



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 892 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JONES NDAMBUKI MUOKA.....CLAIMANT

VERSUS

SAT JOINERS LIMITED.....RESPONDENT

JUDGMENT

Vide an Amended Memorandum of Claim filed on 26th March 2018, the Claimant, a security guard, alleges that he was wrongfully summarily dismissed by the Respondent. He avers that there were no charges served upon him to respond to and that the Respondent did not convene a disciplinary hearing before his dismissal. He avers that the Respondent's General Manager, Mr. Davinder Mathan, informed him of his dismissal after he sought a salary increment in 2013 to the rates provided in the Minimum Wages Order. He avers that on 30th January 2014 he was asked to sign a document which provided that he could not claim any amount that had accrued over the years.

He therefore seeks the following reliefs:

- a) A declaration that the dismissal of the Claimant from his employment was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.
- b) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling Kshs.262,000 plus interest thereon from the date of filing the case until full payment.
- c) Costs of this Cause plus interest thereon.

The Respondent filed a Statement of Response dated 27th June 2014. It denied having summarily dismissed the Claimant and avers that the Claimant signed a document acknowledging receipt of the dues owed to him. It further avers that it had the right to determine the claimant's alleged employment in accordance with statutory requirements.

The claimant testified on his own behalf while the Jackson Makori, the Respondent's Manager testified on behalf of the Respondent.

Claimant's case

It is the claimant's case that he was employed by the Respondent on 12th February 2010 as a night guard at a salary of Kshs.10,000. He testified that in 2013 he was not awarded any salary increment. That on 31st January 2014 a director of the Respondent issued him with documents, which he was expected to sign as were all other employees, as proof of full and final payment. He averred that the document only reflected his salary.

He contended that he was neither charged with any gross misconduct nor invited to a disciplinary hearing. He further contended that he was not issued with any notice of termination. It was his testimony that he never went on leave and that he had never seen the leave schedule. He further testified that he was not a member of NSSF and that the Respondent neither housed him nor paid him house allowance.

In cross-examination, he testified that he was issued with a document to sign which he declined to sign thus he was asked to leave. He testified that he did not agree to the payment of Kshs.37,000 as full and final settlement of his terminal dues. He denied having received any money and averred that he was only paid his monthly salary of Kshs.10,000.

Respondent's Case

JACKSON MAKORI, RW1, testified that he did not know the Claimant but confirmed from the records held by the respondent that the Claimant was engaged as a security guard at a salary of Kshs.10,000. He testified that according to the leave register, the Claimant took leave. He testified that when the Claimant collected his terminal dues, he was accompanied by a labour officer, Mr. Joash, who confirmed with the Respondent that the terminal dues of the claimant was Kshs.37,000. He further testified that the Claimant signed the discharge voucher but he was not paid the full amount in January. He testified that the claimant was paid Kshs.16,000 on 4th February 2014 and Kshs.9,000 on 4th March 2014. According to him the Claimant is owed Kshs.8,800 being the outstanding amount of the agreed sum.

In cross-examination, he testified that the Claimant was terminated because there was reduction of work. He testified that the Claimant was accompanied by a labour officer on 4th February 2014.

Claimant's Submissions

The Claimant submitted that RW1 made reference to redundancy and confirmed that the Claimant had done nothing wrong to warrant his dismissal. He submitted that Section 40 of the Employment Act sets out the procedure for termination on account of redundancy and that the Respondent failed to comply with this procedure. It was his submission that as a result of the redundancy the claimant's dismissal was unprocedural and unfair.

He submitted that Section 45(2) of the Employment Act obligates an employer to prove the validity of the termination and that the Respondent failed to prove that the dismissal was due to shortage of work. He relied on the decisions in *Marty Mutanu Mwendwa -V- Ayuda Ninos De Africa- Kenya (Anidan K) [2013] eKLR*.

He argued that since notice was not given or paid the claim for notice is payable under section 40 of the Employment Act. He stated that the claim for housing is still owing as he was neither paid house allowance nor provided with housing under Section 31 of the Employment Act.

He argued that he is entitled to service pay as his NSSF statement shows that the Respondent never made any remittance of his contributions. He further argued that he is entitled to accumulated leave under section 28 of the Employment Act. He submitted that he is entitled to 12 months compensation under section 49 of the Employment Act and is also entitled to a certificate of service.

He urged the Court to allow the claim and award him costs of the suit and interests from the date of filing this suit.

Respondent's Submissions

The Respondent submitted that the Claimant's employment was terminated in accordance with the law, through a mutual agreement endorsed by both parties. It urged the Court to uphold the document evidencing that the parties entered into a mutual agreement. To buttress this position, it relied on the decision in *Gabriel Ngugi Ndumbu v Gaichanjiru Catholic Hospital [2013] eKLR*.

It submitted that as held in the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR* a discharge voucher per se cannot absolve an employer from statutory obligation and it cannot preclude this Court from enquiring into the issue of whether the discharge voucher was freely and willingly executed.

