



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 320 OF 2017**

**DANIEL KAMAU KAGAL.....CLAIMANT**

**VERSUS**

**TWO FOUR SEVEN GUARDS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent seeking recompense for the alleged unfair and unlawful dismissal. He averred that he was employed by the Respondent as a security guard on 22<sup>nd</sup> October 2015 and had his services terminated on 10<sup>th</sup> August 2017. The Claimant averred that he earned Kshs. 12,000/- at the time of employment and was dismissed while working as a supervisor. He averred that the Respondent's manager Mr. Maina illegally terminated his services and that prior to the dismissal there was no proof of alleged misconduct nor was he served with a reasonable notice to show cause prior to termination. He averred that the summary dismissal was unfair and unprocedural, illegal and unlawful. He averred that the Respondent was liable for unpaid leave for two years, one month's salary in lieu of notice, public holidays totaling 18 days, overtime hours totaling 2,880 hours in 2 years. He thus sought general damages for unlawful dismissal, unpaid leave for 2 years – Kshs. 24,000/-, 1 month salary in lieu of notice – Kshs. 12,000/-, public holidays – Kshs. 7,200/-, overtime worked at the rate of 4 hours per day – Kshs. 144,000/-, costs of the suit plus interest at court rates.

2. The Respondent in its defence averred that the Claimant was its employee but it denied employing him as a supervisor on 22<sup>nd</sup> October 2015. It denied terminating the services of the Claimant as alleged and averred that the Claimant absconded from his employment on 8<sup>th</sup> August 2017 and never returned to work. The Respondent averred that the Claimant unilaterally terminated his services to the Respondent without notice. It denied owing the Claimant any money. The Respondent urged the dismissal of the suit.

3. The Claimant testified that he was an employee of the Respondent from 22<sup>nd</sup> October 2015 and was dismissed in August 2017. He stated that he was terminated because he did not go to work on election day. He stated that he was told to return the uniform and go home. He admitted that he did not go to work on 8<sup>th</sup> August 2017 on the day for elections. He testified that he had been given leave to go for the elections and return. He stated he could not return due to transport. He denied being away for 2 days. In cross-examination he stated that he did not go to the Labour Office. He testified that he did not have a statement from the date of hire. He said that he was hired by Mr. Mwangi the MD of the Respondent. He stated that he was dismissed by a manager Mr. Maina the MD's son. He testified that he never went on leave for 2 years and had 7 unpaid days. He took a salary advance at the bank. He stated that he had a supervisor's badge which he could fetch from home if required and that he would wear it on his chest. He testified that he used to work overtime for 4 hours and that he did not ask for production of the documents. He said that he was dismissed for going to vote. He stated that he was not given leave and was given off to go participate at elections and that he did not return again that day. He stated that he voted at Mucharage Primary School Chinga and that his work station was Karindudu Tank at Karatina. He stated he was a relieving guard and did not have a car. In re-exam he stated the Respondent paid Kshs. 11,340/- as well as NHIF and NSSF dues with the balance of the money deposited in his account.

4. The Respondent's witness was Mwangi Salverius Gatheru who was the finance officer of the Respondent. He stated that the Claimant like all day guards were told to go early and vote then come and relieve the night guards. He said that the Claimant told him he had rights and he left never to return. He testified that he had no authority to dismiss or hire employees. In cross-examination he testified that the Claimant said he was dismissed by Mr. Maina and he was not Mr. Maina. He stated that the Claimant reported on 7<sup>th</sup> August 2017 and did not report on 8<sup>th</sup> August. He stated that the Claimant did not resume work. He said that he tried to call the Claimant to come to work but he did not have the records. He stated there Claimant was paid his dues but he had not produced the evidence. In re examination he testified that employees had payslips and that it was not his duty to avail these. The Respondent was unable to call the second witness who had fallen ill and the parties were to file final submissions.

5. The Claimant submitted that he was not issued with a notice to show cause which the law guarantees under Article 47(1) and the Fair Administration Act as he was entitled to fair administrative action. He submitted that Section 41 of the Employment Act provided that prior to termination the Claimant is entitled to be informed the reasons for the termination and that he was not accorded due process before his termination. The Claimant submitted that in the circumstances the separation was not in accordance with the law and therefore unlawful and unfair. He submitted that he was entitled to the remedies sought in the suit as there was merit in his suit. No submissions were filed for the

Respondent.

6. The Claimant submitted that he was dismissed without notice. The Respondent asserts that the Claimant absconded after the general elections of 2017 and never reported to work. No document was availed by the Respondent to show the fact of the Claimant's alleged absenteeism from 8<sup>th</sup> August 2017. The Claimant raised the issue of an oral dismissal and it was incumbent on the Respondent to discharge its statutory obligation to show there was merit in either the reasons for dismissal or that there was no dismissal since an unfair dismissal had been alleged. The Claimant did not provide any proof that he was underpaid or had worked overtime. He did not seek the production of any records by the Respondent that could have demonstrated that he was not paid for work done. He did not show any leave application forms and from his own evidence he could get leave or off since on election-day he confirmed that he was given an off to go vote. He said that he did not return on that day as there was no transport.

7. The employer is the keeper of records in terms of Section 74 of the Employment Act and the Claimant's claim as to termination without notice has traction. Under Article 47(1) and the Fair Administrative Actions Act he was entitled to fair administrative action and under Section 41 of the Employment Act had prior to termination entitled to be informed of the reasons for the termination. As a result he was not accorded due process before his termination and therefore entitled to recover the following as judgment is entered for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice – Kshs. 12,000/-
- b. 2 months salary as compensation for the unlawful dismissal – Kshs. 24,000/-
- c. Costs capped at Kshs. 40,000/-
- d. Interest on sums in a) and b) above at court rates from date of judgment till payment in full.
- e. A certificate of service.

It is so ordered.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**