



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 36 OF 2015

HALAKE GUYO.....CLAIMANT

VERSUS

VICTORY CONSTRUCTION COMPANY LTD.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this claim on 14.1.2015 claiming terminal benefits plus compensation for wrongful termination of his employment totaling to **Kshs.965,183.70**. He further prayed for malicious prosecution and false imprisonment, punitive damages, certificate of service, costs and interest.

- (a) Three months pay in lieu of Notice $Kshs.9898.50 \times 3 = 29,695.50$
- (b) Accumulated leave for 8 years $9898,50 \times 8 = 79,188$
- (c) Weekly rest days at double rate thus $(9898.5/26)$ daily rate = $380 \times 2 \times 52$ Sundays per year $\times 8$ years = 316,160.
- (d) Unpaid overtime – weekdays at 4 hours per day thus daily rate $380/8$ hours = 47.5 hourly rate $\times 4$ hours per day = 190 \times approx. 300 days per year = 57000 $\times 5$ years = 285,000.
- (e) Public holidays for 8 years – double rate thus 380×11 Public holidays per year = 8360 $\times 8$ years = 66,880.
- (f) Gratuity at 15 days for every year worked thus $380 \times 15 \times 8 = 45,600$
- (g) Leave travelling allowance $15,000 \times 8$ years = 12,000
- (h) House allowance $9,898.50 \times 15\% = 1484.775 \times 8$ years = 11,878.2.
- (i) Damages for wrongful dismissal $9898.50 \times 12 = 118,782$.

TOTAL = 956,183,7

2. The first respondent filed her defence on 26.3.2015 denying the claim for wrongful termination of the claimant's employment and averred that it is the claimant who terminated his employment by failing to report back after being arrested and charged in court. She further denied the claim for malicious prosecution and false imprisonment and averred that the decision to charge the claimant was beyond her control or influence but he sole responsibility of the Director of Public Prosecution.

3. The second Respondent never filed any defence to the suit but Grounds of Opposition contending that the suit lacks merits because he acted within his legal mandate under the National Police Service Act by charging and prosecuting the claimant with Criminal Offence. He therefore prayed for the suit to be dismissed because he did not against the claimant malicious.

4. The suit was heard on 19.3.2018, 8.6.2018 when the claimant testified as Cw1 the first respondent's Technical Director Mr. Kireplal Sing Suri testified as Rw1 but the second respondent called no witness. After the close of the hearing, the respondents filed written submissions but the claimant didn't.

Claimant's Case

5. Cw1 testified that he was employed by the first respondent at Kitui, Naivasha, Kisumu and Limuru for along period but he could not remember the exact date. That while at Limuru site, he notice that some employees of Indiana background were stealing things and he reported to the owner. Thereafter the owner warned him that the people he had reported were planning to kill him and advised him to leave the employment.

6. Cw1 never heeded to the said warning and he testified that while on duty as night guard over 50 robbers cut through the fence and beat him up and put soil in his mouth and stole a compressor machine. Thereafter he was arrested and charged in court but after 8 months of being kept in remand he was acquitted of all the charges.

7. Cw1 further testified that after acquittal, he went reported back to his work place at Ndeiya Limuru but he found that the site had been closed and his house at the site and the belonging he had therein were all missing. He therefore went to the first respondent's Head office at Baba Ndogo Nairobi with the assistance from a good samaritan.

8. Cw1 further testified that when he arrived at the Baba Ndogo office the security guards refused to open for him and he went away. He returned after 2 weeks but again he was denied entry to the offices by the security guards. He contended that he was not paid his salary for the month he was arrested and prayed for the same plus all the other reliefs set out in his claim.

9. On cross examination Cw1 stated that he was arrested by the respondent and thereafter he was prosecuted by the police. That the respondent brought 3 witnesses to support the prosecution case. He further stated that the police did not do proper investigations he concluded by stating that he had worked for 8 years before the arrest.

Defence case

10. Rw1 confirmed the claimant was employed as Watchman at the respondent's site camp from 2008 and worked at Kitui and Kiambu.

That his salary was Ksh.9,800 less NSSF, NHIF and PAYE but he was engaged on temporary contracts. That he was provided with a house at the site. That he never went for leave but he was paid in lieu of leave.

11. Rw1 further testified that on 6.9.2013 in the morning he received a phone all telling him that an Air Compressor Machine was stolen that night from the respondent's site camp. That he called the security guards including the claimant but he gave no satisfactory answer and became arrogant as a result of which he reported to the matter to the police.

12. Rw1 further stated that when the police came to the site, the watchmen started blaming each other and became violent as a result of which, they were forcefully taken to the police station and later charged in court. That after the trial, the claimant was acquitted but failed to report back to work and as a result, he reported to the Labour Office by the letter dated 18.6.2014.

13. Rw1 further testified that the company lost a very expensive machine while under the custody of the claimant. That the machine was big and could only be carried by a big lorry.

14. On cross examination, Rw1 stated that when the machine was stolen, the claimant was on duty with 2 other guards and all were arrested and charged. He denied knowledge of the alleged plan the claimant for reporting their theft to him.

15. Rw1 further contended that the claimant was for 4 years in Kitui and 2 years at Thogoto Kiambu on contract basis. He denied that the claimant was transferred from Kitui to Naivasha then to Kisumu and finally Kiambu. He admitted that the respondent had a contract for sewage in Kisumu but denied that the claimant worked there or even Naivasha.

