



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 245 OF 2017**

**MICHAEL MWANGI WAMWEA.....CLAIMANT**

**VERSUS**

**BRINKS SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent seeking recompense for the alleged unfair and unlawful termination of employment. The Claimant averred that he was employed by the Respondent as a guard on 31<sup>st</sup> March 2012 earning a salary of Kshs. 10,100/-. He averred that he worked for the Respondent until 31<sup>st</sup> March 2017 when he was illegally terminated by the Respondent's manager one Mr. Mwangangi. The Claimant averred that the Respondent did not prove any alleged misconduct nor was he served with a reasonable notice to show cause before he was verbally terminated with allegations that there was no work for him. The Claimant averred that the subsequent summary dismissal was unfair, unprocedural, illegal and/or unlawful and he thus prays for general damages for unlawful dismissal, his outstanding dues as set out in the pension scheme rules, salary arrears for the month of March 2017 – Kshs. 10,100/-, one month's salary in lieu of notice – Kshs. 10,100/-, unpaid leave for one year – Kshs. 10,100/-, unpaid leave for one year – Kshs. 10,100/- plus costs of the suit.

2. The Respondent filed a defence and counterclaim and averred that the Claimant started working on 1<sup>st</sup> April 2012. The Respondent denied the allegations of dismissal and illegal termination made against it by the Claimant and averred that its contract with the client Safaricom Ltd had ended and all employees who had been working there had to be informed of the situation. The Respondent averred its manager informed the Claimant to report to their head office in Nairobi for purposes of redeployment as he did not have a place to work in Nyeri but he failed to report for redeployment as advised. The Respondent averred that the Claimant did not engage in any misconduct and that the Respondent was ready to give the Claimant another assignment and a place to continue working but evidently he was not willing to offer his services any longer as he failed to report to the head office for redeployment. The Respondent averred that the Claimant left employment on his own volition and that his 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 he is the one who voluntarily left work without notifying the Respondent. The Respondent by way of counter-claim seeks for payment of one month's pay in lieu of notice being Kshs. 10,110/- from the Claimant. The Respondent averred that the Claimant took all his leave days before leaving employment hence he should not be entitled to seek payment for leave. The Respondent termed the Claimant's cause as frivolous and vexatious as the Claimant has no valid claim against the Respondent and the reliefs sought are not deserved. The Respondent prayed that judgment be granted in favour of the Respondent as prayed in the counter-claim as against the Claimant for Kshs 10,110/-, costs of the suit and on the counter-claim.

3. The Claimant testified but the Respondent's case was closed for non-attendance despite being served with a hearing notice. The Claimant testified that he was dismissed by a manager one Mr. Mwangangi without being given a reason for dismissal. He adopted his statement in examination in chief and relied on his bundle of documents as evidence.

4. The Claimant submitted that he was not accorded the legal safeguards under Section 41(2) of the Employment Act, being a show cause notice and fair hearing. He termed the termination as unprocedural and substantively unfair and unlawful. The Claimant submitted that the line of defence by the Respondent suggests that the Claimant failed, neglected and/or refused to report to the Respondent's head office which would amount to absconding duty. However, no show cause notice was issued to the Claimant to explain why he failed to report to the head office as directed if at all he had failed to report to the head office. The Claimant submitted that to boot, the Respondent had failed to lead evidence that the Claimant was directed to report to the Respondent's head office for redeployment. The Claimant submitted that the Respondent's allegations are mere contentions not backed by evidence. The Claimant submitted that he had proved his case on a balance of probabilities. The Claimant submitted that he had worked for the respondent for 5 years and that under Section 49(4)(e) of the Employment Act, the period that an employee has worked at termination is a factor to be considered by the court in awarding compensation. The Claimant submitted that since he did not contribute to his termination he is entitled to compensation equivalent to 12 months' pay at Kshs. 121, 200/-. He submitted that he is entitled to one month's pay in lieu of notice, salary arrears for March 2017 and one month's salary in lieu of leave for the year 2013 as pleaded.

