

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 247 OF 2017

LYDIA MUTHONI KAHOI.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her unfair termination from employment and withholding of terminal benefits. The Claimant averred that she was employed by the Respondent as a guard in March 2010 earning a salary of Kshs. 7,200/- a month until 15th August 2017 when she was illegally terminated via a phone call by the Respondent's manager. The Claimant avers that the Respondent did not prove any alleged misconduct nor was she served with a reasonable notice to show cause before she was verbally terminated with allegations that there was no work for her. As a result of the matters aforesaid the Claimant averred that the subsequent summary dismissal was unfair, unprocedural, illegal and/or unlawful. The Claimant was also not afforded an opportunity to be heard or defend herself. The Claimant thus prays for general damages for unlawful dismissal, outstanding dues as set out in the pension scheme rules, one month's salary in lieu of notice – Kshs. 7,200/-, unpaid leave for 2015 – Kshs. 7,200/- and costs of the suit.

2. The Respondent filed a memorandum of response as well as a counterclaim. The Respondent denied the allegations of dismissal and illegal termination made against it by the Claimant. The Respondent averred that its contract with the client, Kenyatta University, had ended and all the guards who had been working there were informed of the situation. The Respondent's manager informed the Claimant to report to their head office in Nairobi for purposes of redeployment but she failed to report for redeployment as advised. The Respondent averred that there were no allegations of misconduct against the Claimant and that it was ready to give the Claimant another assignment and a place to continue working but evidently, the Claimant was not willing to offer her services any longer as she failed to report to the head office for redeployment. The Respondent averred that she left work on her own volition and that her services were never terminated either verbally or otherwise as alleged. The Respondent averred that the Claimant is not entitled to pay in lieu of notice as she is the one who voluntarily left work without notifying the Respondent. The Respondent thus counter-claimed for Kshs. 7,200/- from the Claimant being one month's pay in lieu of notice. The Respondent averred that the Claimant took all her leave days before leaving employment hence she should not be entitled to seek payment for leave. The Respondent averred that the suit was frivolous and vexatious as the Claimant has no valid claim against it and the reliefs sought are not deserved. The Respondent prays that judgment be granted in favour of the Respondent as prayed in the counter-claim as against the Claimant for Kshs 7,200/-, costs of the suit and counter-claim.

3. The Claimant testified as did the Respondent's witness Raymond Nzioka. The Claimant adopted her statement in examination in chief and relied on her bundle of documents as evidence. The Claimant testified that she was dismissed by a manager one Mr. Mwangangi without being given a reason for dismissal. She stated that the manager just came to work and told her and three of her colleagues' that there was no work. She told the court that she did not abscond from duty and that she was no asked to go for redeployment. She testified that she did not go on leave in 2015.

4. The Respondent's witness Mr. Raymond Nzioka who works as a HR officer with the Respondent adopted his statement as evidence and testified that the hiring and firing of employees is done at the head office and the branch manager does not have powers to hire and fire. He stated that the Claimant does not merit for payment in of notice and she should instead be the one to pay the Respondent for not issuing it with notice for failing to report to work. He testified that the Claimant had accrued leave of 4 months and that she was entitled to be paid after she clears with the company. He stated in re-examination that it was not possible for them to issue a notice to show cause as the Claimant did not report work from 15th August and they did not know how to reach her. That marked the end of oral testimony and parties were to file written submissions.

5. The Claimant submitted that she was not accorded the legal safeguards under Section 41(2) of the Employment Act, being a show cause notice and fair hearing. She submitted that her termination was unprocedural and substantively unfair and unlawful. The Claimant submitted that the Respondent did not prove that she was informed to report to the Respondent's head office for redeployment as no such notice was exhibited. She submitted that similarly, the Respondent did not exhibit any evidence of complaint to the Claimant for leaving work without issuing a notice as alleged. The Claimant submitted that other than pleading that she did not report to the head office, no evidence was given that she failed to report to the head office nor evidence of her notification to appear at the head office. The Claimant submitted that the counter-claim being premised on the basis that she deserted work has therefore not been proved and should be dismissed with costs. The Claimant submitted that from the foregoing evidence, it is clear that her employment was terminated by the Respondent even though liability is denied. The Claimant submitted further that under Section 73 of the Employment Act the respondent is supposed to keep all employees records and such records of redeployment of the Claimant should have been produced in court. She submitted that in the absence of such records, she has proved that indeed she terminated from employment. The Claimant submitted that she is entitled to compensation for unfair termination and all the reliefs sought in her statement of claim.

