



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 282 OF 2016

DISMAS SAMITA MUKHWANA..... CLAIMANT

VERSUS

RILEY SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 26.02.2016 through Nyabena Nyakundi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment was unlawful.
- b) One month salary in lieu of notice Kshs. 11, 897.00.
- c) Leave for 4 years Kshs. 54, 726.00.
- d) House allowance Kshs.85, 680.00.
- e) Underpayment in 2011 Kshs.72.00.
- f) Underpayment 2012 Kshs.12,000.00.
- g) Public holidays Kshs.526 x 10days per year x 4 years = Kshs.21, 040.
- h) 12 months' salaries in compensation for unlawful termination 12 x Kshs.11, 897 = Kshs.142, 763.00.
- i) Total claim Kshs.328, 178.00.
- j) Costs of the suit plus interest at Court rates.
- k) Such other directions as the Court may deem fit to meet the ends of justice.
- l) Certificate of service.

The memorandum of response was filed on 12.08.2016 through Obura Mbeche & Company Advocates. The respondent prayed that the suit be dismissed with costs.

To answer the **1st issue** for determination the Court returns that there is no dispute that the parties were in a contract of service. The respondent employed the claimant as a guard around 11.02.2010 on a one year contract which was renewable.

To answer the **2nd issue** for determination, the claimant was dismissed from employment by the letter dated 06.06.2014 on the ground that while assigned duties at Unga Limited Dakar Road, his superior visited the assignment and found that the claimant was not at his place of work. The claimant was summoned to the office and served with a charge sheet on 28.05.2014 but which he refused to sign to acknowledge receipt thereof. The claimant then walked away from the employer and filed the present suit. He was therefore dismissed from employment effective 28.05.2014. The claimant testified in Court admitting that he was absent from the assignment temporarily on 24.05.2014 and at the

meeting of 25.05.2014 he had admitted the mistake in writing and asked to be pardoned. Thereafter he was asked to hand in the uniform. The claimant denied that he refused to sign the charge sheet.

The Court has considered the evidence and returns that by his own admission, the claimant was culpable as was levelled against him. In view of his guarding assignment the Court considers that it amounted to gross misconduct to be absent from the assignment even though temporarily so. Having admitted the allegations and though the respondent having attempted to serve the charge in that regard as was alleged for the respondent, nevertheless the Court considers that the claimant had admitted the allegations and a notice and a hearing under section 41 of the Employment Act, 2007 would be superfluous towards establishing the validity of the reason for termination. The Court finds that by that admission the reason for termination was valid as per section 43 of the Act. In any event parties had discussed the issue and the claimant had written and asked to be pardoned. The claimant contributed to his termination 100% when he was temporarily absent from the assignment. The Court finds that the termination was not unfair and the claimant is underserving of the compensation for alleged unfair termination under section 49 of the Employment Act, 2007. Further in view of the gross misconduct the respondent was entitled to dismiss with a shorter notice than the contractual one as envisaged in section 44 of the Act and the pay in lieu of one month termination period as claimed was not justified at all.

To answer the **2nd issue** for determination, the Court returns that the dismissal was on 26.05.2014 and the suit filed on 26.02.2016 so that 12 months of limitation for continuing injuries under section 90 of the Act had already lapsed. The claims for continuing injuries including the underpayment, annual leave throughout the employment pay for public holidays, and house allowance throughout the service ceased on the date of termination and they were all time barred. In any event the Court finds that there was no recorded dispute in that regard when the employment subsisted. Accordingly the claims and prayers in that regard will fail.

To answer the **3rd issue** for determination, the Court returns that the claimant is entitled to the certificate of service. In view of that award and the parties' margins of success each party will bear own costs of the suit. While making that finding on costs the Court has also considered that the parties appeared before the labour officer and subsequently, as per the claimant's testimony, he was paid Kshs.46, 050.00 as was directed by the labour officer – suggesting that the parties had largely compromised the dispute.

In conclusion the suit is hereby determined with orders:

- a) The respondent to deliver to the claimant the certificate of service in 30 days from today.
- b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.

BYRAM ONGAYA

JUDGE