



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1957 OF 2016

MARK MUGAVI OKANI.....CLAIMANT

VERSUS

EVEREADY SECURITY GUARDS.....RESPONDENT

JUDGMENT

1. This Cause was heard on 8 July 2019. Mark Mugavi Okani (Claimant) testified.
2. An attempt by Eveready Security Guards (Respondent) to secure an adjournment to call its witnesses was rejected by the Court (the Respondent had failed to comply with a Court order on 19 November 2018 to file and serve witness statements on or before 7 December 2018 without providing any sufficient explanation for the failure).
3. The Claimant filed his submissions on 13 August 2019 while the Respondent filed its submissions on 20 September 2019.
4. The Court has considered the pleadings, evidence and submissions on record and identified the Issues for determination as examined hereunder (although the Court directed the parties to file *Agreed Issues* on 19 November 2018, the directive was not complied with).

Unfair termination of employment

5. The Claimant was employed by the Respondent as a security guard on 27 July 2009.
6. On 26 September 2012, a warehouse the Claimant was guarding was broken into and some goods were stolen. The next day, the Claimant was arrested, charged and released on bond. The Claimant only secured his release on bond after 3 months (the criminal charges were withdrawn in July 2015).
7. In his testimony, the Claimant stated that upon release on bond, he reported to the Respondent with an intention to resume work, but was not allowed to resume work. He stated that instead he was requested by the Operations Manager called Benson to provide clearance from Court. He also stated that he was not formally informed of the termination of his employment.
8. The Respondent's defence as pleaded was that the Claimant's employment was not terminated but rather that the Claimant was in lawful custody beyond 14 days. According to the plea, that was a good ground for summary dismissal. The Respondent drew the attention of the Court to *Patrick Irubhai Mwakangalu v Hakika Transport Services Ltd* (2017) eKLR.
9. There was no evidence that the Respondent attempted to comply with the prescriptions of sections 35(1)(c) and 41 of the Employment Act, 2007.
10. Section 44(4)(f) of the Employment Act, 2007 is subject to and should be understood within the requirements of Section 41(2) of the Act.
11. The Respondent knew where the Claimant was and why. For reasons not disclosed, it did not take any formal decision either to inform the Claimant of the end of the contractual relationship due to frustration or impossibility of performance, or to notify the Claimant of the termination of the contract (see *George Akuti v G4S Security Services Kenya Ltd* (2013) eKLR, and *Lawrence Onyango Oduori v Kenya Commercial Bank Ltd* (2014) eKLR and *Banking, Insurance and Finance Union v Consolidated Bank of Kenya Ltd* (2014) eKLR).
12. The Claimant could therefore still consider himself as in a contractual relationship with the Respondent and he exhibited such belief by turning up for work upon release from custody.
13. The Respondent should, therefore, have complied with the requirements of section 41(2) of the Employment Act, 2007 upon the release of the Claimant. It did not.

14. The Court finds that there was unlawful termination of employment (Respondent did not equally satisfy the requirements of sections 43 and 45 of the Employment Act, 2007 as it did not lead any evidence).

Compensation

15. For the unfair termination of employment, the Court is of the view that the equivalent of 4 months' salary as compensation would be appropriate (the Claimant served the Respondent for about 3 years and his gross monthly salary on separation was Kshs 13,000/-).

Breach of contract

September 2012 salary

16. The Claimant sought Kshs 13,000/- being wages for September 2012.

17. An employee is entitled as of right to earned wages and the Respondent should release the wages to the Claimant.

Lost income

18. The Claimant sought Kshs 1,092,000/- as lost income.

19. Although identifying this as a special damage, the Claimant failed to prove how he arrived at the amount.

20. The Court finds that this head of claim was not proved.

Certificate of Service

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

22. The Claimant also sought damages of Kshs 100,000/- because the Respondent had failed to issue him with a certificate of service.

23. The basis for the damages was that he had failed to secure alternative employment.

24. The Court finds that the Claimant did not lay sufficient evidential basis for the award the damages in respect of the failure to issue a certificate of service.

Failure to issue a written contract

25. The Claimant testified that he was not issued with a contract of service, and for the failure, he sought damages amounting to Kshs 100,000/-.

26. Section 9(1) of the Employment Act, 2007 contemplates an employer issuing a written contract if certain conditions exist.

27. This Court has come across innumerable cases where employers have failed to issue written contracts when the statutory and contractual conditions are in existence.

28. However, this is the first case where a party has sought particular relief for the failure to issue a written contract.

29. The objectives and purposes of a written contract of employment cannot be underemphasised. Although the failure to issue a written contract does not void an employment contract, a written contract puts both parties to the contract on notice as to their respective obligations, duties and rights. It regulates the conduct of both parties in the workplace.

30. Failure to issue a written contract may also attract quasi-criminal sanctions of up to Kshs 100,000/-, in terms of section 16 of the Employment Act, 2007.

31. It is not in dispute that the Claimant served the Respondent for more than 3 months, and therefore should have been issued with a written contract setting out the particulars outlined in section 10(1) & (2) of the Act.

32. By failing to issue the Claimant with a written contract, the Respondent was engaging in an unfair labour practice, which warrants damages in order to deter such a prevalent practice in this country.

33. In the view of the Court, damages of Kshs 75,000/- would be appropriate.

Retained personal items

34. The Claimant asserted that the Respondent had unlawfully retained originals of his identity card and academic certificates.

35. The Respondent should release the documents to the Claimant if it has them.

Conclusion and Orders

36. The Court finds and declares that the services of the Claimant was unfairly terminated and that the Respondent was in breach of contract.

37. The Claimant is awarded

(i) Compensation	Kshs 52,000/-
(ii) September 2012 wages	Kshs 13,000/-
(iii) Damages for failure to issue contract	Kshs 75,000/-
TOTAL	Kshs 140,000/-

38. Respondent to issue certificate of service and release any documents of the Claimant in its possession within 15 days.

39. Parties did not file *Agreed Issues*. The Claimant filed submissions outside agreed timelines without offering any explanation. No order as to costs.

Delivered, dated and signed in Nairobi on this 8th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Mwangi instructed by Kogweno & Bubi Advocates LLP

For Respondent Mr Mutoro instructed by Muumbi & Co. Advocates

Court Assistant Lindsey