



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2255 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS MATHINA KYULE.....CLAIMANT

VERSUS

LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent on 5th February 2011, as a guard. His employment was terminated on 12th May 2014. Aggrieved by the termination, the Claimant filed the cause herein on 19th December 2014. The claim was amended on 22nd September 2017. In the amended claim the Claimant sought the following reliefs-

- a. The principal sum of Kshs.595,800.00 computed as below-
 - i. 12 months' salary compensation for unlawful termination (7,800 x 12) amounting to Kshs.96,600.00.
 - ii. Service for 26 days (300 per day x 12 x 2 years) amounting to Kshs.374,400.00.
 - iii. Overtime (4 hours x 26 days x 37.5 x 12 x 2 years) amounting to Kshs.93,600.00.
 - iv. Salary in lieu of notice (7,800 x 3 months) amounting to Kshs.23,400.00.
 - v. Unpaid salary for April in the sum of Kshs.7,800.00.
- b. Interest at court rates on (a) above.
- c. Cost of the suit.
- d. Any other relief this Court will redeem (sic) fit to grant.

The Claimant avers that he was a permanent employee and that his employment was terminated unlawfully without any justifiable cause. At the time of termination, he was earning a salary of Kshs.7,800.00.

It is the Claimant's case that he was not paid his terminal benefits, severance pay, outstanding leave and allowances dues for the period he was in the Respondent's employ in breach of the employment contract.

During trial, the Claimant relied on his witness statement filed on 19th December 2014 and his bundle of documents, as his evidence in chief. It was his testimony that the reason for his termination was not given to him.

It was his testimony that he did not have any disciplinary issues and was never suspended. It was his contention that he never absconded duty. On cross examination, he testified that he worked at the Nairobi Women's Hospital, Kitengela Branch. He reported to work at 6 pm till 6 am the following morning.

It was also his testimony that he took off days from 9th May 2014 and reported back on 13th May 2014. He testified that he was working as a reliever at the time he took his off days. when he reported back the supervisor told him to go back home and report back the following day. The following day he was told to report after 7 days. When he reported after 7 days he was sent for a refresher course for 4 days. He stated

that after his training, Mr. Obipe his supervisor, took away his uniform and informed him to wait until the Respondent called him. He denied not clearing with the Respondent.

The Respondent filed a response on 22nd March 2017 denying the allegations set out in the claim. The Respondent avers that the Claimant was deployed to Nairobi Women's Hospital, Kitengela Branch. While working at the said branch, the Claimant took his off days but never resumed work thereafter.

It is the Respondent's position that the Claimant deserted his duties without any lawful justification or the issuance of a notice. It is also the Respondent's case that if indeed the Claimant's employment was terminated, then the same was done due to the Claimant's gross misconduct and in a bid to increase the overall efficiency of the Respondent.

The Respondent contends that the Claimant never sought the Respondent's audience, neither was he denied a hearing. It is its position that the reliefs sought are speculative, unlawful and unsubstantiated. As such, the claim is premature and an abuse of the court process.

RW1, RISPER ANYANGO OBURE, the Respondent's Human Resource Manager, testified that the Claimant was paid his salary for the month of April 2013. It was also her testimony that the respondent tried to reach the Claimant after he absconded work but his phone was not going through.

During cross-examination, she denied having knowledge of the fact that the Claimant reported for duty after his off day and was told to go back and report after 2 days. She stated that she did not have the numbers used to call the Claimant or the records indicating the dates that the Claimant was absent.

In its written submissions filed on 10th July 2019, the Respondent submitted that the Claimant's employment was never terminated, but rather, he absconded duty for 7 days and efforts to reach him proved futile. The Respondent relies on the case of *Dickson Matingi vs. Db Schenker Limited [2016] eKLR* and *Philomena Kiprotich Kirui vs. Lessos Veterinary Suppliers Limited [2016] eKLR*.

The Respondent avers that the Claimant is not entitled to service pay since NSSF payments were being remitted and relies on the case of *Nancy Muthoga vs. Chandarana Supermarkets [2019] eKLR* and *Kennedy Nyanguncha Omanga vs. Bob Morgan Services Limited [2013] eKLR*. The Respondent avers that the Claimant is not entitled to salary for the month of April as the same was paid to him.

