



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NUMBER 88 OF 2016**

**PETER LUKUKHWA AKHURA.....CLAIMANT**

**VERSUS**

**MARS SECURITY GUARDS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that he was employed by the respondent as a night guard. On 6<sup>th</sup> June, 2004 and worked until 22<sup>nd</sup> October, 2015 when he alleged the respondent wrongfully dismissed him. His salary was Kshs 14,000/= per month at the time of the alleged wrongful dismissal.

2. According to him on 11<sup>th</sup> September, 2015 at around 10:00 p.m. when he and other 3 guards were designated by the respondent to guard a site occupied by Mandiri Construction Limited within Industrial Area Nairobi two of the guards left their designated area and went to steal goods at the neighbouring premises occupied by Golden Flour Mills. One of the guards managed to escape while another was arrested by the security personnel of Golden Flour Mills but later escaped from custody while awaiting the arrival of police from Industrial Area Police Station.

3. When the police arrived they decided to arrest any of the respondent's guards on site including the claimant and his colleague and were subsequently detained at Industrial Area Police from 10:30 pm on Friday 11<sup>th</sup> September, 2015 upto 4:00 pm Saturday, 12<sup>th</sup> September, 2015.

4. According to the claimant he was later on subjected to public odium and untold humiliation as a result of the respondent's public utterances in presence of other staff accusing him of criminal theft of goods from the property he was designated to guard. According to the claimant, despite the fact that he was cleared of any wrong-doing by personnel of Golden Flour Mills and Kenya Police, the respondent proceeded to suspend and eventually dismissed him from employment. The claimant further complained that he was never given a fair hearing nor was due process followed by availing the right to be heard by an impartial and independent arbiter before terminating his services as required by law.

5. The claimant further averred during the period he worked he was only allowed two days of leave per month and that the respondent neither paid him leave allowance nor overtime. According to the claimant the actions of the respondent in not paying him his leave allowance, termination of his service without notice among others violated his constitutional rights.

6. The respondent on its part pleaded among others that it employed the claimant on short term renewable contracts at the end of each contract the claimant would re-apply for a new contract. According to the respondent, at the end of each contract, the claimant would be paid his terminal dues and apply for a new contract. The respondent denied to knowledge of the theft alleged by the claimant.

7. According to the respondent the claimant was terminated on account of deteriorating performance and that he was given a fair hearing before dismissal. The respondent further denied that the claimant worked beyond the maximum statutory limits of work and further that all pending leave days and off days were paid. The respondent further averred that it called upon the claimant to collect his final dues but he refused prompting the respondent to remit the same to District Labour Office.

8. In his oral evidence, the claimant reiterated the averments in the memorandum of claim and further stated that he sued the respondent because when he was dismissed he was not paid his terminal dues. According to him he was never issued with termination notice and that there was no disciplinary hearing. He further stated that he used to work from 6.00 p.m. which were 12 hours but was never paid overtime. It was his evidence that in 2004 and 2005 he went on leave but did not go on leave in 2006.

9. In cross-examination he admitted that he had a termination letter which showed he was employed in 2006 February. He denied there was any disciplinary hearing but was called by the Managing Director and told his services were terminated and that he was issued with a

month's notice. He further stated that he was called upon to show cause during the suspension but he never responded to the show cause letter. The claimant also stated that his contracts were for three months but renewable. He also admitted that it was the respondent's policy that they reapply for their jobs. He denied any theft at any of the sites he was assigned to work.

10. The respondent's witness Mr Danson Msami stated that he was working for the respondent as a clerk. According to him the claimant's terminal dues were kshs 34,566/= which he refused to collect hence were remitted to Ministry of Labour.

11. In cross-examination he stated that muster roll was signed by the employee and that page 17 was signed by the claimant when receiving his salary. Mr Msani further stated that overtime was constantly paid at maximum. The respondent's second witness Mr Faustin Baraza informed the court that he was the respondent's Assistant Operations Manager. Although he stated that he had no inventory in court but when they visited the client's site they found building material missing.

12. Three guards were involved in the theft and the claimant was one of them. The incident was reported to the police and the claimant arrested but he was released two days later and resumed work. He was issued with a show cause letter and responded. According to Mr Baraza the claimant was issued with warning letter and asked to be more careful. Mr Baraza however further stated that he received information on another theft and the same was reported to the police and claimant arrested. Upon release, he was suspended. It was his evidence that the claimant was given reason for termination and invited to a disciplinary hearing where the trade union representative was called. He however did not have the minutes of the meeting in court.

13. It is common ground that the claimant herein was employed by the respondent as a guard. It is further admitted by both parties that the claimant herein was employed on fixed term contracts ranging from 3 months to 6 months but renewable at the option of the parties. It is not in dispute that the contracts were so renewed until September, 2018 when the claimant was suspended as a result of a theft incident which occurred at a customer site where the claimant was assigned to guard. He was arrested on suspicion of being involved but was released without any charges however the respondent issued him with a show cause letter and later gave him one months' notice of termination of employment.

14. According to the claimant in his own admission he never responded to the show cause letter. The respondent subsequently issued the claimant with a termination letter which the claimant initially denied ever being issued with but later admitted in cross-examination that he was issued with one. It is curious to note that despite the denial the termination letter was part of his documents attached to the memorandum of claim.

15. Termination of employment is normal and a consequential end to a contract of employment whatever the cause for it. The respondent herein terminated the claimant's contract for the reason that the claimant had recently failed to deliver in his work. According to the notice of termination dated 23<sup>rd</sup> September, 2015 there were too many complaints concerning the claimant's work.

16. The claimant as admitted had earlier been given a show cause letter over these complaints but failed to respond to them. He cannot therefore be heard to say the termination of his service was unprocedural and that he was not aware of the reasons for termination. A hearing before a decision is taken to dismiss does not have to be oral and formal. Being called upon through a show cause letter can in circumstances such as this one suffice to.

17. The claimant struck the court as an untruthful person since he even denied knowledge of document he himself produced in support of his claim. He denied he was employed on periodic contracts only to admit in cross-examination. This is a court of justice and a party coming before it to seek justice must be truthful.

18. In the circumstances the court reaches the conclusion that the claimant's service was procedurally terminated and for valid reasons. The claim is hereby found without merit and is hereby dismissed with no order as to costs. The claimant has the liberty to collect his terminal dues deposited with the Ministry of Labour if not done already.

19. It is so ordered.

Dated at Nairobi this 24<sup>th</sup> day of May, 2019

**Abuodha J. N.**

**Judge**

Delivered this 24<sup>th</sup> day of May, 2019

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.