



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 1322 OF 2015

DABASO JATTANI BORU.....CLAIMANT

-VERSUS-

FRANKLYN OTWOMA.....1ST RESPONDENT

VISION PEOPLES IN MISSION LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit alleging that he was employed by the respondents as a Security Guard for a monthly salary of Kshs.5,500 per month from 3.3.2013 to 14.2.2015 when he was unfairly dismissed by the respondents. He therefore prayed for terminal dues plus compensation for the unfair dismissal totalling to Kshs.101,552 plus costs and interest.

2. The Respondents filed a joint defence on 26.8.2015 denying the alleged employment relation between them and the claimant and the alleged unfair termination thereof. They averred that they are engaged in charity work at Korogocho slums and all their workforce is engaged on voluntary basis. They further averred that they engaged the Claimant as a Volunteer Guard at an agreed monthly allowance and not under a contract of employment. She further averred that the Claimant turned out to be rude and unruly with the habit of late reporting and absenting himself from work. They further averred that on 14.2.2015, the Claimant reported of work at 7.20 a.m. and went back to his house nearby and reported back at 9.20 a.m. and when he was asked about that misconduct, he rudely stormed out of the premises stating that he would not report back again as a result of which the security of their property was comprised. They therefore denied owing the Claimant the reliefs sought and prayed from the suit to be dismissed with costs.

3. The main issue for determination arising from the pleadings is whether the Claimant was employed by the Respondent under a contract of service or on a volunteer basis.

Claimant's Case

4. The Claimant testified as Cw1 and basically adopted the written statement he filed on 3.4.2019. In brief, he stated that he was employed by the Respondents on 3.3.2013 as a Security Guard earning Kshs.5,500 per month. That he worked well until 14.2.2015 when the respondents summarily dismissed him without any justifiable cause and without giving him any hearing. He therefor contended that the sudden dismissal was unfair and prayed for one month salary in lieu of notice, salary for the 14 days worked in February 2015, 20 public holidays worked, accrued leave for 2 years, gratuity, NHIF deductions and compensation for unfair termination of this employment all totalling to Kshs.101,552.

5. In cross examination, he stated that on 14.2.2015, he reported to work at 7 a.m. and at 3.30 p.m., he was dismissed by the 1st Respondent because he had left his work place to go to the toilet. That while he was in the toilet, the 1st Respondent called him by phone and he told him that he was in the toilet. That when he came out of the toilet the 1st Respondent told him to go away. He denied that he was called for a hearing before a committee.

6. He contended that during his service, the respondents never served him with any warning letter. He however admitted that he wrote an apology letter dated 23.6.2013 for leaving his work station to go to his house, about 50 meters away. He further admitted that on 14.2.2015, he left without filling the gate pass. He also admitted that he was dismissed from employment at Starehe Boys Centre after he differed with his boss.

7. He contended that he was working every day including Sundays and public holidays. He further contended that the employer never remitted any NSF contributions for him.

8. In re-examination, he stated that he wrote the apology letter for leaving his work to go to a kiosk to buy medicine because he was sick.

Defence case

9. The 1st Respondent testified as Rw1 on behalf of the respondents. He relied on his written statement filed on 26.8.2015. He stated that the claimant was engaged as a volunteer Security Guard on 5.3.2013 and he was explained to that there was no contractual relationship between him and the respondents. He further stated that throughout his volunteer service, the claimant was dishonest, rude and very arrogant and had several lapses upon which several warnings were issued to him.

10. Rw1 further stated that on 14.2.2015, the Claimant reported to work at 7.20 a.m. and left without telling anyone as it was his habit. As a result, a disciplinary Committee was convened to hear the Claimant but he became abusive to everyone and went away for good. Rw1 denied that the claimant was dismissed and maintained that he deserted employment. Rw1 further denied that the Claimant was working during public holidays and contended that the respondent was not operating during public holidays. He further contended that there was a second Security Guard.

11. Rw1 further testified that the claimant refused to be registered for NSSF contributions contending that he was old. However, Rw1 contended that the Claimant was registered for NHIF and his contributions were deducted and remitted as indicated in the payslip produced as exhibits.

12. In cross examination Rw1 stated that no minutes were recorded for the disciplinary meeting on 14.2.2015 because the meeting was adjourned. He maintained that the Claimant was arrogant and harsh all the time. However, he produced no warning letters, which were issued to him for the alleged misconduct. He also admitted that the dismissal letter from Starehe Boys Centre was not signed. He maintained that the Claimant was not terminated but he quit employment.