Further, the Claimant is not entitled to a claim for overtime as he never proved that he worked overtime. Additionally, the Respondent submits that the calculation for overtime was grossly exaggerated and in the event the Court decides to award him the same, he should be awarded Kshs.74,880.00.

The Respondent submits that the Claimant is not entitled to compensation for unlawful termination since he has not proved that his employment was unfairly terminated.

The claimant did not file written submissions.

Analysis and Determination

I have considered the pleadings filed by the parties, the evidence adduced before this Court and the Respondent's submissions. The issues before this Court for determination are –

- a. Whether the Claimant's employment was terminated, and if so, was it lawful?
- b. Whether the Claimant is entitled to the reliefs sought.

Termination

Section 41(2) of the Employment Act provides as follows-

“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

Additionally, Section 44(4)(a) allows an employer to summarily dismiss an employee where they absent themselves from work without leave or other lawful cause.

The Respondent's case is that the Claimant's employment was never terminated and that he absented himself from work. RW1 testified that Mr. Obipe's attempts to reach the Claimant through his phone were futile. However, on cross examination she could not recall the number that was used to reach the Claimant or the manner in which the respondent attempted to contact him; whether it was through his colleagues or by his supervisor.

On the other hand, the Claimant testified that he resumed work from his off days but was told by his supervisor to go back home and come

back the following day. He returned the following day and was told to come after 7 days. After the lapse of the 7 days, he reported back and was sent for refresher training for 4 days. After the 4 days, he was told to wait until the Respondent called him and his uniforms retrieved from him.

In *Philomena Kiprotich Kirui vs. Lessos Veterinary Suppliers Limited* [2016] eKLR, the Radido J. held as follows-

“An employer who terminates the services of an employee on grounds of absconding or desertion has to demonstrate and/or prove that the employee had no intention of resuming work.”

The Respondent has not rebutted the Claimant’s testimony that he reported to work on several occasions and that the only reason he never resumed work was because he was told that he would be contacted by the Respondent. When RW1 was asked about the dates the Claimant had absconded duty, she stated she did not have the records to show the dates.

In the circumstances I find that the Respondent has failed to prove that the Claimant absconded duty and find that the Respondent summarily dismissed him when his uniforms were taken away from him, contrary to the provisions of section 41 (2) of the Employment Act which required the Respondent to give Claimant a fair hearing. Consequently, the Claimant’s termination is deemed unfair for failing the test outlined in section 45 (2) of the Employment Act.

Reliefs

I find that the Claimant is not entitled to an award for service pay as the pay slips annexed by the Respondent in its Memorandum of Response indicate that NSSF payments were being made on behalf of the Claimant.

Although, the parties gave contradicting accounts in their pleadings as to when the Claimant’s employment was terminated, the Respondent failed to provide records to show the dates the Claimant was absent. As such, I find that the Respondent has failed to rebut the Claimant’s assertion that his employment was terminated in May 2014. Additionally, the pay slip annexed by the Respondent is for April 2013 and not 2014 when the claimant left employment. Therefore, the claim for salary for the month of April succeeds.

Having found that the Claimant’s employment was unlawfully terminated, I award him 4 months compensation for unlawful termination. I have taken into consideration the Claimant’s length of service and the fact that he did not contribute to his termination.

The Claimant did not provide any contract to prove that he was entitled to 3 months’ notice or notice pay. I award him one month’s salary in lieu of notice.

I further award the claimant overtime for 12 months as the respondent did not controvert the claimant’s evidence that he reported to work at 6 pm and left the following morning at 6 am. I award the claimant overtime in the sum of Kshs.74,880.

Orders

I thus enter judgment for the claimant against the respondent as follows –

1. One month’s pay in lieu of notice Kshs.7,820.00
2. 4 months compensation Kshs.31,280.00
3. Overtime for 12 months Kshs.74,880.00

Total Kshs. 113,980.00

The costs of this suit are awarded to the Claimant. Interest shall accrue at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE