



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1452 OF 2013

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

VERSUS

GROUND FORCE SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant is trade union that represent workers in the Private Security Industry. She brought this suit on behalf of Dorcas Chelagat (grievant) on 9.9.2013 stating that the grievant was employed by respondent on 1.12.2010 as a Security Cadet and worked until 2.2.2012 when she was unfairly dismissed. She further averred that the grievant started with a gross salary of Kshs.3,800 per month and later it was increased to Kshs.4,000, which according to her was below the minimum Gazetted salary of Kshs.8,465 plus House Allowance of Kshs.1,269.

2. She further averred that on 2.7.2012 the grievant reported to work as usual but she found the supervisor with someone else to replace her and when she went to the respondent's office, she was told that her Boss Mr. Tito had given instructions that she should not be seen there again. Consequently, the grievant surrendered her uniform and demanded for her salary for January 2012 but she was told to wait until she was contacted but in vain. Thereafter she reported a dispute to the Labour Ministry for conciliation but the respondent did not attend the meetings and the claimant brought this suit seeking the following reliefs:-

- (a) One month's salary in lieu of notice.
- (b) Underpayment of wages, basic salary and house allowance and overtime for extra hours worked.
- (c) Overtime for 13 months
- (d) Leave for one year
- (e) Prorata leave for one month and Kshs.1,700 deducted for no reason
- (f) Severance pay/Gratuity for one year.
- (g) Certificate of services
- (h) Any other claim that the court deem fit.
- (i) Costs of the suit.

3. The respondent filed defence on 18.10.2013 contending that she had no Recognition Agreement with the claimant and that she was a stranger to the grievant's membership to the claimant union. She further averred that she employed the grievant for a six months contract running from 1.11.2011 to 30.4.2012 but she absconded duty without prior notice and failed to return the official uniform and other assets belonging to the company. She denied ever refusing to pay the grievant's dues, if any, and contended that the payment was subject to clearance procedures including return of all the company properties and equipment in her custody. Finally she averred that she fully submitted herself to the conciliation process but the claimant frustrated the same by abandoning proceedings midstream and prematurely. She therefore prayed for the suit to be dismissed with costs.

4. The suit was heard on 26.11.2018 when the grievant testified as Cw1 but the respondent did not attend the hearing to defend the suit. After the hearing, the claimant filed written submissions.

Claimant Case

5. Cw1 testified that she was employed by the respondent from 2004 as a security guard earning Kshs.6,000 which she was receiving in cash from the respondent's office. She further contended that she was never paid House Allowance and whenever she sought leave she was denied. She further contended the salary remained the same until 2010.

6. In November 2010, she went to the office to seek for tan off but it was denied and her uniform was taken away she was also told that her job was over. She contended that the termination was done without any prior notice and without being paid any terminal dues. She therefore prayed for the reliefs set out in the statement of claim.

Claimant's Submission

7. It was submitted for the claimant that the claimant was employed by the respondent on 11.11.2004 starting with a salary of Kshs.5,000 per month which was fair below the gazette minimum salary. That the claimant was never paid any house allowance, overtime and off days.

8. It was further submitted that when the claimant demanded for her salary arrears, she was ordered to surrender her uniform and unlawfully dismissed without any prior notice. That the matter was reported to the Ministry of Labour but the respondent failed to attend the meetings or to submit her proposal.

9. The claimant submitted that the termination of the grievant's contract of service was unfair because it was for justifiable reason and done without following a fair procedure, being prior hearing under section 41 of the Employment Act. She therefore urged the court to award the reliefs sought. She further submitted that the objection to the suit on grounds that she lacks the locus standi is not valid because she is duly registered and recognized as a legitimate union to represent the section where the respondent operates and the requirement of CBA and Recognition Agreement was not necessary.

Analysis and Determination

10. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the grievant was employed by the respondent as a Security Guardette. The issues for determination are:-

- (a) Whether the claimant has locus standi to sue herein.
- (b) Which period did the grievant work for the respondent.
- (c) Whether the claimant deserted her employment or she was unfairly terminated by the respondent.
- (d) Whether the claimant is entitled to the reliefs sought.

Locus standi

11. The objection to the suit on ground of locus standi was not prosecuted by the respondent and as such I treat the same as abandoned.

Period of Service

12. There are serious contradictions between the claimant's pleadings and the evidence tendered by Cw1 on the period of service. In the claim, it is pleaded that the grievant was employed by the respondent on 1.12.2010 as a Security Cadet at an initial salary of Kshs.3,800, which was later increased to Kshs.4,000, and worked until 2.2.2012 when she was unfairly terminated by the respondent. On the other hand, Cw1 stated in her testimony under oath that she was employed by the respondent as a Security Guard in 2004 for a salary of Kshs.6,000 per month, which remained the same and worked until November 2010 when she was terminated without prior notice.

13. Again the claimant pleaded that on 2.2.2012 the grievant reported at his place of assignment being Vetagro and Pulpers along Duruma Road Nairobi and found her supervisor with a new guard to replace her and then she went to the office and found instructions from the boss to the effect that she was not wanted in the Company. In her testimony under oath, Cw1, stated that in November 2010, she went to the respondent's office to seek for an off but she was denied and her uniform taken away before being told that her job was over.

14. After careful consideration of the contradictions between the pleadings and evidence, I find and hold that the claimant has failed to prove on a balance of convenience, whether the grievant worked for the respondent from 2004 to November 2010 or from November 2011 to February 2012. It is obvious that where there is such substantive departure, by evidence, from the pleadings, the court should not find in favour of the party who makes such departure unless there is amendment to the pleadings to align with the evidence. I therefore return that the claimant does not know when and how the cause of action arose.

Unfair termination

15. Under section 47(5) of the Employment Act, the burden of proving unfair termination is on the employee who alleges that he was so terminated while the employer has the burden of justifying the termination. For the burden of proof to shift from the employee to the

employer, the employee must discharge his burden first.

16. In this case, the claimant has not discharged her burden of proving that the grievant was unfairly dismissed. As observed above, there is sharp contradiction between the claimant's pleadings and evidence, which has led me to find that she does not know when and how the cause of action arose. In view of the said ignorance inferred from the said sharp contradiction between the pleadings and evidence I decline to find that the grievant's services were unfairly terminated by the respondent. I also decline to find that she absconded her duties because the respondent didn't tendered any evidence to support that allegation.

Relief

17. The reliefs sought are special damages but no figures have been pleaded. It is trite that special damages must be specifically pleaded and proved. I therefore decline to assess what has not been pleaded and proved. In any event the prove of the same would still be an uphill task considering my findings above that the period of service by the grievant has not been proved by the claimant. Even some effort to quantify some reliefs vide written submissions is not successful. The counsel talks of 7 years' service which has no basis in the pleadings which expressly state that the claimant only worked from 1.12.2010 to 2.2.2012 and sought gratuity/severance pay for only one year as opposed to quantification of House Allowance, leave and gratuity for 7 years.

Conclusion and disposition

18. I have found that the evidence by the claimant contradicts sharply with, and has substantively departed from the pleading. I have further found that for foregoing reason, the claimant has not proved on a balance of that the services of the grievant were unfairly terminated by the respondent on either of the dates stated in the pleadings or evidence and submissions by counsel. I have further found that the reliefs sought are of special damages and are declined because they have not been specifically pleaded and proved in evidence. Consequently, I dismiss the suit with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS N. MAKAU

JUDGE