



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 962 OF 2014

THOMAS MUTHOKA WAMBUA.....CLAIMANT

v

COLLINDALE SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. Thomas Muthoka Wambua (Claimant) sued Collindale Security Ltd (Respondent) on 10 June 2014 alleging unfair termination of employment and breach of contract (an *Amended Statement of Claim* was filed on 24 July 2014).
2. The Respondent filed its *Statement of Defence* to the *Amended Statement of Claim* on 2 November 2018 (it was admitted on 6 November 2018), and the Cause was heard 11 March 2019.
3. The Claimant testified and closed his case, and an attempt by the Respondent to secure an adjournment was declined by the Court because the Respondent had failed to notify its witness to attend Court, without tendering any explanation for the failure.
4. The Claimant filed his submissions on 27 May 2019 (should have been filed by 10 April 2019) while the Respondent filed its submissions on 4 June 2019.
5. The Court has given due consideration to the pleadings, evidence and submissions and identified the Issues for determination as examined hereunder.

Unfair termination of employment

Procedural fairness

6. Section 35(1)(c) of the Employment Act, 2007 provides for *written notice of termination of employment* of at least 28 days where the employee is paid by the month while section 41 of the Act contemplates a hearing (informing the employee of the reasons for the contemplated termination of employment and affording him an opportunity to be heard).
7. The Claimant was employed by the Respondent as a security guard in 2003 and served until 14 August 2014.
8. On the circumstances leading to the termination of employment, the Claimant testified that there was a robbery at the premises he was guarding on the night of 23 July 2013 as a result of which he was arrested by the Police.
9. Upon the arrest, the Claimant was arraigned in Court, charged with robbery with violence and although released on bond, was remanded until 20 August 2013 as he could not immediately raise the bond.
10. According to the Claimant, on release, he reported to the Respondent's offices and was issued with a letter informing him of the termination of his employment on account of *desertion*.
11. The Claimant asserted that the Respondent knew he had been arrested and charged in Court because it had sent a reliever guard to the assignment he had been deployed to.
12. The Respondent did not rebut the Claimant's evidence that after his arrest, the Respondent sent another guard to take over the assignment.
13. Although under section 44(4)(f) of the Employment Act, 2007 the arrest and detention of the Claimant would have been a valid and fair

reason for summary dismissal, it was still incumbent upon the Respondent to ask the Claimant to show cause/make representations, in terms of section 41(1) & (2) of the Act.

14. It was not sufficient or reasonable for the Respondent to only inform the Claimant of the termination of his employment on account of *desertion*.

15. The mere fact that an employee is in lawful custody is no excuse for not complying with the peremptory requirements of procedural fairness (see *Lawrence Onyango Oduori v Kenya Commercial Bank Ltd* (2014) eKLR).

16. It was not because of the Claimant's intention that he was not able to attend work and therefore *desertion*, as known in law had not occurred (see *Skweyiya v Lingelihle Town Council* (1990) II ILJ 136 and *Laminate Profiles CC v Aubrey Mompei & Ors* (2007) ZALC 12).

17. This Court will endorse the legal principle set out in the aforesaid comparative cases as sound in law in our jurisdiction.

18. The Court therefore finds that the termination of the Claimant's employment was procedurally unfair.

Pay in lieu of notice

19. Since the Respondent did not give notice, the Court will allow the claim for 1 month pay in lieu of notice of Kshs 10,911/70.

Compensation

20. The Claimant served the Respondent for about 10 years and in consideration of the length of service, the Court is of the view that the equivalent of 10 months gross wages would be fair and appropriate (gross in terms of Legal Notice No. 197 of 2013 was Kshs 12,547/65).

Underpayments

21. The Claimant contended that he was paid below the prescribed minimum wage from 1 May 2011 to 14 August 2013 by Kshs 78,378/40.

22. The prescribed minimum wages (exclusive of house allowance) for night guards within Nairobi from 1 May 2011 to 30 April 2012 was Kshs 8,463/-; from 1 May 2012 to 30 April 2013 was Kshs 9,266/- and from 1 May 2013 it was Kshs 10,563/- (Claimant filed the respective Legal Notices).

23. Interestingly, while denying the underpayments, the Respondent filed employment records (term contracts) of the Claimant from 2003 to 2011 and from 1 November 2013 to 1 November 2014, but withheld contracts for the period 1 May 2011 to 14 August 2013, being the period in contention.

24. The records must have been adverse to the Respondent.

25. The Court can conclude that the Respondent was in breach of contract by paying the Claimant below the prescribed minimum wages.

26. The head of claim is allowed in the sum of Kshs 78,378/40.

Uniform refund

27. The Claimant testified that it was part of the contract and he was deducted Kshs 500/- for 9 months being security for uniform, and that the same was refundable upon separation.

28. The Respondent contended that the Claimant's terminal benefits included Kshs 4,500/- being uniform refund.

29. Because the Claimant declined to accept the benefits, the Court will find that the Claimant is entitled to the uniform refund.

Certificate of Service

30. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

31. The Court finds and declares that the termination of the Claimant's employment was unfair, and further that the Respondent was in breach of contract, and awards the Claimant

(i) Pay in lieu of notice Kshs 10,911/-

(ii) Compensation Kshs 125,470/-

(iii) Underpayments Kshs 78,378/40

(iv) Uniform refund Kshs 4,500/-

TOTAL Kshs 219,259/40

32. Respondent to issue Certificate of Service within 15 days.

33. Claimant is denied costs for failing to file/serve submissions within agreed timelines.

Delivered, dated and signed in Nairobi on this 14th day of June 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Mugure instructed by Onesmus Githinji & Co. Advocates

For Respondent Mr. Mwale instructed by Mwale & Co. Advocates

Court Assistant Lindsey