



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1179 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> September 2019)

DANIEL MOKUA .....CLAIMANT

VERSUS

EVEREADY SECURITY GUARDS COMPANY LIMITED.....RESPONDENT

**JUDGMENT**

1. The Claimant filed a Memorandum of Claim on 7<sup>th</sup> July 2015 alleging that he was wrongfully dismissed by the Respondent and that the Respondent had declined to pay him his terminal dues and damages. He avers that on 21<sup>st</sup> December 2014 he was accused of sleeping while on duty and was thereafter coerced into signing a warning letter on 22.12.2014 and eventually dismissed. He seeks the following reliefs:

***1. A declaration that the dismissal of the Claimant from employment was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.***

***2. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs. 269,996/=.***

***3. Cost of this suit plus interest thereon.***

2. The Respondent filed its Memorandum of Response on 3<sup>rd</sup> September 2015. It denies having dismissed the Claimant and avers that he was employed until 23/12/2014 when he deserted work. It further denies owing the Claimant any terminal dues and prays that the Claim be dismissed with costs.

3. During the hearing, the Claimant testified on his own behalf while the Respondent's Operations Manager testified on behalf of the Respondent. Thereafter, each party filed its respective submissions.

**Claimant's case**

4. The Claimant, CW1, relied on his witness Statement filed on 2/7/2018 in his evidence in chief. He testified that the warning letter dated 22.12.2014 was served upon him but he declined to sign it because the allegations were not true. He averred that he was forced to sign it as he risked being sacked and that on the same day he signed the warning letter, he was dismissed from employment.

5. He testified that the letter dated 22.12.2014 was written to him after being issued with many warnings therefore the warnings were not authentic. He denied having absconded duty on 22.12.2014 and averred that he could not have left without his salary.

6. He averred that he was not served with any letter to show cause why he had absconded duty. He averred that he was not paid his December 2014 salary and was not issued with any notice. He averred that he seeks uniform refund and overtime, which he was never paid.

7. In cross-examination, he testified that he was given instructions at the time of employment and one was not expected to sleep while on duty. He however denied having been sleeping on duty. He testified that at the time of dismissal he never returned or signed a list of the items issued to him. He further denied being improperly dressed on 22.12.2014.

**Respondent's case**

8. Benson Wekesa Musonga, RW1, testified that the Claimant absconded duty on 22.12.2014. It was his testimony that the Respondent trains its employees on the rules and regulations which the Claimant understood. He testified that the Claimant was issued with a uniform, which he signed for.

9. He averred that on 29.9.2013 the Claimant was issued with a warning letter, which he signed stating that he slept while on duty and after this mistake was brought to his attention on 22.12.2014, he left the office and never returned. He averred that the Claimant did not also return the uniform issued to him.

10. In cross-examination, he testified that he did not write any letter to the Claimant after he absconded duty on 22.12.2014. He testified they never responded to the Claimant's letter dated 22.12.2014 as they expected him to report to work on 23.12.2014.

#### Claimant's submissions

11. In his written submissions, the Claimant relied on Section 41 of the Employment Act and averred that he was neither given any reasons for his dismissal nor was he invited to a disciplinary hearing. He submitted that the Respondent never tendered any evidence indicating that due process was followed prior to his dismissal and in order to evade liability the Respondent alleges that the Claimant deserted duty.

12. He submitted that the fairness test in this case was never achieved as there was no substantive justification for the Respondent to terminate the Claimant's employment. In support of this, the Claimant relied on Sections 43 and 45 of the Employment Act and the decision in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.

13. He submitted that no notice was issued to him thus his claim is justified under Section 36 of the Employment Act. In respect of unpaid salary he submitted that he is entitled to payment commensurate to the work done and that he was never paid his December 2014 salary.

14. He submitted that he was deducted Kshs. 100 per month for the uniform issued to him, therefore he is entitled to Kshs.1,700. On unpaid overtime, he averred that he reported to work from 6.00pm to 6.00 am which amounts to 4 extra hours thus he is entitled to overtime at the rate of 1.5. He relied on Section 49 of the Employment Act and urged the Court to award him 12 months' salary as compensation.

#### Respondent's submissions

15. The Respondent submitted that the Claimant deserted his duty and that the desertion was preceded by several warnings that had been issued to the Claimant due to his misconduct while discharging his duties. In support of the allegation of desertion, it relied on the finding in Ezra Nyamweya Motari v Kanini Haraka Enterprises Ltd [2016] eKLR and further submitted that the intention not to return to work depends on the facts as presented in evidence.

16. It relied on Section 47 (5) of the Employment Act and submitted that the Claimant has not proved a case of unfair termination and that an act of gross misconduct warrants summary dismissal under Section 44 (4) of the Employment Act. In conclusion, it submitted that the Claimant is not entitled to the remedies sought as he absented himself from work.

17. I have examined all the evidence and submissions of the Parties before me. The Claimant has averred that he was terminated on 22.12.2014. The Respondent on the other hand aver that the Claimant absconded duty. They aver that they issued him with a warning letter dated 29/4/2014 and in reply the Claimant responded apologising over the warnings issued against him.

18. It is however not explainable why a warning issued on 29.4.2013 would be responded to on 22/12/2014. Whereas the Respondent aver that the Claimant absconded duty there is also no letter of warning or notice to show cause why he should not be dismissed on account of absconding duty.

19. On 27.3.2015, the Claimant through his counsel wrote a demand notice to the Respondent for wrongfully dismissing the Claimant and making a demand for payment of Claimant's December salary and his terminal dues. There is no evidence that the Respondent responded even to indicate that the Claimant had absconded duty. If indeed Claimant had absconded duty, it would have been easy for the Respondent to reply and indicate so.

20. In absence of any contrary evidence that the Claimant absconded duty, there being no notice to show cause as to why he should not be dismissed for absconding duty, I find that position by the Respondent not true. I find that the Claimant was dismissed without valid reason and without due process as explained by the Claimant, which leads to the finding that the Claimant was dismissed unfairly and unlawfully as envisaged under Section 45(2) of Employment Act 2007.

21. Having found as above, I find for Claimant and I award him as follows:-

**1. 1 month's salary in lieu of notice = 10,900/=**

**2. Salary for December 2014 upto to 22<sup>nd</sup> December 2014 =  $22/30 \times 10,900 = 7,993/=$  less 1,000 advance = 6,993/=**

**3. 10 months' salary as compensation for unlawful termination =  $10 \times 10,900 = 109,000/=$**

**TOTAL = 126,893/=**

**4. Claim for overtime not proved and is therefore dismissed.**

*5. The Respondent will 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 23<sup>rd</sup> day of September, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mukeli for Claimant – Present

Respondent – Absent