



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 199 OF 2017

CHARLES ORINA ORENGE.....CLAIMANT

VERSUS

TWO FOUR SEVEN GUARDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the unfair and unlawful dismissal from employment. He averred that he was employed as a security guard in April 2016 until dismissal on 12th April 2017 and that he earned Kshs. 7,200/- a month as basic pay. He averred that he was not given any notice of the intention to terminate his services and neither was he offered a chance to show cause prior to dismissal on phone by Teresiah Wachuka the supervisor and agent of the Respondent. He sought damages for the unlawful dismissal, compensation for the loss of income – Kshs. 86,400/-, 1 month's salary in lieu of notice – Kshs. 7,200/-, unpaid leave for 1 year – Kshs. 7,200/-, costs of the suit interest at court rates.

2. The Respondent filed a memorandum of defence in which it averred that the supervisor/agent named Teresiah Wachuka did not dismiss the Claimant. The Respondent averred that it was the Claimant who absconded from his workstation without giving any notice to the Respondent's agent and thus the issue of a show cause letter could not arise. The Respondent averred that there was no entitlement due to the Claimant either for leave, notice or any loss of income. The Respondent urged the dismissal of the suit with costs.

3. The Claimant and the Respondent's agent Teresiah Wachuka Gatheru testified. The Claimant stated that he was called by the Respondent's agent while at KMTC and told not to report to work and to ensure that he returned the uniform. He testified that he was not told the reason for the dismissal. In cross-examination he stated that he was working with a new comer he called 'soldier' at night when he was called by Teresiah Wachuka and that he did not go to complain at the Respondent's head office in Karatina. He denied being the one who called her and that he was asked to return his uniform and go away. He stated that he did not desert his employment.

4. The Respondent's witness testified that she used to organize and supervise the guards. She stated that the Claimant called her at about 7.00pm on the material day and asked to be permitted to go on off and she asked him to permit her organize for relief. She asked him to wait but he refused and that he was not keen to go on. She sent a supervisor to KMTC who found that the Claimant had signed off and the supervisor stayed on that night as the Claimant had left. She stated that it was the Claimant who called her and he left and she did not know what caused him to leave. In cross examination she testified that she did not write a show cause letter after the Claimant left. She stated that after the Claimant left they did not get each other and she found him selling sugar cane at NYEWASCO Towers. She stated that she never called him after that day and that the Respondent did not have any problem with the Claimant.

5. The parties filed written submissions. The Claimant submitted that the Respondent did not prove the Claimant absconded from work through the production of an attendance register which as the keeper of employment records per Section 73 and 74 of the Employment Act that the Respondent was entitled to have. The Claimant submitted that the termination was without prior notice contemplated under Section 35 and in the alleged circumstances of absenteeism he was not given a notice to show cause and fair hearing as envisaged under Section 41 of the Employment Act. He submitted that the dismissal was not for a fair or valid reason per the law and that he was therefore entitled to the relief sought since the Respondent did not discharge its mandate under Section 43 of the Employment Act. The Claimant sought payment of the sums sought in the claim as well as compensation under Section 49(1)(c) of the Employment Act. The Claimant submitted that the Respondent did not controvert that the Claimant did not go on leave and that he therefore was entitled to the payment in lieu of leave not taken.

6. The Respondent submitted that the Claimant was not dismissed but he absconded from work. The Respondent submitted that it had produced a muster roll which showed that the Claimant deserted his employment. The Respondent submitted that he who alleges must prove and thus urged the dismissal of the claim as the Claimant had not proved on a balance of probabilities that he was entitled to the relief sought.

7. The Claimant asserts he was dismissed on phone by the supervisor. She on her part denies that the Claimant was dismissed asserting the Claimant called asking to go on off and was not granted permission but he opted to go nevertheless prompting the supervisor she sent to

check on the Claimant staying on for the shift. The register indicating the signing off was not availed neither was the supervisor who filled in for the absent Claimant called to testify. Under Section 43 of the Employment Act, there is a burden placed on the employee and the employer. The Respondent did not discharge its burden to show the Claimant was absent as a result of absconding work. The fact the muster roll shows he was absent could mean he had been summarily dismissed and was thus absent in compliance with the request by the Respondent's agent not to report to work. In the final analysis, the Claimant is entitled to a declaration that his dismissal was unfair and without notice thereby entitling him to relief as follows:-

- a. Payment in lieu of notice Kshs. 7,200/-
- b. Compensation for 3 months – Kshs. 21,600/-
- c. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 28th day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true

copy of the original

DEPUTY REGISTRAR