



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 914 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PHILIP WAWERU GITU.....CLAIMANT

VERSUS

STRAIGHT SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

The Claimant herein filed his Memorandum of Claim on 17th June 2013 contending his wrongful and unlawful dismissal and the non-payment of his dues by the Respondent. The Claimant seeks the following reliefs:

a) A declaration that he was wrongfully and in toto breach of the employment contract dismissed from his employment.

b) Kshs.1,133,634 made up of the following

- i. One month's salary in lieu of notice at rate 20,000 x 1 = Kshs.20,000
- ii. Unpaid house allowance for 6 years 5,000 x 72 months = Kshs.360,000
- iii. Unpaid service allowance for 6 years 15 days a year = Kshs.120,000
- iv. Unpaid leave for 21 days a year x 6 years = Kshs.120,000
- v. Unpaid salary for 15 days at time of construction of new format of Paying salaries = Kshs.11,538.45
- i. Risk allowance or hardship 4,000 per month x 72 = Kshs.288,000
- ii. Travelling allowance when going on leave 3000 x 6 years = Kshs.18,000
- iii. Off allowances 4 days a month 20000/30 days
667 x 4 days per month 2868 x 6 years = Kshs.192,096
- i. N.S.S.F dues for ten months 400 x 10 = Kshs.4,000
- ii. Costs and interest of the suit
- iii. Any other or such other further relief as this court may deem fit to grant.

The Respondent filed its Statement of Defence on 17th July 2013 in which it denied the allegations in the Memorandum of Claim. It averred that the Claimant's termination was occasioned by the Claimant's poor performance in his duties.

During the hearing the Claimant testified on his behalf whilst the Respondent called one witness Francis Munene who testified on behalf of the Respondent.

Claimant's Case

The Claimant testified that his engagement with the Respondent was pursuant to an oral arrangement with the Respondent as he was initially employed as a guard and thereafter appointed as a manager. He testified that his salary was Kshs.20,000 which was paid into his bank account but he was never issued with a payslip. It is his case that the salary was deposited into his account but was not at the rate of Kshs.20,000. He testified that he never went for leave for the six years he worked for the Respondent from the year 2007 – 2012.

He testified that he received a letter dated 1st August 2012 informing him that his services had been terminated and that he would be paid terminal benefits upon returning the Respondent's property.

He testified that after termination he was informed that there was a job which was on contractual basis but there were no salary discussions. He testified that he was offered the job in Kenol and surrounding areas which included Put Sarajevo. It is his case that he was to be paid Kshs.10,000 via mobile phone. He testified that he worked in the month of December 2013 and from January to March 2014 but only received half pay for the month of March 2014.

During cross-examination the Claimant testified that there were issues that arose from time to time and that there were problems between Put Sarajevo and the Respondent as the former's property was lost when no guards were assigned to the property. He testified that it was his duty to assign guards but there were instances where there were no guards assigned as he had not been instructed to assign guards.

He testified that a balloon was stolen in Othaya and thereafter he was informed, in February 2012, that the guards were expected to keep an eye on the property. It was his case that he was not in Othaya at the time of the loss as he had been transferred.

He testified that he was paid Kshs.17,000 or 16,000 and was at times paid in cash. He testified that he was paid Kshs.35,000 at one time on 10th September 2012 and that the payment was for notice. He testified that he had received Kshs.10,000 which was paid through his bank account having worked on contract in 2013. He testified that his termination did not relate to his work performance at Put Sarajevo.

Respondent's Case

RW1, Francis Munene testified that he is a director at the Respondent. He testified that the claimant was employed as a watchman in 2007. He was promoted to supervisor and thereafter to a Manager and transferred to Othaya.

He testified that while the Claimant was assigned to work in Othaya there were many incidents which resulted to the Claimant's transfer to Ruiru in May 2012. That the Claimant was requested to proceed on leave to allow the Respondent investigate various theft incidents. The findings of the investigations were that the Claimant never attended work as he spent most of his time at his home in Muranga. He testified that the Claimant was issued with a letter inviting him for a disciplinary hearing but he did not respond to the charges in the disciplinary letter which included failure to deploy guards. RW1 testified that the Claimant did not attend the disciplinary hearing and was dismissed on the 31st July 2012. He testified that at the time of the Claimant's dismissal, he earned a salary of Kshs.20,000 which was inclusive of house allowance. He further testified that NSSF deductions made by the respondent. That the Claimant took an off day every Sunday.

He testified that upon payment of his terminal dues, the Claimant filed a complaint at the labour office. He testified that the Claimant was paid Kshs.35,000. He denied that the Claimant was ever offered employment after termination. He testified that the Claimant was paid a further 40,000 as agreed at the labour office making a total of Kshs.75,000. ort back after payment was made.