It admitted that the Claimant is entitled to one month salary in lieu of notice and submitted that the amount was catered for in the Kshs.37,000 stated in the discharge letter. It maintained that the Claimant went on leave thus the claim for unpaid leave days should fail.

It submitted that the claim for gratuity should fail as the claimant failed to state whether he is claiming gratuity based on an agreement he had with the Respondent or on statutory basis. It relied on the decision on *Dickson Mwendwa Munuve v Oceanfreight (EA) Limited [2013] eKLR* where the Court held that gratuity is either a contractual or statutory entitlement.

In respect of house allowance, it submitted that employees whose house allowance is consolidated with salary are not entitled to separate house allowance. It urged the Court to uphold the position in *Daniel Njuguna Muchiri v Sagar Bakery Limited [2013] eKLR*. It further submitted that throughout his employment the Claimant was earning a basic salary of Kshs.10,000 which was higher than the minimum wage for security guards as provided in the Regulation of Wages Order. It submitted that the claimant is not entitled to damages for unfair termination as his employment came to an end through a mutual agreement.

Analysis and Determination

The uncontested facts are that the Claimant was employed by the Respondent as a security guard for a salary Kshs.10,000.

The main issues for determination are:

- a) Whether the Claimant was wrongfully dismissed
- b) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was wrongfully dismissed

The Claimant avers that he was chased away by the Respondent's General Manager and informed that his employment had been terminated. RW1 testified that the Claimant was terminated due to the reduction of work. Further, the Respondent's submission is that the Claimant's employment was mutually terminated. It relied on the documents annexed to the Statement of Response dated 4th February 2014. However, this document is in respect to the payment of terminal dues and not on the mutual separation between the parties. I therefore find that there is no proof of mutual separation.

Under Section 45(2) of the Employment Act, an employer is required to prove that the reason for termination was valid. The Respondent herein gave 2 reasons for the termination of the employment being a mutual separation and a reduction of work which would result into a redundancy as defined under section 2 of the Employment Act. The respondent did not comply with redundancy procedure under the Act. I therefore find that there was no valid reason for termination.

Section 41 of Employment Act provides that before terminating or summarily dismissing an employee an

employer ought to explain to the employee the reason for termination and afford him a hearing. The Claimant testified that he was not invited to a disciplinary hearing. The Respondent on its part maintained that the separation was mutual and did not adduce any evidence that it conducted a disciplinary hearing in respect of the claimant. I therefore find that the Claimants dismissal was unprocedural.

Whether the Claimant is entitled to the reliefs sought

The Claimant avers that there was no agreement on the amount of Kshs.37,000 and further states that he was not paid as provided in the discharge voucher. It is the Respondent's case that the discharge voucher was willingly signed by the Claimant. The Claimant in paragraph 5 of his Amended Memorandum of Claim avers that he was informed to sign a document stating that he could not claim any accrued dues.

Section 3(6) of the Employment Act provides that any agreement to relinquish or vary the minimum terms and conditions of employment shall be null and void. The Section is reduced below –

3(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

The discharge voucher did not constitute a settlement. In any event, the respondent did not abide by the same.

According to the evidence on record, the respondent does not deny terminating the employment of the claimant without giving him reason thereof or an opportunity to defend himself. This amounts to unfair termination in terms of Section 45(2) of the Employment Act.

This being the case, I find that the claimant is entitled to one month's salary in lieu of notice and payment in lieu of annual leave as the respondent did not adduce any evidence to prove that the claimant took annual leave.

With respect to service pay the claimant attached a copy of the statement of NSSF which shows that the respondent only made payments for four months in 2013. He is thus entitled to service pay for the period he worked from February 2010 to January 31st 2014, a period of 4 years at 15 days' salary per year worked.

With respect to house allowance the claimant testified that he was paid Kshs.10,000 and no house allowance. This was not denied by RW1. Having been a night guard, his basic salary was Kshs.10,911.70. He was thus underpaid and his salary did not include house allowance. He is thus entitled to house allowance at 15% of statutory minimum was in the sum of Kshs.1,637/= for the 48 months he worked. This amounts to Kshs.78,576/=. .

The claimant is entitled compensation for unfair termination of employment. Taking into account the length of service, the circumstances under which he was employed, the underpayments of statutory benefits, the circumstances under which he was terminated and the package payable to him, I award him 4 months' gross salary as compensation.

I thus award the claimant the following –

- 1.-- Notice (basic + house allowance)----- Kshs.12,548.70
- 2.-- Service pay----- Kshs.25,097.00
- 3.-- House allowance----- Kshs.78,576.00
- 4.-- Leave for 4 years at 21 days per year (21 x 4) = 84 days

---- (basic salary/26 x 84 = 10,911.7/26 x 84)----- Kshs.35,253.18

5.--- Compensation at 4 months gross salary Kshs. 50,194.80

Total Kshs.201,670.00

The respondent shall also pay claimant's costs for the suit. Interest shall accrue from date of filing suit for items 1 to 4 and from date of judgment for item. This is because the benefits under item 1 to 4 were payable on the date of termination.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE