



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1017 OF 2011

MWENWA SANARE.....CLAIMANT

VERSUS

THAMES ELECTRICAL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 24.6.2011 seeking kshs.122112 from the respondent for alleged unfair termination of his contract of service on 25.10.2010. The Claim was amended on 18.4.2016 to increase the sum sought to kshs.316512 made up of one month salary in lieu of notice, 12 months' salary compensation for unfair termination of his employment, salary for days worked in October 2010, 21 leave days and 3 years rest days
2. The respondent filed his defence on 18.1.2012 and amended it on 30.8.2016 denying the alleged unfair termination. In the alternative she averred that if she terminated the claimant's services, she did so properly complying with the law after the claimant absconded duty after being arrested on suspicion of theft following the breaking into of the her premises. She therefore prayed for the suit to be dismissed with costs because he was paid his rightful dues after termination.
3. The suit was heard on 21.4.2016 and ex-parte judgment rendered on 26. 5.2016. However following an application by the respondent the judgment was set aside on by consent on 16.8.2016 and the suit heard afresh. The claimant testified as Cw1 but he basically adopted his earlier testimony and the defence counsel cross examined him. On the other hand the respondent called her manager Mr Satish Kumar Modi as Rw1 and thereafter both parties filed written submissions.

Claimant's Case

4. CW1 testified that he was employed by the Respondent as a night Guard on 6.4.1998. He worked as such until 2009 when he was deployed to be Day Time Guard working daily without any off day. His salary was Kshs.16,200 per month.
5. On Sunday 24.10.2010 he was on duty and at 9.00am, his colleague guard went to collect dog's food while Kenya Power and Lighting Corporation Staff were repairing the transformer at the gate. At the same time, some young men of Indian extraction who resided within the respondent's compound which he was guarding passed by and went to the side of the Godowns. Shortly thereafter the alarm at the Godown went off. In response, CW1 told the Power men not to let anyone in except the other guard who went for the dog's food, and ran to check on what was happening at the Godown.
6. On arrival, Cw1 found the Godown door open and the young Indians having removed copper metal bars and they asked him where he was when people went to steal the copper metals. While still that was happening G4S Guards arrived in response to the alarm and upon enquiry, the Indians admitted that they were the ones who opened the Godown. When the G4S Guards reported the matter to the Respondent's boss Mr. Nilesh Junior, the latter called police. The boss then instructed CW1 and the others to return the metals to the Godown and CW1 continued with his work.
7. On Monday 25.10.2010, the boss told CW1 to remain in the compound but do no work because he was going to dismiss him and deny him his benefits. That at about 5pm the boss told G4S Guards to arrest CW1 and take him to Industrial Area Police which they did. That on arrival at police station, CW1 found the Manager of the Respondent and he was then locked up for 4 days before being released without any charges.
8. Thereafter CW1 reported to his Union and the Labour Officer but the Respondent refused to settle the matter amicably prompting him to

bring this Suit. He prayed for salary for October 2010, one month salary in lieu of notice, leave for 2010 which was due in November 2010, service pay and compensation totaling to Kshs.316,520.

9. On cross examination, Cw1 stated that he was employed by the respondent as night watchman from 10.4.1998 earning Kshs.4,500 but in 2009 he was changed to day guard. He further stated that on 24.10.2010, he found the young Indians removing copper rods from the stole and they said the rods had been stolen. That shortly after him came G4S guards came in response to the alarm, but it is his boss who called the police. That they questioned him and he told them that no theft had taken place since it is the Indians who opened the store.

10. He maintained that he was arrested but released after 4 days without charges but never reported back because his boss Mr. Nilesh had caused his arrest. He however stated that he reported the matter to the labour Office and his Union and also wrote many letters to the respondent but he was not recalled. That he also reported to Sonko but all in vain.

Defence case

11. Rw1 testified that on the Sunday of 24.10.2010, one of the respondent's employees Mr. Alpesh called him and informed him that he heard some people making noise in the respondent's store near the office premises. He then rushed there and upon opening the store with Mr. Alpesh they saw no one. Security guards were then called and they discovered a hole on the roof made by cutting through the corrugated iron sheet and the electric fence had been tampered with. He then checked the stock and discovered that some copper materials had been dropped outside which made him to infer that theft had occurred.

12. Rw1 further testified that upon questioning the claimant as the day guard present, he stated that he had let strangers to the premises after being given incentive while his colleague Mr. Loiba Ngotole had gone to buy dog food. Thereafter the claimant was arrested by the police, in their own, discretion as a suspect and he recorded a statement under

'charge and caution' admitting that he was involved in the scheme that occasioned loss of millions to the respondent.

