



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT**

**AT NAIROBI**

**CAUSE NUMBER 733 OF 2014**

**BETWEEN**

**AGGREY KHAYUMBI SESE.....CLAIMANT**

**VERSUS**

**BOB MORGAN SERVICES LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Omakwe & Associates, Advocates for the Claimant*

*Wainaina Ireri & Company Advocates for the Respondent*

---

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 4<sup>th</sup> June 2014. He states he was employed by the Respondent on renewable contracts, beginning 1<sup>st</sup> April 2008. His last contract was for 52 weeks, beginning 7<sup>th</sup> March 2013. It was terminated by the Respondent on 12<sup>th</sup> May 2013. His salary was Kshs. 16,500 monthly. He was a Site Supervisor by the time of termination. He was alleged to have instructed fellow Employee to sign attendance register, indicating the Claimant was on duty, while he was not. The Claimant avers that the Respondent did not investigate the allegations. He was not asked to show cause why, he should not be disciplined. Termination was instant. The Claimant prays the Court to grant him Judgment against the Respondent in the following terms:-

- a) Declaration that termination was unfair and unlawful.
- b) Damages for wrongful and unlawful termination.
- c) Salary for the balance of the contract period.
- d) Salary from the date of termination to the date of determination of the Claim.
- e) Such further orders as the Court deems appropriate.

2. At paragraph 21[2] of the Statement of Claim, the Claimant pleads other items which are not included in the final prayers. These include refund of Sacco contributions; general damages, from the date of termination to the date of Judgment; costs; and interest.

3. The Respondent filed its Statement of Response, on 13<sup>th</sup> August 2014. It is not disputed that the Claimant was employed by the Respondent. Particulars of employment are not disputed. He was found to be missing from his assigned site at Beirsdof East Africa Limited, on the night of 12<sup>th</sup> May 2013. Deployment Officer could not find the Claimant. His guarding duties were immediately taken over, upon the instructions of Respondent's Control Room, by another Officer. It was noted in the Occurrence Book that the Claimant had absconded. Further investigation disclosed that the Claimant had formed an unofficial arrangement with a Co-Employee, to have the Co-Employee sign attendance register on Claimant's behalf, to indicate falsely, that the Claimant was on duty. He was required to show cause why, he should not be disciplined for this employment offence. He did not offer a reasonable explanation. He was summarily dismissed, and paid all his

terminal dues in the sum of Kshs. 28,865. He acknowledged receipt, and discharged the Respondent from further claims. His Certificate of Service issued to him. The Respondent prays the Court to dismiss the Claim, with costs.

4. The Claimant testified and rested his case, on 16<sup>th</sup> October 2018, during the Court's Service Week at Nairobi. Denis Micheka Orina, Respondent's Human Resource Manager testified on the same date, bringing the hearing to a close. The Cause was last mentioned before the Hon. Deputy Registrar on 19<sup>th</sup> November 2018 when Parties confirmed filing of their Submissions, and an order issued for relay of the file to the Court in Mombasa for preparation of the Judgment.

5. The Claimant restated the averments contained in his Statement of Claim, in his oral evidence. He conceded on cross-examination, that on 12<sup>th</sup> May 2013, Supervisor Kioo carried out inspection. Supervisor visited the Guards on inspection daily. The Claimant however did not see the Supervisor on this date. Rather inconsistently, the Claimant also told the Court that Kioo did not visit the site on 12<sup>th</sup> May 2013. Redirected, the Claimant told the Court that the Supervisor did not visit the site on every day.

6. The Human Resource Manager told the Court that at the time of inspection on the material day, 12<sup>th</sup> May 2013, the Claimant was not physically present. He may have signed the register, but was absent when the Supervisor went to the site. The Claimant wrote to the Respondent on 16<sup>th</sup> June 2013, explaining his absence. He was given a chance to explain his absence before dismissal. Cross-examined, the Witness told the Court that 2 other Guards, Onyango and Musyoka- were with the Claimant on the material night. These 2 Guards wrote to the Respondent on 17<sup>th</sup> June 2013, confirming that the Claimant was at his place of work on the material night. The Human Resource Manager told the Court that he was the Quality Assurance Officer at the time of the occurrence, not the Human Resource Manager. He was not directly involved in human resource management. He did not have the name of the Guard who was alleged to have replaced the Claimant. There are no minutes of any disciplinary hearing. The Claimant absconded on 12<sup>th</sup> May 2013. He returned to work and was let in. The Manager had not found a replacement for the Claimant. Redirected, the Witness told the Court that the Claimant may have reported for duty, but was unavailable at the time of inspection. The decision to terminate the Claimant's contract was based on the probationary nature of the contract.

#### **The Court Finds:-**

7. The particulars, terms and conditions of service are not disputed.

8. The Court does not agree with the last statement made by Human Resource Manager at paragraph 6 above. Termination would not be justifiable on the ground that the Claimant was serving probation. He had worked as a Guard from the year 2008. He would not be on valid probation in the year 2013, while still discharging the role of a Security Guard. From the outset, the Court has formed the view that probation did not constitute valid ground for termination. There would have to be other valid reason or reasons, to justify termination.

