



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 728 OF 2015

BETWEEN

ELIAS NAWAYO.....CLAIMANT

VERSUS

K.K. SECURITY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Marende Necheza & Company Advocates for the Claimant

Obura J. & Company Advocates for the Respondent

JUDGMENT

1. In his Amended Statement of Claim filed on 18th November 2015, the Claimant avers he was employed by the Respondent as a Security Guard, in the year 1998. He was dismissed by the Respondent on 5th March 2010. He was alleged to have stolen pieces of aluminum, property of the Respondent. He was not charged in Court, with the offence of stealing. He was not availed a fair hearing. His last salary was Kshs. 6,839 monthly. He seeks Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 6,839.
- b) 12 months' salary in compensation for unfair termination at Kshs. 82,068.
- c) Leave allowance for November 2009 at Kshs. 6,839.
- d) Service pay for 21 years at Kshs. 71,809.
- e) Costs.
- f) Interest.
- g) Any other suitable relief.

2. The Respondent filed its Statement of Response on 4th July 2017. The Claimant was an Employee of Respondent's predecessor, Tudor Security Services Limited. The Respondent took over the business in 2004. It did not employ the Claimant from 1998. The Claimant was arrested by Respondent's Supervisor while conveying stolen items from Respondent's Client's premises. He was taken through a disciplinary process, in accordance with the Employment Act 2007. It was recommended by the disciplinary panel, that the Claimant is summarily dismissed. He was advised by the Respondent, to collect his terminal dues.

3. The Claim was initially filed at the Resident Magistrate's Court in Mombasa, registered as Civil Suit No. 1820 of 2010, before being

transferred to the Employment and Labour Relations Court, for what was then a matter of jurisdiction.

4. The Claimant gave evidence, and rested his case on 11th December 2017. The Respondent's case was fixed for hearing on 7th March 2018, 18th June 2018, and 24th September 2018. The Respondent was not ready on any of these dates to present its case. It was agreed the Respondent closes its case without calling evidence, and Parties were directed to file their Closing Submissions. They confirmed doing so at the last mention, on 3rd December 2018.

12. The Claimant restated the averments contained in his Pleadings, in his oral evidence. He was stopped by his Supervisor on the material day, and asked why he was carrying a big bag. The Claimant was carrying his work uniform. The Respondent inspected the bag and found nothing. The Respondent nonetheless told the Claimant to leave, because he was a thief. The Claimant was suspended. He was required to write a letter of apology to continue working. He was summarily dismissed on 5th March 2010.

13. On cross-examination, he testified that he was employed permanently in 1998. He worked for Tudor Security Limited, which later merged with the Respondent. He was stationed at Alba Petrol Station. There was no yard with scrap metal at Alba. On 19th February 2010, the Claimant worked night shift. In the morning, he met the day shift Guards, who included Cosmas Barasa. They enquired why the Claimant was carrying a bulky bag. The Guards inspected Claimant's bag. There were no scraps of aluminum found. The Claimant carried his uniform and shoes only, in his bag.

14. The Claimant was called before the Operations Manager and Shop Steward. He was heard. He denied the charges. He was summarily dismissed. He was offered some little terminal benefits. Pay slips show he was actively subscribed to N.S.S.F.

The Court Finds: -

15. The Claimant was employed by the Respondent's predecessor, Tudor Security Services Limited, as a Security Guard, in 1998. The Respondent took over the business in 2004, and continued to employ the Claimant, until 5th March 2010, when the Respondent summarily dismissed the Claimant, on the allegation that the Claimant was found carrying scraps of aluminum, folded in his work uniform, in his bag.

16. The Claimant concedes that he was suspended, and heard later, by a panel which included the Operation Manager and the Shop Steward. A decision was made to summarily dismiss the Claimant.

17. In light of the Claimant's concession that he was heard, and considering that the hearing took place in the presence of the Shop Steward, the Court is prepared to accept that the Claimant was granted a fair hearing. There was a period of suspension and investigation, preceding hearing. The Claimant was made fully aware of the allegations against him. Procedure was fair.

18. There is considerable doubt, in the absence of evidence from the Respondent, on the validity of the allegations against the Claimant. There are no Witnesses who gave evidence before this Court, to establish the assertion that the Claimant was found stealing scraps of aluminum, belonging to Respondent's Client. There were names of Security Guards mentioned in the proceedings, said to have found the Claimant carrying the stolen items, in his bag. These Security Guards did not give evidence.

19. Sections 43 and 47 [5] of the Employment Act requires the Employer to justify the grounds for termination of employment. Without adducing evidence, the Respondent did not discharge this evidential burden. No valid reason was, or reasons were, shown to justify termination. Termination was on this ground unfair.

20. ***The Claimant is granted the prayer for compensation for unfair termination at 6½ months' at Kshs. 44,453.***

21. ***The prayer for notice is allowed at Kshs. 6,839.***

22. It is not clear if the Claimant seeks annual leave pay or leave traveling allowance, in his prayer for leave allowance. The prayer is not clear and is declined.

23. His pay slip discloses that he was actively subscribed to N.S.S.F. He is not eligible for service pay under Section 35 of the Employment Act. He has not invoked any CBA, Wage Order or Policy, granting him other forms of social security benefits, in addition to pension available under the N.S.S.F regime. This item is declined.

24. ***No order on the costs.***

25. ***Interest allowed at 14% per annum, from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED: -

[a] Termination was unfair for want of valid reason, or reasons.

[b] The Respondent shall pay to the Claimant 6 ½ months' salary in compensation for unfair termination at Kshs. 44, 453 and 1 month salary in lieu of notice at Kshs. 6,839 - total Kshs. 51,292.

[c] No order on the costs.

[d] Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 22nd day of February 2019.

James Rika

Judge