13. Rw1 further stated that he secured a copy of the said statement and advised the claimant to ensure that the criminal charges facing him were terminated before being allowed back to work. Thereafter Rw1 never knew whether the claimant was charged in court or not and the claimant never reported back with evidence that he had been cleared by the police from the said theft case. He however denied the allegation that the claimant's services were terminated.

14. On cross examination, Rw1 maintained that the claimant participated in the theft and the matter was dealt with by the police. He however contended that the company also investigated the matter separate from the police. He admitted that he never served the claimant with show cause letter or invited him to a disciplinary hearing. He further admitted that in his written witness statement paragraph 14 and 16, he indicated that he was waiting for the police to clear the claimant so that he could be received back to work but he absconded. He also admitted that paragraph 9 of the amended defence stated that the claimant was issued with a termination letter. Finally, he admitted that he never responded to claimant's Advocates' demand letter but contended that he did to the labour officer's letter.

15. Rw1 admitted that the claimant was not paid his salary for October 2010. He denied the claim for accrued leave and contended that the claimant went for all his annual leaves. He however produced no leave records to support his allegation.

16. In re-examination, Rw1 admitted that the claimant disappeared on 24.10.2010 and returned on 25.10.2010.

Analysis and Determination

17. After careful consideration of the pleadings, evidence and submissions by both sides, there is no dispute that the claimant was employed by the respondent as a Security guard from 1998 till 24.10.2010 when he was arrested by police in connection with theft case at the respondent's store. The issues for determination are:

- a. Whether the employment contract was unfairly terminated by the respondent or the claimant deserted his job.
- b. Whether reliefs sought should issue.

Unfair termination or desertion

18. Under section 47 (5) of the Employment Act, the burden of proving unfair termination of contract of service rests with the employee who alleges that he was so terminated while the employer has the burden of justifying the termination. However the said burden of proof does not shift to the employer until the termination is proved to have been done by the respondent. In this case the Claimant stated that on 25.10.2010 he reported to work but his boss told him to remain at his work station but not to do any work because he was going to be dismissed without any benefits. That at about 5 pm he was arrested and escorted to the police station where at he was locked up for 4 days and then released without any charges.

19. After his release from the police custody the claimant reported the matter to his Union and the Labour office but the Respondent refused to settle the matter amicably. He denied that he absconded work and maintained that he was unfairly dismissed as admitted by paragraph 9 of the amended defence. He however during cross examination he admitted that he never reported back to work after being released because it is his boss who had caused his arrest. The foregoing admission corroborates the pleadings and evidence by the defence that the claimant absconded work after being arrested and released by the police.

20. In view of the foregoing, it is obvious that the termination of the contract of service herein was through desertion by the claimant after being released from police custody. Instead of reporting back to work after securing his liberty from the lawful custody, the claimant went about reporting the matter to the labour office and his trade union and not to his employer. After careful consideration of the material presented to me, I return that the claimant has not proved on a balance of probability that his contract of service was unfairly terminated by the respondent.

Reliefs

21. In view of the foregoing finding that the Claimant's contract of service was not unfairly terminated, I dismiss the claim for one month salary in lieu of notice and compensation for unfair termination. Under section 49 of the Employment Act, such reliefs are only available where the court makes a finding that the termination of contract of service was unjustified or unfair.

22. The claim for salary for the 25 days worked in October 2010 is however granted because Rw1 admitted the same. Hence $Kshs.18,200 \times \frac{25}{26} = Kshs.17,500$ Likewise the Claim for 21 leave days earned in 2010 is allowed because no evidence was adduced in the form of leave records by the employer to disapprove the same. Under section 74 of the Employment Act, the employer is the custodian of employment records including leave records, and her failure to produce the same leads to the presumption that the allegation by the claimant is true. Hence $\frac{21}{26} \times Kshs.18,200 = Kshs.14,700$. The particulars of claim for 3 years rest days equaling to $Kshs.89,712.20$ was not pleaded and it is dismissed.

Conclusion and disposition

23. I have found that the claimant has not proved that he was unfairly discharged but he is the one who deserted his employment. I have further found that he is not entitled to compensatory damages but only his unpaid salary and accrued leave. Consequently, I enter judgment for $Kshs.32,200$ plus half costs and interest at court rates from the date of filing the suit. The award is subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 15th day of March, 2019

ONESMUS N. MAKAU

JUDGE