



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1422 OF 2015

JOSHUA TAKO ALUONDO.....CLAIMANT

VERSUS

XFOR SECURITY SOLUTIONS KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit on 14.8.2015 alleging that his contract of employment was unlawfully and unfairly terminated by the Respondent on 21.1.2015 and his terminal dues withheld. He therefore prayed for the following reliefs:

a. A declaration that the Respondent's action of refusing to pay the Claimant his terminal dues and benefits was unlawful, unfair and inhuman b. A declaration that the Claimant is entitled to payment of his terminal dues and compensatory

damages pleaded.

c. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs. 324,000/=

d. Interest on (c) above from the date of filing suit till payment in full.

e. Costs of this suit plus interests thereon.

2. The Respondent filed its Statement of Response dated 01/10/2015 admitting that she dismissed the claimant from employment but denied that the dismissal was unfair. On the contrary, she averred that the dismissal was fair and justified because the Claimant was caught dead asleep while on duty, which offence he admitted during his disciplinary hearing. She opposed the reliefs sought and prayed for the suit to be dismissed with cost.

3. The suit was heard on 9.5.2018 when the claimant testified as Cw1 and the Respondent's HR Manager Mr. Linux Mwakio testified as Rw1. Thereafter both parties filed written submissions.

Claimant's evidence

4. Cw1 testified that he was employed by the respondent on 1.11.2013 as a security guard for a monthly salary of Kshs.12,000. That he worked diligently until 21.1.2015 when he was served with a dismissal letter from the Respondent's director. He contended that the dismissal was unfair because it was without any lawful cause and done without giving the him any hearing. That it was also not preceded by any warning or notice. He therefore prayed for the reliefs sought in his claim.

5. During cross examination, Cw1 admitted that he signed a written contract with the Respondent. He stated that he was a reliever guard and as such he was not stationed in one place. He admitted that his duty was to ensure security by remaining awake and confirmed under the contract he signed, sleeping while on duty was a serious offence. He denied being found asleep while on duty on 17.1.2015. He further denied the photo produced by the Respondent showing a person sleeping and contended that the person in the picture was not him. He also denied that he was called for disciplinary hearing on 19.7.2015 and declined to attend. He contended that he reported to work as usual from 17.1.2015 to 21.1.2015 and stated that the evidence of that was the Occurrence Book at Emperor Plaza where he was guarding.

Defence case

6. Rw1 stated that on 17.1.2015, the company held a night operation to check whether the guards at the sites were alert. That the claimant who was guarding at Apple Cross was found dead asleep by the Operations Manager Mr. Barasa, who then photographed him. That the Claimant was the only guard at the sentry box and he was wearing the Respondent's uniform and a scarf round his neck. That the following day Mr. Barasa relayed the report and the photo to him at the Head Office, Mombasa.

7. Rw1 further testified that he immediately wrote a letter inviting the Claimant to a disciplinary hearing on 19.1.2015 but on 24.1.2015, the invitation letter was returned to him with information that the claimant did not attend the hearing. As a result, he wrote a dismissal letter on 25.1.2015 but erroneously dated it 21.1.2015.

8. On cross examination, Rw1 admitted that he is not the one who took the photo of the Claimant while asleep on 17.1.2015 but Mr. Barasa who has since left the company. He contended that the photo was taken at Apple Cross inside a Sentry box but admitted that it does not show the surrounding but on the sentry box. He further admitted that he had no evidence to prove that the letter inviting the claimant to the hearing was served on him. Finally, he admitted that the claimant was never served with any warning letter before his dismissal.

Claimant's Submissions

9. The Claimant submitted that **Section 44 of the Employment Act** puts the burden upon an employer intending to summarily dismiss an employee and that the Respondent has not justified any of the grounds under the law. He argued that the photograph produced by the respondent was not admissible because the Respondent never produced a certificate by the person who operated the machine that produced the photo, as required by **section 106 B (4) of the Evidence Act**. He further submitted his dismissal was unfair because he was not afforded a hearing as required by **Section 41 of the Employment Act**.

10. On the reliefs sought, he submitted that he is entitled to one month's notice pay as provided for in *paragraph 5* of his letter of employment and not one week as alleged by the Respondent. He contends that the Respondent is bound by the terms of the said contract. He further argued that the Employment Act provides for an award of 12 months as damages for loss of employment through unfair and wrongful termination. Finally, he submitted that he is entitled to his accrued leave for 2 years as provided for in **Section 28 of the Employment Act**.

Respondent's submissions

11. The Respondent submits that the statutory burden of proving unfair termination of employment or that wrongful dismissal has occurred rests on the employee while the burden of justifying the grounds of the termination of employment or wrongful dismissal rests on the employer as stipulated in **Section 47(5) of the Employment Act**. She further submitted that the Claimant's Advocate never objected to the production of the photograph of as an exhibit without a certificate and went head to cross-examine Rw1 on the photograph after it was produced.

12. It further submits that even though sleeping at work is not explicitly enumerated in **Section 44(4) of the Employment Act** as a ground for summary dismissal, a case can be made on the same *for wilful neglect to perform work* as it was the Claimant's duty to be on guard that night and not be asleep. That as per **Clause 11** of his employment contract on Disciplinary Procedure the Claimant was aware that sleeping at work amounted to gross misconduct and is a ground for immediate termination.