16. Rw1 further contended that the claimant never went for the salary of Kshs.9,800 for his last month of service. He further contended that the claimant had cashed all his leave days. He maintained that service pay was not payable to the claimant nor is salary in lieu of notice because he was arrested by the police and charged. He denied that the company conspired to have the claimant arrested. He denied that the claimant lost anything after the arrest but maintained that the company lost a machine worth Kshs.8 million.

Analysis and Determination

17. There is no dispute from the evidence tendered that the claimant was employed by the 1st respondent as a Watchman until 6.9.2013 when he was arrested and charged with stealing or failure to prevent a theft. There is also no dispute that the claimant remained in remand custody until he was acquitted after 8 months. The issues for determination are:-

- (a) Whether the claimant's contract of service was wrongfully terminated by the 1st Respondent.
- (b) Whether the claimant was maliciously prosecuted and falsely imprisoned.
- (c) Whether the claimant is entitled to the reliefs sought.

Unfair/

wrongful termination

18. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests on the employee who alleges that he was so terminated. In this case, the claimant admitted in his pleadings and evidence that he was arrested and charged with a criminal offence after his employer's compressor machine was stolen while under his watch.

He further admitted that the court gave him bond terms which he could not meet and therefore he remained in custody through out the trial until his acquittal 8 months down the lane. Rw1 denied ever discussing the claimant and blaming him for deserting his employment after his arrest and even after the acquittal. The claimant contended that he reported back to the site and found the same closed. That he further went to the Head Office at Baba Ndogo Nairobi twice but he was denied entry by the Security Guards.

19. I have carefully considered the evidence and the submissions presented on this issue there is however nothing to prove that the claimant was dismissed by the employer from his job. The correct position is that the claimant was not able to secure his liberty from a lawful custody following his arrest and arraignment to court for criminal charges associated with his duties as a Watchman at the 1st respondent's

site camp. In addition, he has not adduced any evidence or called any witness to prove that he indeed reported back to work after the acquittal and denied access by the grounds with or without the instructions of the employer. Consequently, it is my finding that the claimant was to blame for the termination of his employment contract by failing to secure his liberty from a lawful custody within 14 days.

20. Under section 44(4)(f) of the Employment Act the following constitute a justifiable or lawful ground for dismissing an employee summarily:

“(f) in the lawful exercise of any power of arrest given by or under any law written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days wither released on bail or on bond or otherwise set at liberty;”

21. As observed herein above, the claimant never secured his liberty with the said limitation period after being arrested and charged with theft which was punishable by imprisonment. His vacancy could not therefore remain open after the close of the 14 days limitation period since his services as a Watchman were essential. The respondent was therefore entitled to treat the claimant’s contract of service to have been constructively terminated after the lapse of the 14 days without the claimant reporting back after the arrest. Consequently, I return that the claimant’s contract of service was not wrongfully terminated by the 1st Respondent.

Malicio

us Prosecution and False Imprisonment

22. The first respondents submitted that she only reported a robbery case to the police and left the matter in the discretion of the police. She therefore denied liability for the alleged malicious prosecution and false imprisonment. She relied on several precedents to urge that she acted lawfully to report the offence content that the ingredients of the tort of malicious prosecution have not been proved in this case.

23. The 2nd respondent also submitted that she acted within her mandate to arrest and prosecute as provided for section 24 of the National Police Service Act and denied any alleged malice. He therefore urged that the suit is frivolous and vexations and should be dismissed with costs.

24. The burden of proving the tort of Malicious prosecution and false imprisonment lies with the claimant who alleges the same was committed. In this case, the claimant never adduced any evidence to prove the said tort. All his evidence was mainly in relation to the employment claim. Consequently I return that the tort of malicious prosecution and false imprisonment have not been proved on a balance of probability.

Reliefs

25. In view of the finding herein above that the claimant’s services were not wrongfully terminated by the employer, I dismiss the claim for salary in lieu of notice and compensation for wrongful dismissal.

26. Likewise, the claim for house allowance is dismissed because the claimant stated in his evidence that he was provided with a house with the employer’s site camp.

27. The claims for leave and leave travelling allowance are also dismissed. The allegation by Rw1 that the claimant cashed all his leave days is supported by the leave payment sheets filed by both the clamant and the 1st Respondent as exhibits. On the other hand, the claim for leave allowance is not supported by evidence to prove that under contract of service, the allowance was payable whether or not the claimant went for his leave.

28. The claims for rest days, overtime and public holidays are also dismissed for lack of particulars and evidence. Although the claimant has pleaded that, he worked continuously for 8 years, the evidence on record shows that he only worked for 6 years from 2008 to 2013. Secondly, the claimant stated that he worked in various station (sites) including Kitui, Kisumu, Naivasha and Limuru and as such the court

draws the inference that the clamant missed work some days while relocating from each of the said sites and settling in the other.

29. Finally, the claim for Gratuity is granted for 6 years at the rate of 15 days' pay per year of service as prayed. The said claim is granted pursuant to Regulation of the Private Protective Securities Order.

Conclusion and Disposition

30. I have found that the claimant has not proven that his employment was wrongfully terminated by the 1st Respondent and blamed him for the termination by failing to secure his liberty from a lawful custody within 14 days after arrest and arraignment in court. I have further found that the claimant has not proved the ingredients of malicious prosecution and false imprisonment. I have however found that he is entitled to gratuity for the 6 years served. The said gratuity shall be paid together with the salary for his last month since Rw1 admitted that it is still outstanding being Kshs.9,898.50. consequently I enter judgment for the claimant against the 1st Respondent as follows:-

- (a) Gratuity.....Kshs.29,695.50
- (b) Salary.....Kshs. 9,898.50

Kshs.39,594,00

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The claimant will also have costs plus interest from the date of filing suit. The decreed sum will be paid subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE