



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 756 OF 2016

MAIKO OSCAR MICHAEL.....CLAIMANT

VS

G4S SECURITY SERVICES KENYA.....RESPONDENT

JUDGMENT

Introduction

1. Maiko Oscar Michael, the Claimant in this case was employed by the Respondent as a Security Guard. He brought this claim following the termination of his employment on 23rd October 2013.
2. The Claimant’s claim is documented by a Memorandum of Claim dated 6th October 2016 and filed in court on 7th October 2016. The Respondent filed a Response on 22nd May 2017.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Operations Manager, Dorcas Masika.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent on 4th June 2010 at a monthly salary of Kshs. 16,500. He adds that he worked extra hours without compensation and that he never went on leave.
5. On 9th October 2013, a robbery occurred at the offices which the Claimant was assigned to guard. The robbers stole four cylinders of LPG gas worth Kshs. 16,380. The Claimant and his colleague were arrested and charged with the offence of stealing, with the alternative count of neglect to prevent a felony. They were subsequently acquitted on both counts.
6. After the incident of 9th October 2013, the Claimant was suspended on 12th October 2013 with instructions to return on 23rd October 2013, for a disciplinary hearing. The Claimant states that no hearing took place and that instead, he was served with a dismissal letter.
7. The Claimant terms his dismissal wrongful and unfair and now claims the following:

- a) 3 months’ pay in lieu of notice.....Kshs. 49,500
- b) Unpaid leave days for 3 years.....49,500
- c) Overtime (average of 2 hours per day) for 3 years.....410,625
- d) 12 months’ salary in compensation.....198,000
- e) Certificate of service
- f) Costs plus interest

The Respondent’s Case

8. In its Response dated 22nd May 2017 and filed in court on the same date, the Respondent admits having employed the Claimant as Security Guard at a monthly salary of Kshs. 16,500.

9. On the morning of 10th October 2013, the Respondent received a report at its Control Room, of theft at one of its client's premises in Ganjoni, British Oxygen Gases (BOC Gases). The said premises were being guarded by the Claimant and his colleague, Alfred Amunga.

10. The Respondent's Operations Manager visited the premises and found some gas cylinders missing. The Operations Manager went through the records with the client's Branch Manager and established that:

a) On the evening of 9th October 2013, when the day guards handed over to the Claimant and Alfred Amunga, there were 13 full and 5 empty 6kgs gas cylinders that were left at the premises;

b) On the morning of 10th October 2013, there were only 9 full and 5 empty gas cylinders;

c) The missing gas cylinders were valued at Kshs. 16,000.

11. The theft was reported at the Central Police Station in Mombasa upon which the Claimant and Alfred Amunga were arrested and charged with the offence of stealing contrary to Section 268(2)(1) as read with Section 275 of the Penal Code, with the alternative charge of neglect to prevent a felony, contrary to Section 392 of the Penal Code.

12. Upon being released on bond, the Claimant and Alfred Amunga reported to work on 12th October 2013. They were suspended pending investigations and asked to attend a disciplinary hearing on 23rd October 2013.

13. After the disciplinary hearing, a decision was made to dismiss the Claimant and his colleague on account of negligence of duty. The Respondent maintains that the dismissal was lawful and fair.

14. The Respondent denies that the Claimant worked overtime without compensation.

Findings and Determination

15. There are two (2) issues for determination in this case:

a) Whether the Claimant's dismissal was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

16. The Respondent filed an unsigned letter dated 23rd October 2013 addressed to the Claimant as follows:

"Dear Maiko

RE: SUMMARY DISMISSAL

We make reference to the disciplinary hearing held at Mombasa offices on 22nd October 2103. It was established that while assigned duties at British Oxygen Company Kenya Limited as a Security Officer you fundamentally breached your obligations arising under your contract of service whereby:-

On the night of 9th and 10th October 2013, you carelessly and improperly performed your duties consequently failing to prevent a felony where four-six kilograms LPG gas cylinders belonging to British Oxygen Company Kenya Limited were stolen.

Your above actions amounts (sic) to gross negligence of duty thus justifying a summary dismissal. This letter therefore serves to advise that you have been dismissed from service with G4S Kenya Ltd as per Section 44(4)(c) of the Employment Act with effect from the date of this letter.

Your terminal dues will be computed as follows:-

a) Days worked up to 23rd October 2013

b) Leave days earned but not taken up to 23rd October 2013

c) Any overtime and allowances earned and not paid

The above dues shall be net to (sic) statutory deductions and any loans owed to the company.

Please hand in all company property in your possession to your immediate manager and obtain a stores clearance form so that your final dues may be processed.

For G4S Kenya Limited

Yours Sincerely,

David Itubia

Regional HR Officer-Coast

17. Although this letter is unsigned, its contents were reproduced by the parties in pleadings and evidence as a true representation of the events leading to the Claimant's exit from the Respondent's employment. According to the evidence before the Court, the Claimant was accused of negligence of duty, leading to loss of property belonging to the Respondent's client, BOC Gases.

18. The question before the Court is whether this was a valid reason for termination of employment as contemplated by Section 43 of the Employment Act, 2007. It is now well settled that in answering this question, the Court does seek to replace the employer's decision with its own. Rather, the Court seeks to establish whether the action of the employer was reasonable and justifiable in the circumstances of the particular case.

19. This is what is known as the 'reasonable responses test' as restated by the Court of Appeal in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR**. This test is in sync with the related principle that the standard of proof in internal disciplinary matters is on a balance of probability and not beyond reasonable doubt as in criminal matters.

20. In this regard, the Court of Appeal in **Attorney General & another v Maina Githinji & another [2016] eKLR** affirmed that an employee acquitted of criminal charges may well be found culpable of internal administrative charges on the same set of facts.

21. It is not in dispute that goods belonging to the Respondent's client were lost under the Claimant's watch. There was neither a break-in nor a direct aggression. Apart from denying the allegations of negligence made against him by the Respondent, the Claimant did not bother to demonstrate to the Court efforts made by him to prevent the theft.

22. In light of the standard set by the 'reasonable responses test' it seems to me that the Respondent had a valid reason to dismiss the Claimant.

23. That said, the next question is whether in effecting the dismissal, the Respondent observed due procedure. The Claimant states that he was not afforded an opportunity to be heard as required under Section 41 of the Employment Act.

24. On its part, the Respondent was equivocal on this issue. The dismissal letter dated 23rd October 2013 makes reference to a disciplinary hearing held on 22nd October 2013, while the witness statement penned by Dorcas Masika on 5th October 2017 states that the Claimant and his colleague, Alfred Amunga attended a disciplinary hearing on 23rd October 2013.

25. While the difference in dates may not be overly material, there was no record to demonstrate that the charges facing the Claimant were formally placed before him prior to dismissal. It would appear therefore that the mandatory procedural fairness requirements of Section 41 of the Employment Act were not satisfied. For this reason, the Court finds and holds that the Claimant's dismissal was procedurally unfair and he is entitled to some compensation.

Remedies

26. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service plus his own conduct prior to the dismissal. I further award the Claimant one (1) month's salary in lieu of notice.

27. In response to the Claimant's claim for leave pay, the Respondent's Operations Manager, Dorcas Masika told the Court that the Claimant was not entitled to annual leave because he did not work continuously. Masika did not however produce any record to support her assertion regarding the nature and status of the Claimant's employment. I therefore allow the claim for leave pay.

28. The claim for overtime was not proved and is dismissed.

29. Ultimately, I enter judgment in favour of the Claimant as follows:

- a) 3 months' salary in compensation.....Kshs. 49,500
- b) 1 month's salary in lieu of notice.....16,500
- c) Leave pay for 3 years (16,500/30x21x3).....34,650
- d) Prorata leave for 4 months (16,500/30x1.75x4).....3,850

Total.....104,500

30. This amount will attract interest at court rates from the date of judgment until payment in full.

31. The Claimant is also entitled to a certificate of service plus costs of the case.

32. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2019

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JUDGE

Appearance:

Mr. Kitonga for the Claimant

Mr. Owiti for the Respondent