



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2025 OF 2015

ROBERT MMUGI MUHAVI.....CLAIMANT

- VERSUS -

RADAR LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd March, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 12.11.2015 through S.M. Keyonzo and Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Kshs. 376, 721.00 being salary in lieu of notice Kshs. 13, 762.00; house allowance from October 2009 to December 2009 at Kshs. 2, 500.00 per month making Kshs.97, 500.00; travelling allowance from October 2009 to December 2009 at Kshs.1, 500.00 per month making Kshs.58, 500.00; payment in lieu of 91 days leave earned but not taken Kshs.41, 895.00; 12 months' salary compensation for unfair dismissal under section 49(1) (c) of the Employment Act, 2007 Kshs.165, 762.00.
- b) Interest at Court rates till payment in full.
- c) Costs of the suit.

The respondent filed the memorandum of defence on 17.02.2016 through Kittony Waiyaki Advocates. The respondent prayed for a declaration that there was no unfair dismissal of the claimant from employment; the claimant's suit be dismissed with costs plus interest thereon from the date of judgment till payment in full; and any other relief that the Honourable Court may deem fit and just to grant in the circumstances.

It is not in dispute that the respondent employed the claimant as a security guard per contract of temporary employment dated 02.10.2009 at Kshs.8, 788.00 per month being accumulated daily wage per month worked. The engagement was for 90 consecutive days but not exceeding three months from 02.10.2009. However, at the end of the 90 days the parties did not sign another contract and the claimant continued in the respondent's service in the same capacity.

On 12.12.2013 the claimant was on duty at Hurlingham Area in Nairobi when he was arrested by police from Industrial Area Police Station. He was charged with the offence of stealing contrary to section 268(1) as read with section 275 of the Penal Code thus, "**On the 26th of December 2013 at Safaricom site Nairobi gospel Hurlingham within Nairobi county jointly with another not before the stole 2 litres of diesel worth Kshs.210/= the property of Safaricom Kenya.**" That was in criminal case no.5019 of 2013 at Kibera Magistrate's Court.

The claimant's case was that on 30.12.2013 he was released on a cash bail of Kshs.500.00 and he reported on duty but he was verbally informed that he had been sacked and therefore he could not resume duty. The claimant's further case is that on 08.01.2014 he received a letter from the respondent on summary dismissal. The letter stated thus, "**On 26th December, 2013 while assigned duties at Safaricom Harlingham, booster station you were arrested by police on suspicion of fuel siphoning and locked in police custody and since then you had never reported on duty, which leaves the company with no other alternative but to SUMMARILY DISMISS you from employment under the Employment Act 2007 of Laws of Kenya.**

Arrange to return all the company property in your possession before payment of your final dues.

Yours faithfully,

RADAR LTD

Signed

JAMES MWANZIA

HUMAN RESOURCE MANAGER

Cc Shop Stewards”

The claimant’s case was that he was acquitted of the criminal charges as there was no case to answer for want of evidence against him. As at termination he earned Kshs.13, 962.00 per month.

To answer the **1st issue** for determination, the Court returns that the claimant continued in unbroken service until the termination. The Court returns that as submitted for the claimant, the claimant’s otherwise casual service converted to a service subject to minimum statutory terms of service as per section 37 the Employment Act, 2007 because the work as assigned could not be completed in less than three months and indeed, the claimant served for unbroken period of more than three months until the termination.

To answer the **2nd issue** for determination, the Court returns that the termination of the claimant’s employment was not unfair. First, the claimant was terminated on account of absence from duty following his arrest and as stated in the letter of summary dismissal. It is submitted for the respondent that absenteeism and suspicion of or commission of a criminal offence of any kind on the part of the employee amounted to gross misconduct as per clause 8(2) of the contract of service. Taking the material on record into account, the claimant was indeed arrested and charged and as at the time of dismissal, the respondent was entitled to invoke clause 8(2) of the contract of service. The claimant was entitled to due process of a notice and a hearing even in cases of gross misconduct - as was held in **Shankar Saklani –Versus- DHL Global Forwarding (K) Limited [2012]eKLR** that a notice and hearing on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on the grounds of misconduct, poor performance or physical incapacity of the employees as per section 41 of the Act. However, in the instant case, the Court returns that as at the material time of dismissal it was apparent that the claimant had been absent from duty on account of the arrest and criminal proceedings. The Court considers that a notice then a hearing would not have served any practical purpose towards the claimant’s exculpation in that regard. In any event, at the hearing the claimant admitted to the facts of the arrest, charge and absence from duty prior to the release on bond. Even if the claimant reported on duty after the release on the cash bail and was told he had been dismissed as per his own testimony, the reasons for the dismissal were not thereby varied. Accordingly, the claimant is not entitled to the compensation for the alleged unfair termination. Similarly, pay in lieu of termination notice will not be due.

To answer the **3rd issue** for determination, the Court returns that the claimant is not entitled to house allowance, travelling allowance, and 91 days of leave because they were claims in the nature of continuing injuries whose cause of action was limited to 12 months from the date of cessation per section 90 of the Act. The continuing injuries ceased on dismissal on 30.12.2013 or on the date of dismissal letter on 08.01.2014 so that the 12 months had lapsed when the suit was filed on 12.11.2015. The claims and prayers will fail. Further, it was not explained how the amounts claimed was arrived at for the period stated in the memorandum of claim.

The Court has considered all circumstances of the case including that the claimant was acquitted in the criminal case and each party shall bear own costs of the suit.

In conclusion the claimant’s suit is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 22nd March, 2019.

BYRAM ONGAYA

JUDGE