6. The Respondent submitted that the Claimant did not call any witness to corroborate her assertion that she was verbally dismissed from work. Despite having testified that they were 3 when they were verbally dismissed she did not invite any of her colleagues to confirm that

indeed they were verbally dismissed. Evidence of the telephone call that was allegedly made to the Claimant was also not provided. The Respondent submitted that the Claimant's allegations of verbal dismissal are therefore unsubstantiated and unproved and remain mere allegations. The Respondent submitted that the Claimant did not also disprove the fact that she was asked to report for redeployment but she failed to. The Respondent submitted that he who alleges must prove and that it was the duty of the Claimant to prove her story and convince the court instead of leaving the court to guess who could be telling the truth between the two parties. The Respondent submitted that the Claimant failed to discharge her duty and has herself to blame. The Respondent submitted that there is no evidence at all to point to any dismissal and much less unlawful dismissal as the Claimant did not have any bad record that would have caused the Respondent to contemplate terminating her. The Respondent submitted that according to Section 47(5) the burden lies on an employee to prove unfair or wrongful termination and that this burden was not discharged by the Claimant and therefore the burden had not shifted to the Respondent to justify anything. The Respondent urged the court to therefore find that indeed there was no proof of any dismissal at all and a discussion for unfair termination cannot arise. The Respondent asserted that the Claimant did not ask for compensation but she sought for general damages. The Respondent submitted that the court in a number of instances has refused to award general damages in unfair termination disputes. The Respondent relied on the case of **Onesmus Irungu Kamau v Faulu Micro-finance Bank Ltd [2017] eKLR** where the Court held that "... *the prayer of general damages would not be allowable even had the claimant shown that his contract was unfairly terminated...*" and the Respondent submitted that the claim for general damages cannot succeed. The Respondent argued that the remedy under Section 49(1)(c) is only available where there was unfair termination. The Respondent submitted that the Claimant having left work and failed to turn up for redeployment without giving any explanation, she cannot expect to be granted the prayer of one month's salary in lieu of notice. It was submitted that even if the Respondent wanted to deal with the Claimant in any way, she was not available. The Respondent submitted that the prayer for salary in lieu of notice should therefore fail as it is unfounded and clearly unmerited. The Respondent submitted that the Claimant did not provide any evidence to show that she was denied leave hence this prayer should fail. The Respondent submitted that the Claimant did not provide for an iota of evidence to prove that she was dismissed and/or that the Respondent was at fault, as such she should not be entitled to any damages and the court should thus find in favour of the Respondent. The Respondent submitted that it had agreed to pay the Claimant accrued leave for the four months worked amounting to Kshs. 1,680/- and that the Claimant had agreed that she was not entitled to the full days of annual leave as prayed for as she had not earned it by the time she left employment. On the issue of costs, the Respondent submitted that the Claimant's suit was uncalled for as the Respondent did not do anything to warrant being sued. The Respondent submitted that further, the Claimant never notified the Respondent of her intentions to file a suit as she failed to prove to the court that the letter of demand was ever received by the Respondent. The Respondent submitted that the Claimant proceeded to file this suit without any justifiable cause and she ought to bear the costs of the suit and those of the counter-claim. The Respondent further submitted that the Claimant's desertion from work without communication shows that she was no longer interested in working for the Respondent and was not willing to have her station of assignment changed. But then she ought to have informed her employer. In any event, the desertion must have disrupted the Respondent's running of its business and probably necessitated an unplanned hiring process. The Respondent submitted that the Claimant failed to give it notice and she ought to pay one month salary of Kshs. 7200/- in lieu of that notice. The Respondent submitted that the Claimant disowned sections of her memorandum of claim and with that turn of events it is difficult to believe her story. The Respondent submitted that the Claimant had thus failed to prove her case against it and it urge the court to dismiss the Claimant's claim and find in favour of the Respondent.

7. Under Section 43 of the Employment Act, the Claimant has a burden to prove the dismissal was unfair and unlawful while the Respondent has the burden of proving there were reasons for termination. The Claimant was allegedly dismissed orally alongside 2 of her colleagues. She also asserts that she received a phone call from Mr. Mwangangi dismissing her. This forked dismissal is evidence there was lack of clarity in her suit. Was she dismissed orally in presence of her colleagues or was she called on phone and dismissed by Mr. Mwangangi? Having failed to prove the exact mode of her dismissal, it would be conjecture to attempt to analyse whether the dismissal was unprocedural or not. In regards to the counterclaim, the employer is required to be the keeper of records in terms of Section 74 of the Employment Act (not 73 as asserted by the Claimant). As such, if there was a redeployment that was in the offing, why did the employer not exhibit the same? In the court's considered opinion the Claimant is not liable to the Respondent for the alleged failure to give notice. As the Respondent has conceded it owes the Claimant some dues on account of leave the same are to be paid forthwith. As each party failed to prove their case the suit is dismissed as is the counterclaim. Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 27th day of November 2019

Nzioki wa Makau

JUDGE