



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 1639 OF 2013

CHARLES KYALE MBUVI.....CLAIMANT

VERSUS

RACE GUARDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant pleaded that he was on 6th August, 2010 employed by the respondent as a security guard attached to East African Portland Cement, Athi River at a monthly salary of kshs 4,900/= . According to the claimant he diligently performed his duties and at no time was he ever issued with any warning letter or notice regarding his work performance.
2. On 5th May, 2011 while in the course of his duties at the Railways gate the Respondent's supervisor one Mr. David Kinoti who was in charge of the area without any justification or provocation assaulted and severely injured him and ordered him to undress and remove his work uniform and immediately terminated his employment on the spot. The respondent further withheld his salary for the month and his salary for the month and his accrued benefits and has since never settled the same.
3. The claimant further averred that no termination letter was issued to him nor did the respondent explain to him the reasons for termination as required by law. He stated that at the time of termination, his monthly salary was kshs.5,840 which he claimed was below the recommended minimum wage for his cadre. Further that he used to work over and above his normal working hours without payment from the respondent.
4. The respondent on its part pleaded that it paid the claimant his dues in form of house allowance and for working during public holidays and further that the claimant never collected his salary for the month of May, 2011. The respondent further averred that the claimant absconded his duties as security guard hence was in breaching of his obligations to the respondent.
5. The respondent further contended that on 7th June, 2011 upon the claimant reporting to the operations manager he never showed the manager where he was hurt nor did the manager see any external injuries on physical examination. Further that both the claimant and Mr. David Kimiti never reported the alleged occurrence as would be required hence what transpired between them was a matter involving individual and had nothing to do with the respondent.
6. The respondent further averred that the claimant was never secured and that Mr. David Kimiti had no powers to seek or make any decision regarding employees which was well within the claimant's knowledge as such power was only vested on the Operations Manager or the Director.
7. In his oral evidence the claimant repeated the averments in the statement of claim and further stated that on 5th May, 2011 he was on night duties and that his work was to open the rail gate for train. On the material day the supervisor was on patrol when he saw someone outside and he got out and chased the person away. The supervisor then came back and accused him of opening for thieves who stole metal from the respondent's premises. It was his evidence that the supervisor hit him on the head and hand and asked him to hand over the keys and took his uniform.
8. It was his testimony that he reported the issue to the respondent's General Manager who chased him away and told him to see the Operations Manager. Later on he was given kshs.1,000 and told never to go back to the respondent. He was not issued with a dismissal letter.
9. In cross-examination he said it was Mr. Kimiti who chased him away he however admitted that Kimiti was not the one who employed him but was his supervisor.

10. The respondent's witness Mr. Paul Ndolo informed the court that he worked for the respondent as a security officer. It was his testimony that in June, 2011 the claimant came to his office and reported that he was assaulted by his supervisor Mr. Kimiti. He said Kimiti accused him of leaving a gate open. According to him he never saw any physical injuries. He further stated that he asked the claimant to come with Kimiti to see him but they never came. He also stated that the claimant was neither suspended nor dismissed.

11. In cross-examination he stated that the claimant was never issued with a termination letter and was never issued with a show cause letter.

12. The respondent denied dismissing or suspending the claimant. It alleged that the claimant absconded duty. It was however common ground that there was complaint of assault of the claimant by one Kimiti. The respondent's witness Mr. Ndolo informed the court that the claimant informed him of the incident but he did not see any physical injuries on the claimant. He informed the court that he asked the claimant to come back to him with Mr. Kimiti but his never happened.

13. Mr. Kimiti was the claimant's supervisor and the one he claimed to have not only assaulted him but also chased him away on the material day. It was therefore the respondent's responsibility through a more senior officer to summon the two disputants to find out what the cause of the dispute was and resolve it. It was in the court's view a poor complaints handling mechanism to ask the claimant to go and call his supervisor to come and see the security officer yet it was within his power to summon Mr. Kimiti. This casual treatment of the claimant's complaint renders more plausible his claim that Mr. Kimiti ordered him to stay away from his employment.

14. The respondent has admitted that it never issued the claimant with a notice to show cause. On an allegation of termination of service on account of desertion it is the duty of an employer to show that reasonable steps were taken to contact the employee including issuance of notice to show cause why the employment contract should not be terminated on account of desertion. No such evidence was produced before the court.

15. In the circumstances the court finds that the termination of the claimant's services was unfair within the meaning of **Section 45 of the Employment Act** and awards the claimant as follows;

- a) Unpaid salary for May, 2011 Kshs.5,840.00
- b) One month's salary in lieu of notice Kshs.5,840.00
- c) Three month's salary as compensation for unfair termination of service Kshs.17,520.00
- d) Costs of the suit Kshs.29,200.00

17. The claim for underpayment, unpaid public holidays, a leave days and severance pay are rejected as no evidence was tendered in support. In any event by the time of termination the claimant had only worked for the respondent for seven months and may not have earned leave as claimed.

Dated at Nairobi this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge