maintained that they both reported back to duty immediately upon their release. They maintained that the Respondent has failed to prove desertion and relied on the cases of **SABC v CCMA & Others (2002) 8 BLLR 693 (LAC)**, **Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School (2015) eKLR** and **Tirus Kariuki Mungai v Postal Corporation of Kenya (2016) eKLR** where the Courts held that an employer who wishes to rely on the ground of desertion must not only show attempts made to reach the employee in question but also notify the employee that termination of employment on that account was being considered.

The Claimants contend that their termination was un-procedural and unlawful as the Respondent failed to comply with the mandatory provisions of Sections 41 and 45 of the Employment Act, 2007. The Claimants relied on the cases of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** and **David Gichana Omuya v Mombasa Maize Millers Limited (2014) eKLR** where the Courts found an employee's termination is un-procedural where an employer fails to comply with the provisions of Section 41, 43 and 45 of the Employment Act, 2007.

The Claimants maintained that they are entitled to the reliefs sought in their Memorandum of Claim and urged this Court to allow the same as prayed.

There are no submissions on record filed on behalf of the Respondent.

Having considered the facts of this cause, evidence, submissions and authorities cited by the claimant, the issues for determination are: -

1. Whether the Claimant was unlawfully terminated or she deserted duty;
2. Whether the Claimant is entitled to the remedies sought.

Unfair termination

The Claimants contended that their services were wrongfully and unfairly terminated by the Respondent and that the allegation that they had absconded duties from 11th July, 2013 are not true. They further contend that their absence from duty was occasioned by their arrest and detention at the Industrial Area Police Station. Further that they were arraigned in Court in Makadara under **Criminal Case No. 3234 of 2013** and failed to raise the bond terms as issued by the Court and were held in remand.

They further aver that immediately upon their release they did report back to duty only to be issued with termination letters on account of desertion. Both Claimants through their letters dated 16th August, 2013 and 13th August 2013 did appeal against the decision to terminate their employment clearly indicating therein their reasons of not reporting to work, which was as highlighted above.

The Respondent on the other hand contended that it rightfully and lawfully terminated the Claimant's employment for absconding duties and/or desertion of lawful duty.

Black's Law Dictionary (Ninth Edition) defines desertion as:

“The wilful and unjustified abandonment of a person's duties or obligations.”

In the South African case of **Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** the Court sought to distinguish desertion from unauthorized absence from duty as follows:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”

Were the Claimants guilty of desertion as contended by the Respondent?

Section 44(4)(a) provides that absence from work without leave or other lawful cause from the appointed place of work is a ground for summary dismissal. The claimants did not absent themselves from work without lawful cause. They were under lawful custody, having been presented to the police by the Respondent who was aware of their absence and the reason thereof.

Further the Appeal letters dated 16th August, 2013 and 13th August, 2013 clearly explain the whereabouts of the Claimants during the period it is alleged that they had absconded duties. The Respondent therefore cannot purport to claim that the Claimants were guilty of desertion.

Even if the Claimants had absconded duty as alleged they are still by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support there having been a disciplinary hearing or notice of the same issued prior to the termination. It is the duty of the Respondent to show this Court it did accord the Claimants fair hearing prior to their termination. In the case of **Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR** the court held that:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In view of the foregoing I find that the termination of the Claimants' employment was indeed unlawful, unfair and wrongful.

Whether the Claimant is entitled to the reliefs sought

The Claimant is entitled to the following:

i. Salary for July 2013

The Claimants maintained that they had not been paid for the days worked in July 2013 being 11 days prior to their arrest, detention and prosecution. This fact is not disputed by the Respondent herein. The amount is calculated herein below:

1st Claimant

$11/26 \times \text{Kshs.}12,008 = \text{Kshs.}5,080.31$

2nd Claimant

$11/26 \times \text{Kshs.}10,912 = \text{Kshs.}4,616.62$

Salary in lieu of notice

The Claimants are entitled to one (1) month's salary in lieu of notice by dint of Section 36 of the Employment Act, 2007.

1st Claimant **Kshs.12,008**

2nd Claimant **Kshs.10,912**

ii. Unpaid leave allowance

No evidence was adduced by the Claimants in support of this prayer. The same fails for want of proof.

iii. Compensation for unfair termination

Having found that the termination of the claimants' employment was unlawful and unfair, the Claimants are entitled to compensation by dint of Section 49 of the Employment Act, 2007. It is my opinion that 10 months' salary is reasonable compensation for the unfair termination for the claimants. In arriving at this I have considered the length of the Claimant's employment and the circumstances under which their employment was terminated. I have further considered the fact that they were discharged under Section 87(1) of the Criminal Procedure Code following the failure of the Respondent to produce witnesses, and that it is the said Respondent who caused their arrest and detention. The compensation is tabulated as hereunder:

1st Claimant

Kshs. 12,008 x 10 months = **Kshs.120,080.00**

2nd Claimant

Kshs.10,912 x 10 months = **Kshs.109,120.00**

In conclusion judgment is entered in favour of the Claimants as against the Respondent in the following terms:

1st Claimant Alex Siboi Masinde

- a. Unpaid Salary for July, 2013.....Kshs. 5,080.31
- b. Salary in lieu of notice.....Kshs. 12,008.00
- c. Compensation for unfair termination....Kshs. 120,080.00

Total Kshs.137,168.31

2nd Claimant Okemwa Peter Magara

- a. Unpaid Salary for July, 2013.....Kshs.4,616.62
- b. Salary in lieu of notice.....Kshs.10,912.00
- c. Compensation for unfair termination....Kshs.109,120.00

Total Kshs.124,648.62

The Claimants are awarded costs and interest shall accrue at Court rates from the date of Judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 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, this 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 this 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