9. In the Statement of Response, the reason given is that the Claimant had made an unholy arrangement with Colleagues to falsify the attendance register, indicating the Claimant was on duty, while he was not. However, this position somewhat changed in the evidence given by the Human Resource Manager. It was explained that the Claimant probably signed in, and out, on the night of 12<sup>th</sup> May 2013, but was not present when Supervisor Kioo visited the site.

10. The Supervisor did not testify before this Court. There is no statement, or document in any form, signed by the Supervisor, showing that the Claimant absconded. The Daily Checking List, for the night shift or 12<sup>th</sup> May 2013, indicates that the Claimant was on duty. The Guards, who were on duty with him, wrote to the Respondent on 17<sup>th</sup> June 2013, confirming that the Claimant was on duty. The Human Resource Manager was at the time, Quality Assurance Manager, with no direct involvement in the dispute at hand. His evidence is restricted to the employment records supplied to him by the Respondent. He was not a participant, in the occurrences of 12<sup>th</sup> May 2013. There was no valid reason, or reasons shown, justifying termination.

11. The Certificate of Service issued to the Claimant shows the date of termination as 30<sup>th</sup> May 2013. Other dates have been mentioned. The letter of summary dismissal is dated 17<sup>th</sup> June 2013. The other date which was mentioned in the proceedings is 12<sup>th</sup> May 2013.

12. The letter of summary dismissal states that "*Management has therefore approved you are dismissed for gross-misconduct.*" The effective date is not given. The Claimant is advised to lodge appeal if dissatisfied, within the next 7 days. He did so through a letter dated 16<sup>th</sup> June 2013. It is not clear why the letter of summary dismissal is dated 17<sup>th</sup> June 2013, advising the Claimant to appeal, while the letter of appeal is dated 16<sup>th</sup> June 2013. The letters from Messrs. Onyango and Musyoka, which appear to have been in support of the appeal, are dated 17<sup>th</sup> June 2013.

13. Whichever date, the decision of the Respondent was made, there is no evidence of a disciplinary hearing. The mix-up in the date of termination attests to the presence of defects in the process. The Claimant was not confronted with specific charges; explained details of those charges in a language understood by him; and taken through a hearing in the company of a Colleague or a Trade Union Representative.

14. The Court is persuaded that termination failed to meet the minimum standards of fairness under Sections 41, 43 and 45 of the Employment Act 2007. **It is declared that termination was unfair.**

15. The Claimant had worked from the year 2008. His contract was subsequently renewed without fail, in every year, until June 2013. It would reasonably be expected that the last contract would be renewed, and the Claimant would continue serving, after 52 weeks, effective from 7<sup>th</sup> March 2013. Termination was flawed on both substantive and procedural grounds. The Claimant is not shown to have in any way, contributed to the decision to terminate his contract. He had worked for 5 years. He was paid salary for the month of May 2013, overtime pay, annual leave days, and public holiday supplement, as shown in the Clearance Certificate. In total, he was paid Kshs. 28,865. The Court has taken into account the requirements of Section 49 [4] and 50 of the Employment Act. **The Claimant is granted equivalent of 8 ½**

*months' salary in compensation for unfair termination at Kshs. 140,760.*

16. Equivalent of 12 months' salary cannot be notice pay as claimed at paragraph 21 [2] [a] of the Statement of Claim. ***The prayer for notice pay is granted at the equivalent of 1 month salary at Kshs. 16, 560.***

17. The Court has taken into account the period left in Claimant's contract, in granting compensation for unfair termination. Economic injury sustained by the Claimant, has been adequately redressed. The prayer for salary for the balance of the contract is rejected.

18. Utterly without foundation is the prayer for salary from the date of termination, to the date of determination of the Claim. Why would the Claimant want to be paid salary for no work done, over a period of 6 years? He left employment in the year 2013. This ludicrous prayer is declined

19. Equally confounding is the prayer for damages from the date of termination, to the date of determination of the Claim. The prayer has no support in the law, judicial precedent, wage instrument, or the contract which regulated the Parties. It is rejected.

20. There is an inelegantly pleaded prayer for refund of Sacco contributions. No evidence of such contributions has been availed. The Sacco in question is not a Party to the proceedings. This prayer is likewise rejected.

21. ***No order on the costs.***

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

IN SUM, IT IS ORDERED:-

***a) It is declared that termination was unfair.***

***b) The Respondent shall pay to the Claimant: equivalent of 8½ months' salary in compensation for unfair termination at Kshs. 140,760 and notice pay at Kshs. 16,560- total Kshs. 157,320.***

***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 signed at Mombasa this 30th day of January 2019.**

**James Rika**

**Judge**

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of February 2019.**

**Byram Ongaya**

**Judge**