5. The Respondent filed submissions and placed reliance on Section 109 of the Evidence Act and submitted that the burden of proof to show that the Claimant was verbally terminated lies with him. It submitted that it is one thing for the Claimant to state that he was verbally terminated and an entirely different thing proving it. The Respondent submitted further that the Claimant deserted duty and he is now asking this court to buck away from well settled law and declare that a deserter should be compensated. The Respondent submitted that proposition should not be entertained. The Respondent submitted that if the Claimant was genuine with his allegations, he would have reported to the head office and made a claim of unlawful dismissal in case he was not redeployed or paid. The Respondent submitted that whenever an employee deserts duty, the assumption is that he does not intend to continue working for the employer, whereas that is a ground for summary dismissal, that option could not be exercised as the Claimant was nowhere to be found. In any case the employee signed a contract of employment with the employer in which dismissal by verbal communication was not contemplated and that all he had to do was to insist that he be given a written communication as per the contract. The Respondent cited Section 47(5) of the Employment Act which provides that the burden of proving that unfair termination has occurred rests on the employee while the burden of justifying the grounds for terminations rests on the employer. The Respondent cited the case of **Kenya Breweries Limited v Kiambu General Transport Agency Limited [2000]**

**eKLR** and submitted that in this case the Claimant came to court without a single witness to validate his claim and insists that the court should believe his word against that of his employer as though he is a paragon of piety. The Respondent submitted that is a flawed reading of the law. The Respondent submitted that the act of desertion was tantamount to insubordination as enunciated in the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR**. It submitted that insubordination amounts to a valid and fair reason for termination of employment as was held in the case of **Linet Akasa Shikoli v Lilian Otundo [2014] eKLR**. The Respondent submitted that the Claimant left employment on his own volition but the Respondent still had the right to terminate the Claimant by virtue of insubordination. The respondent submitted that it acted reasonably in the circumstances by informing the Claimant to present himself before the head office for redeployment and as such the Claimant's claim should be dismissed. The respondent urged this court to be persuaded by the case of **Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR** which analysed the test of reasonableness of an action taken by an employer against an employee. The Respondent submitted that an employee is only entitled to payment in lieu of notice if dismissal was due to redundancy, however the Employment Act does not provide for payment in lieu of notice in case of desertion. The Respondent submitted that in any event the Claimant's desertion disrupted the Respondent's running of the business as it necessitated unplanned hiring which required money hence it is only fair that the Respondent be awarded Kshs. 10,110/- in lieu of notice from the Claimant. The Respondent submitted that the Claimant's claim for salary for the month of March is unfounded. He was actually paid his dues for the month and the Respondent provided payslips for the month of August 2012 and March 2017 to back that assertion. The Respondent submitted that the Claimant's claim for annual leave is not backed by facts as he had only worked for 3 months before deserting duty and that had he worked for a whole year he would have been entitled to the leave sought. The Respondent submitted that the Claimant did not provide any evidence to show that he 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 he was dismissed and/or that the Respondent was at fault and that as such he was not entitled to any damages. The Respondent urged the court to find in its favour.

6. The Claimant's claim was in regard to his dismissal. He had a burden under Section 43 to prove he was unfairly terminated in terms of Section 45. He was verbally dismissed as stated in his claim and as proved in his testimony before the Court. The defence of the Respondent was that he was not verbally terminated and that he was **verbally** notified of the end of the contract with Safaricom Limited and asked to report to head office for redeployment. I find it difficult to believe the Respondent who deliberately failed to adduce such evidence in court. Yes, the Claimant may not be a paragon of piety but he testified on oath and gave his side of the story. The Respondent failed to counter it and if indeed there was any redeployment, the Respondent being so pious as to pontificate about process should have delivered a written redeployment to the staff it was moving to other sites. In the counterclaim all they seek is a month's notice and if they were conscious of the decision in **Evans Kamadi Misango v Barclays Bank of Kenya Limited (supra)** they would have made the transfers in writing. From the evidence adduced the balance of probabilities is that termination occurred as stated by the Claimant. The Claimant however failed to prove he was entitled to leave as he had not worked for more than 3 months. The counterclaim was not proved and is dismissed with no order as to costs. I enter judgment for the Claimant as against the Respondent for:-

- i. One month's salary in lieu of notice – Kshs. 10,100/-
- ii. One month's salary as compensation for unlawful termination – Kshs. 10,100/-
- iii. Costs of the suit
- iv. Interest on the sums in i) and ii) above at court rates from date of judgment till payment in full
- v. Certificate of service

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**