13. He admitted that the Claimant was being paid a salary. He denied that the Claimant was sick on 26.6.2013 and that he was meant to write the apology letter for going to buy medicine. He maintained that the Respondents' premises were closed during Public Holidays.

14. In re-examination, Rw1 changed his testimony to say that the Claimant was only being paid allowance and no salary. He further stated that the claimant never applied for any sick leave on the day he wrote the apology letter. Finally, he states that the claimant worked from 5.3.2013 to 14.2.2015.

Claimant's Submissions

15. The claimant submitted that he was not engaged by the respondent as a mere volunteer but as an employee under a contract of service as envisaged in section 2 of the Employment Act. He contended that the payslips and bank statements he produced as exhibits was to prove that he was employed for a monthly salary by the respondents.

16. In addition, he submitted that the said employment was unfairly terminated by the respondent contrarily to Section 45(1) and (2) of the Employment Act because there was no valid and fair reason and a procedure was not followed. He relied on *Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013]eKLR*. That the alleged misconduct was not true and no warning was ever served on him before the separation. He further contended that he was not accorded any hearing before the dismissal as required under Section 41 of the Employment Act and submitted that the termination was procedurally unfair.

17. Finally, he submitted that he is entitled to the reliefs sought in the claim and relied on the provisions of the Employment Act for emphasis.

Respondents' submissions

18. The Respondent submitted that the Claimant was not engaged as an employee within the meaning of section 2 of the Employment Act and maintained that he was a volunteer Security Guard. In the respondents' view, the claimant was not employed for a salary or certain benefits that are due to an employee.

19. As regards unfair termination, the respondents submitted that they never dismissed the Claimant but rather absconded his work without notice or permission after hurling insults to the 2nd Respondent's Staff. They further submitted that because the Claimant was a volunteer, they had no mandate to take disciplinary action against him including dismissal.

20. Finally, the respondents submitted that the claimant is not entitled to the reliefs sought because there was never an employer – employee relationship between him and them. They therefore prayed for the suit to be dismissed with costs.

Analysis and determination

21. There is no dispute that the claimant was engaged as a Security Guard by the respondents from 5.3.2013 to 14.2.2015. The issues for determination are:-

(a) Whether or not the Claimant was engaged as an employee under a contract of service.

(b) If the answer to (a) is in the affirmative whether the claimants deserted the employment or he was unfairly dismissed by the Respondents.

(c) Whether the Claimant is entitled to the reliefs sought.

(a) Whether the employee was under a contract of service

22. Section 2 of the Employment Act defines employee, employer and contract of service as follow:-

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies”

23. The Claimant contended that he was employed by the respondents as an employee under a contract of service and produced payslips and a bank statement to prove that he was throughout his service, paid by the respondents a salary every month. However, the respondent contended that the claimant was just a volunteer Security Guard being paid an allowance and produced identification cards to prove that the Claimant was a volunteer and not an employee under section 2 of the Employment Act.

24. I have carefully considered the evidence and submissions by both sides. According to the job application letter dated 5.3.2013 produced by the defence, the claimant applied for employment as a Security Guard and not to offer volunteer services. No written contract of service was produced as evidence but there is sufficient material produced to help the court determine the relationship between the parties.

25. To begin with, the identification cards annually issued by the respondents to the claimant were clear that he was a Volunteer Worker serving as a Security Guard. The last card to be issued was for the period from 1.1.2015 to 31.10.2015. The respondents also produced unconfirmed handwritten minutes, which allegedly were for the meeting, which interviewed the claimant. The said minutes are however not authentic.

26. Even if they were authentic, the claimant is quoted to have stated that he was looking for vacancy in the position of Watchman. Thereafter the interview panel asked him questions about his work experience and details of his former employers and why he left their employment. There is nowhere in the minutes where the interview panel told him that they could not employ him but could only accept him as a volunteer. As regards to remuneration the panel asked him how much he was earning from the former employment and he answered that he was receiving Ksh.400 per day. The panel then asked him how much allowance he was willing to ask from the respondent and he responded Kshs.6,000 per month. Finally the panel offered Kshs.5,000 and the claimant accepted on condition that it will be reviewed after some months.

27. With the foregoing, a deal was struck and the claimant was asked to present his National Identification card and passport photos, which must have been used to open his personal file and issuance of the said staff card.

28. Despite the mention of an allowance of Kshs.5,000 during the interview and the subsequent issuance of staff card for volunteer work, the respondents went ahead to pay the Claimant a monthly salary and issued him with payslips every month. According to the payslips produced, the Claimant was earning a gross salary of Kshs.5,500 per month itemized as Kshs.4,500 basic pay and Kshs.1,000 House Allowance. The payslips further reflected a deduction of Kshs.160 for NHIF every month leaving a Net pay of Kshs.5,340 which figure was religiously paid through the Bank as shown in the bank statements produced by the Claimant.

29. Applying the evidence analysed above to section 2 of the Employment Act, it is clear that the parties herein related as employer and employee under a contract of service. The Claimant was an employee and he was drawing a salary for the services he rendered. Over and above the issue of salary, the work attendance register produced by the respondent as exhibits and admission by the Rw1 that on 14.2.2015 a disciplinary committee was convened to discuss the claimant, further confirms that the claimant was an employee. By controlling, the claimant's reporting and exiting time and the mandate to take disciplinary action against the claimant, confirms that the claimant was an employee of the respondents within the meaning of section 2 of the Employment Act.

(b) Whether the claimant was unfairly dismissed or he deserted his employment

30. Under Section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. Termination of employee's employment is unfair if it was not grounded on a valid and fair reason and fair procedure was not followed. Valid and fair reason is one, which relates to the employees conduct, capacity and compatibility or based on the employer's operational requirement. Fair procedure on the other hand involves, but is not limited to according the employee a fair hearing before dismissing him.

31. In this case, the Claimant contended that on 14.2.2015, he went to the toilet and while inside Rw1 called him by phone and he told him he had gone to the toilet. He further contended that upon returning from the toilet, Rw1 dismissed him from employment for no reason.

32. However, Rw1 contended that on the said day the claimant reported to work at 7.20 a.m. and thereafter went away without telling anyone that he had left. That, as a result, he called the claimant to a disciplinary committee but when he came, he became unruly and abused everyone before going away for good. Rw1 denied that he dismissed the claimant and maintained that the claimant deserted his employment.

33. The court finds that the claimant absented himself from the place appointed for him for the performance of his duty. The evidence by Rw1 that the Claimant reported to work and left without notifying anyone was corroborated by the Claimant when he stated on the said day, he left his place of assignment and went to the toilet and while there Rw1 called him by phone. The claimant did not tell the court where the toilet he went was situated and how long he had been there before Rw1 called him. It follows therefore that the evidence by Rw1 that the claimant went away from his work station is uncontroverted.

34. The court finds it illogical, the allegation by the claimant that he went to the toilet and when he came out the employer dismissed him. However, I am persuaded by defence evidence that the Claimant absented himself from his place of work and when he was called to a disciplinary hearing he become abusive to the committee and disappeared from his job for good. Consequently I return that the claimant has failed to discharge his burden of proving that he was unfairly dismissed from employment rather he deserted his employment.

Reliefs sought

35. In view of the foregoing finding that the claimant deserted his employment, I dismiss the claim for salary in lieu of notice and compensation for unfair termination. However, he is awarded salary for the 14 days worked in May 2015 equaling to Kshs.2,552. I further award him the claim for accrued leave for the period worked, that is two years equaling to 42 days.

$$42/26 \times \text{Kshs.}4,500 = \text{Kshs. } 7,269.23$$

36. The claim for 20 public holidays is dismissed for want of particulars and evidence.

37. Likewise the claim for gratuity is dismissed because no evidence was adduced to prove that the claimant was entitled to gratuity. Finally, the claim for NHIF is declined because the claimant did not adduce evidence to prove that his NHIF deductions were not remitted to the NHIF Agency.

Conclusion and disposition

38. I have found that the claimant was an employee and not a volunteer. I have further found that the claimant did not prove that his employment was unfairly terminated, but rather it is the he who deserted on 14.2.2015. I have however found that the claimant is entitled to some reliefs and now proceeds to enter judgment for him in the following terms:-

14 days salary..... Kshs.2,552.00

42 leave day..... Kshs.7,269.23

Total..... Kshs.9,821.23

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The award is subject to statutory deductions. The claimant will have costs and interest at court rates.

Dated, Signed and Delivered in Open Court at Nairobi this 11th day of October, 2019

ONESMUS N. MAKAU

JUDGE