



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 584 OF 2016

CYPRIAN MUTEMBEI NDIGA.....CLAIMANT

VS

BRINKS SECURITY SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. Cyprian Mutembei Ndiga, the Claimant in this case was an employee of Brinks Security Services Limited, working in the position of Security Guard.
2. Ndiga brought his claim by a Memorandum of Claim dated 3rd August 2016 and filed in court on 5th August 2016. The Respondent filed a Memorandum of Response on 3rd March 2017.
3. The matter proceeded to full trial where the Claimant testified on his own behalf. The Respondent's Mombasa Branch Manager, Bernard Kyengo testified on behalf of the employer.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent sometime in February 2013 at an initial monthly salary of Kshs. 9,500 which was later increased to Kshs. 10,500.
5. The Claimant was assigned to guard Kengen Kipevu Power (Station) Plant. He worked until 31st December 2015 when his employment was terminated verbally.
6. Prior to the termination, the Claimant had on 9th December 2015, been issued with a recovery/warning letter indicating that the sum of Kshs. 6,000 would be deducted from his salary.
7. The Claimant denies allegations of theft made against him by the Respondent which he terms as a fabrication.
8. The Claimant's case is that the termination of his employment was unjustifiable and unfair.
9. The Claimant cites the following particulars of breach of contract and/or statutory obligations by the Respondent:
 - a. Failing to give the Claimant reasons for terminating his services;
 - b. Failing to give the Claimant notice of termination of services;
 - c. Punishing the Claimant without any reason;
 - d. Failing to note that the Claimant was not on duty at the time of the theft;
 - e. Ambushing the Claimant with termination.

10. The Claimant states his claim as follows:

- a. Notice pay.....Kshs. 14,054
- b. Underpayment in 2013, 2014 and 2015.....100,188
- c. 12 months' salary in compensation.....168,648
- d. Refund of shares for 18 months.....36,000
- e. Salary for December 2015.....14,054
- f. Damages for unlawful termination
- g. Certificate of service
- h. Costs plus interest

The Respondent's Case

11. In its Memorandum of Response dated 28th February 2017 and filed in court on 3rd March 2017, the Respondent states that the Claimant was employed on 26th February 2014, by a written contract, a copy of which was issued to him.

12. The Respondent further states that on 8th December 2015, the Claimant failed to carry out his duties as required. As a result, thieves came in and cut an electric fence belonging to Kengen Power Plant, Mombasa, where the Claimant had been assigned and stole copper tapes from the copper roll. For this failure and negligence, the Claimant was issued with a warning letter.

13. The Respondent adds that the Claimant was given the warning letter after preliminary investigations revealed that the theft incident was occasioned by the Claimant's negligence as he never bothered to patrol his area of assignment even after hearing activation of the electric fence siren.

14. The Respondent denies terminating the Claimant's employment and states that the Claimant deserted duty after receiving the warning letter. The Respondent further denies the particulars of breach of contract pleaded by the Claimant.

15. The Respondent reiterates that a theft occurred on 8th December 2015, while the Claimant was at work which incident occasioned loss to the Respondent.

16. The Respondent denies that it is liable to refund the Claimant his shares as claimed as such shares are in the custody of a definite body known as Brinks Sacco which is a separate legal entity.

Findings and Determination

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

- a. Whether the Claimant has made out a case of unlawful termination of employment;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

18. The Claimant testified that his employment was terminated on 31st December 2015, verbally without justifiable cause and without notice.

19. On its part, the Respondent pleaded that the Claimant deserted duty after being served with a warning letter dated 9th December 2015.

20. However, in responding to the demand letter from the Claimant's Advocate, the Respondent stated that the Claimant was summarily dismissed for failure to perform his duties. This latter position was confirmed by the Respondent's Branch Manager, Bernard Kyengo.

21. Kyengo told the Court that the Claimant and his colleague failed to patrol the assignment area, enabling thieves to have easy access. He added that both security guards were surcharged the sum of Kshs. 6,000 each, being the shared cost of repairing the fence and replacing the lost copper tapes.

22. With this clear testimony by the Respondent's witness regarding the reason for and the circumstances surrounding the Claimant's exit from employment, there are only two related questions to ask; one, whether the Respondent has established a valid reason for the termination and two, whether in effecting the termination, the Respondent followed due procedure.

23. The Claimant told the Court that at the time he checked out from work, the place of assignment was intact. On the other hand, the Respondent accused the Claimant and his colleague of laxity, leading to theft of and damage to client property.

24. With these conflicting positions, the only way to establish culpability on the part of the Claimant would have been a disciplinary process within the confines of Section 41 of the Employment Act. The Claimant testified that he was not subjected to any disciplinary process prior to the termination of his employment.

25. The Respondent produced a warning letter addressed to the Claimant dated 9th December 2015. This letter also served as notice of a surcharge against the Claimant to the tune of Kshs. 6,000 to cover the cost of repair of the damaged electric fence and replacement of the lost items.

26. I will say three things regarding the letter of 9th December 2015; first the warning and surcharge represented two distinct disciplinary actions for the same offence; second, these disciplinary actions were taken without any prior opportunity being offered to the Claimant to defend himself and third, having punished the Claimant not once but twice, the Respondent could not lawfully terminate the Claimant's employment on account of the same offence.

27. By the Respondent's own admission as contained in the recovery/warning letter dated 9th December 2015 and letter dated 9th August 2016 addressed to the Claimant's Advocates in response to the demand letter, the Claimant was warned, surcharged and dismissed for the same offence. This is a classic case of double jeopardy.

28. Additionally, the Respondent admitted having withheld the Claimant's terminal dues ostensibly on the basis of some unsubstantiated dispute.

29. In the result, I find and hold that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

30. I therefore award the Claimant six (6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service with the Respondent as well as the Respondent's unlawful conduct in the termination transaction, including withholding the Claimant's terminal dues.

31. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for December 2015.

32. Regarding the claim for underpayment I have this to say; the Claimant pleaded figures in his Memorandum of Claim but did not adduce any evidence in support. As submitted by the Respondent, a claim for underpayment falls within the category of special damages which must be specifically pleaded and proved at trial (see *Charles Kariuki Mwangi v Intersecurity Services Limited [2018] eKLR*).

33. The Claimant did not discharge his evidential burden on this limb and this claim therefore fails and is dismissed.

34. The Claimant admitted that his shares were held by Brinks Savings and Credit Cooperative Society and his claim from the Respondent on this account is therefore misplaced.

35. Finally, I enter judgment in favour of the Claimant as follows:

- a. 6 months' salary in compensation.....Kshs. 63,000
- b. 1 month's salary in lieu of notice.....10,500
- c. Salary for December 2015.....10,500
- Total.....84,000**

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

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

38. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OCTOBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Anaya for the Claimant

Ms. Kimuli for the Respondent