13. On the procedural impropriety, the Respondent submitted that the Claimant was invited to a hearing but wilfully declined and argued that refusal to attend the disciplinary hearing estops him from claiming that he was denied an opportunity to be heard. She therefore urged the Court to find that his termination was justified in light of the position he held and the fundamental breach of his contract.

14. On the reliefs sought, she submitted that in the event the Court finds procedural impropriety on her part in dismissing the Claimant, the appropriate relief should be one week's salary in lieu of notice (kshs, 2,049.39) as per **Clause 13** of the contract of employment and not one month's pay as pleaded by the Claimant; and accrued leave of **Kshs. 8,197.42**. However, she opposed the claim for damages for loss of employment contending that it was not provided by the law.

Analysis

15. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent as a security guard from 1.11.2013 until termination by the dismissal letter dated 21.1.2015. The issues for determination are:

- i) Whether the Claimant was unfairly and unlawfully terminated from his employment by the Respondent.
- ii) Whether the Claimant is entitled to the reliefs as prayed in the Memorandum of Claim.

Unfair termination

16. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Procedure is fair if the employee is granted a fair hearing in terms of justice and equity.

17. In this case, the Respondent dismissed the claimant for sleeping while on duty as a security guard. The person who found him sleeping did not testify but Rw1 produced a photography allegedly taken on the Claimant while sleeping. The person who took the photo never testified nor was any certificate produced by the person who processed it. However, the Claimant never objected to the production of the photo and did cross examine RW1 on the same. The foregoing notwithstanding, I find that the evidence by Rw1 on the alleged sleeping on

the job by the claimant and the taking of the photo to be hearsay. He only stated what he was told by Mr. Barasa who did not testify. I therefore return that the said hearsay evidence and the photo produced is not sufficient to prove that the Claimant was found sleeping on job. The person in the photo, the place and time of the photo are unknown.

18. Likewise Rw1 gave hearsay evidence on the failure by the claimant to attend disciplinary hearing. He however admitted that there was no evidence to prove that the Claimant was served with the invitation to attend the hearing and declined. I therefore return that the Claimant was terminated without being accorded a fair hearing as required by section 41 of **the Employment Act**. Section 41 of the Act, before dismissing an employee on ground of misconduct, poor performance or physical incapacity, the employer is enjoined in mandatory terms to explain to the employee the reason for which termination is being considered. The said explanation must be in a language of the employee's understanding and in the presence of another employee or shop floor union official who are both entitled to air their representation in response to the reasons cited by the employer. Finally, the employer must consider the views by the employee and his chosen companion before deciding to dismiss the employee.

19. In view of the fact that the Respondent has failed to prove on preponderance of evidence that the claimant was found sleeping on the job and that it followed a fair procedure before dismissing him from employment, I return that the dismissal was unfair within the meaning of section 45 of the Employment Act.

Reliefs sought

20. In view of the foregoing finding, I award the Claimant damages under section 49 (1) of the Employment Act being salary in lieu of notice and compensation for unfair termination. The claimant prayed for one month's salary in lieu of notice while the Respondent submitted for one week's salary in lieu of notice. I, however, dismiss the offer of one week's salary in lieu notice by the respondent based on the contract signed between the parties. It is now obvious that the freedom of contract in employment contracts in Kenya is subject to the express provisions of the Employment Act. Section 26 of the Act provides that the Terms of service given therein are the minimums and as parties cannot contract below them like in this case.

21. Section 35(1) (c) of the Act provides that where an employee is employed for salary which is paid on monthly intervals or more, the contract is terminable by a notice of 28 days in writing. In this case, clause 13 of the contract of service provided that the employer could terminate the same by a notice of 48 hours while the Claimant could do the same by a week's notice. The said clause was unlawful and not binding on the Claimant vis-à-vis section 35(1) (c) of the Act. The obligation of writing the contract is on the employer, which must be done in accordance with the law because in Kenya no one can employ any person outside the Employment Act except in the categories specifically excluded by the Act. I therefore award the Claimant one month salary in lieu of notice.

22. I also award him 3 months salary compensation for the unfair termination considering that he worked for only 2 years. I have also considered the fact that the Respondent did not prove that he contributed to the termination through misconduct.

23. Finally, the Claimant prayed for cash in lieu of the leave days earned from 1.11.2013 to 21.1.2015. The contract of service provided for 24 leave day per year or 2 days per month. The contract also provided for encashment of the leave at the rate of 2 days per month which was payable as part of the salary. I therefore dismiss the claim for accrued leave because by acknowledging that he has no claim for salary arrears, the Claimant confirms that he was paid for all the leave days earned since it was paid together with the salary.

Conclusion and disposition

24. I have found that the termination of the Claimant's employment by the Respondent was unfair both substantively and procedurally.

I have also found that the Claimant is entitled to damages under section 49 (1) of the Employment Act and leave for the years worked. Consequently, I enter judgment for him as follows:

a) Notice	Kshs. 12,000
b) Compensation	Kshs. 36,000
Total	Kshs. 60,000

The claimant will also have costs plus interest at court rates from the date hereof. 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