



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 201 OF 2017

JAMES MUNYERIA NJUGUNA.....CLAIMANT

VERSUS

TWO FOUR SEVEN GUARDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his dismissal from work. He averred that he was dismissed on phone on 28th March 2017 by Terry the Respondent's supervisor. He averred that the Respondent did not prove any misconduct on his part and he was not served with a notice to show cause before the services were terminated. He thus sought payment of one month salary in lieu of notice, the unpaid leave, compensation, unpaid balance of salary of Kshs. 3,200/- for the month of March and damages for the unlawful and unfair dismissal.

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 testified that he was called by Terry his supervisor and asked to return his uniform and not to report to work. He stated that he took the uniform back but protested at the office and the supervisor was unhappy with him for doing so. He stated that he was dismissed without cause. In cross-examination he stated that he had an ordinary phone – a Tekno and he gave his mobile phone number as proof of the fact. He stated that the supervisor called him using her phone and told him not to report to work and that he returned the uniform and signed for it. He confirmed that he did not write to the Respondent protesting his dismissal.

4. The Respondent called Teresiah Wachuka Gatheri who stated that she was a supervisor of the Respondent overseeing watchmen. She stated that the Claimant stopped working for the Respondent on 24th March 2017. She recalled they had an issue with the Claimant who did not report to work on the 7th and 8th March. She testified that the Claimant used to get money and get inebriated and not report to work. She stated that despite talking to him he did not report on 13th and 24th March and that she called him to the office and when he eventually reported there on 27th March he handed in the uniform and said he cannot work. She stated that he was paid for the days worked and that the Claimant did not have a phone and she never called him as a result. In cross-examination she stated that the Claimant used to be drunk and absent and there was evidence of absenteeism she had produced. She acknowledged that the roster did not show drunkenness was the cause of the absenteeism. She stated that she managed to communicate with the Claimant through the in-charge's phone and that the Claimant was paid his dues.

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's termination was without prior notice contemplated under Section 35 and in the alleged circumstances of absenteeism, a

procedure to show cause would have ensued resulting in a lawful termination. As this was not done, the Claimant is entitled to the reliefs he seeks as he proved his dismissal was unlawful in the circumstances.

8. 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. Unpaid balance of March salary – Kshs. 3,200/-
- c. Compensation for 3 months – Kshs. 21,600/-
- d. 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