In cross-examination RW1 testified that the letters produced by the Respondent in Court were never signed by the Claimant but it was not true that they were forgeries. He testified that the Claimant was paid Kshs.15,000 until the increment to Kshs.20,000.

Claimant's submissions

The Claimant submitted that he was dismissed on malicious and unfair grounds and that the Respondent had failed to provide adequate reasons for terminating the Claimant's services in the dismissal letter dated 1st August 2018. He relied on sections 43(1)(2) of the Employment Act.

The Claimant submitted that he was neither given an opportunity to be heard nor was he adequately notified of this dismissal. The Claimant submitted that the provisions of sections 41, 43 and 45 of the Employment Act are minimum requirements in employment and the absence of these elements invalidate a contract of employment. The Claimant relied on the decision in GMV v Bank of Africa Kenya Limited Cause 1227 of 2011.

The Claimant submitted that he is entitled to the prayers sought. He lied on the case of Southern Highlands Tobacco v McQueen (1960) EA

“A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it a duty to do what he can mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the Plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation.”

The Claimant submitted that the Respondents Memorandum of Reply does not raise any substantial issues or deny it acted in bad faith. He submitted that the documents filed by the Respondent were prepared after his dismissal as he never signed the documents.

Respondent's Submissions

The Respondent submitted that the Claimant was issued with a show cause letter that listed the charges that he was to face during the

disciplinary hearing scheduled for 14th July 2012. That the Claimant was given an opportunity to explain himself thus his termination cannot be termed as unfair. It submitted that the Respondent had failed to discharge the burden as required under section 47(5) of the Employment Act.

The Respondent submitted that the Claimant is not entitled to house allowance since he was paid a consolidated salary as testified by RW1. In addition, the Respondent submitted that the claim for house allowance was time barred as provided under section 90 of the Employment Act and relied on the decision in Rioba Maugo v Riley Falcon Security Services Ltd [2016] eKLR.

The Respondent submitted that the Claimant was a member of NSSF and under Section 35 (6) of the Employment Act is disentitled from claiming service pay. It relied on the decision in Gilbert Kasumalu Kithi v Nyali Beach Holiday Resort [2015] eKLR.

The Respondent submitted that the Claimant is not entitled to 21 leave days a year since he had been sent on compulsory annual leave pending investigation for his outstanding 3 days of leave. The Respondent submitted that the Claimant's claim of risk and travelling allowance had no basis in law or in contract. The Respondent submitted that the RW1 testified that he had received his terminal dues of KShs.75,716 via Mpesa and that the Claimant's allegation that the monies were for his engagements after termination should fail.

Determination

Having considered the pleadings, testimony of the witnesses and written submissions, the issues for determination are whether claimant's employment was unfair and if he is entitled to the prayers sought.

The claimant produced a letter of termination on grounds of restructuring while the respondent produced several letters, one dated 6th February 2002 sending the claimant on annual leave to give way for investigations into alleged lapses in work sites he was in charge of, the other letter dated 10th July 2012, referring to several instances of lapses and inviting the claimant for a disciplinary hearing and finally a letter of summary dismissal dated 31st July 2012 which refers to a disciplinary hearing on 14th July 2012.

There are thus two different versions of evidence one from the claimant and the other from the respondent which are at variance. In such a case the court falls back on the law of evidence. Section 107 to 109 of the Evidence Act provides that it is the burden of a person who alleges a legal right or liability or a fact to prove the same.

From the foregoing I find that the claimant has not proved on a balance of probabilities that his summary dismissal was unfair. I find the evidence of the respondent more probable on several grounds. The first is that as RW1 testified, all letters are signed by him as Managing Director while the letter of termination produced by the claimant has the signature of a different person who has signed off as Human Resource, a position RW1 stated was held by someone else while the signatory of the letter, Mr. Charles Njoroge was an operations Manager in Ruiru.

Secondly, at paragraph 6 of the memorandum of claim the claimant pleads that he was dismissed by the Director while the letter of termination he produced was not signed by a Director, but Mr. Charles Njoroge.

Remedies

The claimant prayed for several remedies.

Having found that the claimant did not prove that he was terminated, and having found that he was summarily dismissed, he is not entitled to pay in lieu of notice. He is further not entitled to house allowance as there was no proof that his salary did not include house allowance and further no proof that in the 6 years he worked for the respondent he ever demanded payment of house allowance. The claimant was a member of NSSF and is not entitled to service pay. The claimant did not prove that he did not go on leave. He did not deny the letter dated 6th February 2012 which indicated that he had 35 days leave balance.

The claimant did not explain or prove the prayer for unpaid salary for 15 days at the time of construction of new format of paying salaries. He did not prove that he was entitled to risk allowance, or travelling allowance or off-allowance.

The result is that the entire claim fails and is accordingly dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE