



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA IN NAIROBI**

**CAUSE NO. 955 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> April, 2019)**

**STEPHEN OUMA LUDENDE.....CLAIMANT**

**VERSUS**

**RADAR LIMITED.....RESPONDENT**

**JUDGMENT**

1. On 4<sup>th</sup> June 2015, the Claimant through the firm of Namada and Company Advocates, filed his Memorandum of Claim dated 3<sup>rd</sup> June 2015. The Claimant is suing the Respondent for unfair and unlawful dismissal, and non-payment of terminal dues and damages. He seeks the following reliefs:-

- a. A declaration that the Respondent's dismissal of the Claimant from employment was unlawful and unfair.*
- b. A declaration that the Claimant is entitled to payment of terminal dues and damages as prayed.*
- c. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling KShs. 166,950.00 plus interest thereon. The same was computed as follows:-*
  - i. 1 months' salary in lieu of notice in the sum of KShs. 11,130.00.*
  - ii. Payment in lieu of leave not taken/unpaid leave for the entire period of service in the sum of KShs. 22,260.00.*
  - iii. Compensation at 12 months' gross salary in the sum of KShs. 133,560.00.*
- d. Cost of this suit plus interest thereon.*

2. The Claimant avers that he was employed by the Respondent on 21<sup>st</sup> May 2010 in the capacity of a security guard earning a daily salary of KShs. 371.00. He worked continuously with due diligence and to the satisfaction of the Respondent. However, on 2<sup>nd</sup> May 2012 he was summarily dismissed vide an even dated summary dismissal letter on the ground that he had absconded duty on 20<sup>th</sup> April 2012 which amounted to gross misconduct.

3. It is his case that his appeal to explain his innocence was not heard and he was told to leave the Respondent's premises. It is his position that his summary dismissal was unfair and unlawful because he was not guilty of the alleged misconduct, he was not accorded a hearing or issued with a letter to show cause and neither was due process followed.

4. On 5<sup>th</sup> October 2015, the Respondent through the firm of Kittony Waiyaki Advocates, filed their Memorandum of Defence opposing the Claimant's claim. They seek the following orders:

- a. A declaration that there was no unfair dismissal of the Claimant from unemployment.*
- b. The Claimant's suit be dismissed with costs plus interest thereon.*
- c. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.*

5. The Respondent contends that the Claimant's employment was summarily dismissed vide the letter dated 2<sup>nd</sup> May 2012. The letter

explained the reasons for the Claimant's dismissal.

6. The Respondent denies that the decision to summarily dismiss the Claimant was unfair and unlawful. Instead, the Respondent avers the Claimant left his designated post during working hours without cause or permission, in violation of his employment duties as a guard. The Claimant never returned to his post.

7. It is the Respondent's case that no appeal was lodged by the Claimant to clear his name.

8. The Respondent contends that the Claimant is not entitled to payment of terminal dues or damages. Further, he has not proved that such payment is owed to him. However, the Respondent shifts his position by stating that if payments were owed to the Claimant, the same were relinquished when he left his workstation, which act occasioned loss and injury to the Respondent. Additionally, it is the Respondent's case that the Claimant is not entitled to any payment because the Claimant did not suffer any loss or trauma as he willfully and without permission conducted himself in a manner indicating that he did not want to be in employment.

9. It is the Respondent's position that the suit herein is misconceived, bad in law, incompetent, is an abuse of Court process, unmaintainable and should be dismissed with costs because the Claimant's services were lawfully terminated and the reasons for the termination explained to him.

10. The suit was heard on 24<sup>th</sup> January 2019 where the Claimant testified as CW1 and the Respondent called Sharon Sambu as RW1.

11. CW1's testimony seems to reiterate the averments made in his Memorandum of Claim. Additionally, he testified that on 20<sup>th</sup> April 2012 he was on duty, off Juja Road. It is also his testimony that he was patrolling the buildings and heard a woman screaming. He went out to check what was wrong. However, the headquarters was informed that there had been no guard around. Thereafter, his boss took him to KD Training School and he worked there for two weeks.

12. It is the Claimant's evidence that he was not issued with a termination notice. He stated that he had never taken leave days. Further, it was his testimony that his dismissal caused him and his family an untold suffering.

13. During cross-examination, he testified that he had a written contract with the Respondent but admitted that the same was not in Court. However, it was his testimony that he was being paid daily as a casual. He stated that his station was Thika Trust and that he had also worked at Premere Industry.

14. He contended that he was sent to KP after the complaint was made to the headquarters but could not recall the name of the supervisor.

15. Upon re-examination, he insisted that he was taken to KP after a complaint was made to the headquarters.

16. RW1 testified that the Claimant was employed as a security guard and worked on casual terms. It was her testimony that a client informed them that the Claimant was not in his working station. It was her contention that if the Claimant was indeed moved to KP, he ought to have been issued with a dispatch note. She further contended that the Claimant did not lodge any appeal.

17. During cross-examination, she testified that the Claimant worked continuously during the subsistence of his employment. She admitted that despite the Claimant not working diligently, no warning letters were issued to him.

18. It was her testimony that the whereabouts of the Claimant between 20<sup>th</sup> April 2012 and 2<sup>nd</sup> May 2012 were unknown to her. She admitted that the Claimant was not issued with a letter to show cause or subjected to a disciplinary hearing. She also conceded that it was not wrong for a security guard to carry out patrols.

### **Submissions by the Parties**

19. The Claimant in his submissions dated 28<sup>th</sup> January 2019, submits that under Section 45 of the Employment Act 2007, an employer must prove that the reason for termination is fair and valid and that the procedure for termination was fair. He further submits that fair procedure was not applied hence his dismissal was unfair and unlawful.

20. He argues that he did not abscond duty since he was inside his assigned duty station, carrying out routine patrols. It is his position that the Respondent misled this Court by stating that they did not know his whereabouts between 20<sup>th</sup> April 2012 to 2<sup>nd</sup> May 2012 as RW1, the Respondent's Human Resource Manager, had details of the employees, their assigned duties and their duty stations.

21. The Claimant further argues that even if he absconded duty, the Respondent did not follow the legal procedures laid out in law. He was not issued with a letter to show cause or a notice to attend a disciplinary hearing and neither was a letter written to the local labour officer notifying him that an employee had absconded work.

22. He relies on the case of ***Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals Workers vs. Mombasa Sports Club [2014] eKLR*** where the Court was of the opinion that termination of employment was unfair where it offended the provisions of **Section 45 of the Act**. He further relied on the case of ***Donald Odeke vs. Fidelity Security Limited [2012] eKLR*** where the Court was of the opinion that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them. It does not matter what offence the employee is charged with, if the employee was not heard, the termination is ipso facto unfair.

23. The Claimant submits that since notice was not issued and payment in lieu of notice not paid, he is entitled to payment in lieu of notice

pursuant to Section 36 of the Employment Act, 2007. He also submits that he is entitled to payment of leave for the leave days not taken during his period of service pursuant to Section 28 of the Act. He argues that he is entitled to payment of 12 months gross salary compensation as provided under Section 49 of the Employment Act.

24. The Respondent in its submissions dated 19<sup>th</sup> February 2019, submits that Section 44 (4) of the Employment Act permits an employer to summarily dismiss an employee if the employee absents himself from his appointed place of performance of work.

25. The Respondent argues that the Claimant's testimony that he left his duty station to patrol was not pleaded in the pleadings or his witness statement and neither did he adduce evidence to prove that he was at his station when the client called the Respondent to report his absence. It is the Respondent's position that the Claimant's evidence that he was transferred to Kenya Power Training School is untrue since he did not have a batch card from the school. The Respondent relies on the case of ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR*** where the Court held that parties are bound by their pleadings and are not allowed to depart from them.

26. To buttress their assertion that the Claimant was absent from work, the Respondent relies on the case of ***Banking Insurance & Finance Union (Kenya) vs. Barclays Bank of Kenya Limited [2014] eKLR*** where the Court stated that:-

***“What is wrong is not bringing the same to the attention of the employer and further being away from work without consideration or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer.”***

27. It is submitted that this formed the basis for terminating the Claimant's services for gross misconduct.

28. The Respondent submits that the Claimant's employment was fairly and lawfully terminated. All the necessary steps required to be followed as under Section 44 (1) of the Act were followed. Further, Section 44 (3) of the Act reiterates the Respondent's position for summarily dismissing the Claimant.

29. I have considered all the evidence and submissions of the parties. From the evidence of the parties, the Respondent aver that they dismissed the Claimant from duty for absconding duty on 20<sup>th</sup> April 2012 at 1005 hours.

30. The Claimant denied ever absconding duty and he indicated that he was on duty on the said date.

31. Despite this assertion, the Respondent failed to subject Claimant to any disciplinary hearing to prove the allegations of absconding duties.

32. The Respondent had averred that they got information from a client that the Claimant was not at his duty station. The said client who gave this information was not called as a witness.

33. Section 41 of Employment Act 2007 states as follows:-

***“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.***

34. Section 45(2) of Employment Act 2007 also state as follows:-

***(2) “A termination of employment by an employer is unfair if the employer fails to prove:***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure”.***

35. From the evidence adduced, I do not find the Respondent have proved they had valid reasons to dismiss the Claimant and neither did they subject him to due process. In the circumstances, it is my finding that the dismissal of the Claimant was unfair and unjustified and I declare it so.

36. In terms of remedies, I find for Claimant and I award him as follows:-

*1. 1 month salary in lieu of notice = 11,130/=*

*2. Leave for 2012 = 11,130/=*

*3. 8 months' salary as compensation for unlawful dismissal = 8 x 11,130= 89,040/=*

**TOTAL = 111,300/=**

*4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in open Court this 30<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Bucheberi for Respondent – Present

Claimant – Absent