



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 89 OF 2017

BETWEEN

GEORGE OTIENO OTIENO.....CLAIMANT

VERSUS

TEXAS ALARMS [K] LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

Nyakoni Ratemo & Company Advocates for the Respondent

Tindika & Company Advocates for the Claimant

JUDGMENT

1. George Otieno Otieno filed his Statement of Claim, on 2nd February 2017. He states, he was employed by the Respondent as a Supervisor on 8th August 2014. His salary, described as gross in the contract of employment, was Kshs. 14,700. He was entitled also, to a monthly supervisory allowance of Kshs. 5,000, bringing his full salary to Kshs. 19,700. He states, the Respondent failed to assign him duty and pay his salary, effective 28th April 2015. He considered his contract to have been unfairly terminated. He prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 19, 700.
- b) Gratuity at 18 days' salary, for 1 year of service at Kshs. 13,644.
- c) Salary arrears for the period August 2014 to 28th April 2015.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 236,400.

Total...Kshs. 344, 744.

- e) Declaration that termination was unfair.
- f) Costs.
- g) Interest.
- h) Any other relief.

2. The Respondent filed its Statement of Response on 11th July 2017. Its position is that the Claimant was employed by the Respondent as a

Supervisor, on 9th August 2014, not 8th August 2014. His salary was as indicated in the Claim. He was unable to supervise the Security Guards placed under him. In early September 2014, the Claimant, Human Resource Manager Ben Aduda, and Operations Manager met, to discuss Claimant's poor performance. It was decided that he is demoted. He was assigned the role of Crew in Respondent's Alarm Response Team, through a letter dated 12th September 2014. The supervisory allowance was taken from him. His gross salary was slashed from Kshs. 14,700 to Kshs. 11,220 monthly. He absconded on 12th September 2014, resurfacing on 1st October 2014. He was heard upon return. He explained that he was away due to domestic concerns. He was forgiven and continued working as Crew. He deserted on 24th April 2015. He was not dismissed by the Respondent constructively or otherwise. The Respondent sought to find out from the Claimant if he intended to return. He informed the Respondent he had travelled upcountry and did not intend to return. The Respondent prays the Court to dismiss the Claim.

3. The Claimant gave evidence, and rested his case, on 19th September 2018. Ben Aduda gave evidence for the Respondent on 11th March 2019. The Respondent indicated it would present one more Witness, a Mr. Juma Makokha. He was scheduled to be heard on 10th July 2019, but did not turn up. Hearing closed on 10th July 2019. The Claim was last mentioned on 11th October 2019, when Parties confirmed filing of their Closing Submissions.

4. Otieno told the Court he was employed as a Guard Supervisor, on 9th August 2014. He was frustrated by the Respondent. He was not given a motorbike to move around guarding sites. His Supervisors did not give him proper instructions on where to work. His monthly salary was delayed. He was assigned duty in different areas within a very short period. He was demoted. He became part of the Crew in Alarms. He was not consulted on demotion. He was not given reason for demotion. He was not taken through probation upon employment. He still continued to work after demotion, but with many challenges. He was forced to change his work attire in public. He was abused. He was denied off-duty days. He worked for about 8 months. He was never issued confirmation letter. He was locked out by the Guards at the gate, on 24th April 2015. He was subsequently informed that the Operations Manager had given instructions that the Claimant should not continue working. He wrote a letter of resignation. The Guards took the letter and shredded it. He called one Ms. Beatrice and told her he had resigned. He quit because he lost trust and confidence in the Respondent. He was qualified for the job, having been a military officer in the past.

5. Cross-examined, the Claimant confirmed he first worked for the Respondent on 9th August 2014. He worked as Supervisor. There were other Supervisors. They were allocated different zones. He had worked as a military officer for about 8 years. He was not placed on probation by the Respondent. Demotion took place about 1 month, after the Claimant was employed. Demotion letter stated the Claimant would serve a period of 6 months on probation. He was issued a different employment number. Supervisor allowance was taken away from the Claimant. He collected new uniform. Before this, he wore uniform reserved for Supervisors. He did not disappear until 1st October 2014. He was on duty between 16th September 2014 and 1st October 2014. He did not ask his Supervisor for permission to travel to Nairobi in this period, to collect his terminal benefits from the army. The work uniform remained at the workplace. There was a changing room. He does not claim unpaid salary for days worked in April 2015. His letter of resignation was torn by the Guards. He was not aware if the Respondent paid N.S.S.F contributions. He complained about demotion. He was forced to resign. Redirected, the Claimant told the Court that he referred to constructive dismissal in his demand letter. It is also in his Pleadings. He resigned because of his circumstances. He was not told anything about probation.

6. Aduda confirmed that the Respondent employed the Claimant on 9th August 2014. His terms and conditions of employment are as shown in his contract. He worked in this position up to 12th September 2014. The Respondent realized the Claimant was a raw deal. He could not supervise the Guards. It affected productivity. The Respondent convened a panel of Management Officers and decided to demote the Claimant. He left without leave of the Respondent, on 16th September 2014, returning on 1st October 2014. He had before requested to see Aduda. He was let in. He told Aduda he wished to travel to Nairobi to collect his terminal dues from the army. He was not granted leave. Upon return, he was warned and allowed to resume duty as Crew. He continued working until 25th April 2015 when he deserted. The Respondent made futile attempts to reach the Claimant. His contract was not terminated by the Respondent.

7. Aduda told the Court on cross-examination that the Respondent believed the Claimant would fit in his role, given his military background. There are no minutes placed before the Court, of the meeting alleged to have discussed Claimant's poor performance before demotion. There was no new contract issued based on new terms, after demotion. He absconded twice. He was always given a chance to continue working. Beatrice works as a Controller, gathering and dispersing information. She was not a Witness for the Respondent. There is no letter calling the Claimant back, after he allegedly deserted. The Respondent is ready to pay Claimant's dues, if he returns Respondent's uniform. Redirected, Aduda told the Court that the Claimant was assigned a new number on demotion. He did not complain about demotion

The Court Finds:-

8. The Claimant was employed by the Respondent as a Supervisor, with effect from 9th August 2014.

9. His appointment letter, dated 8th August 2014, states that the Claimant had written an application to the Respondent, seeking promotion to the position of Supervisor.

10. He cannot have been seeking promotion, because he was not already in employment. Parties agreed the Claimant had not worked for the Respondent, before 9th August 2014. He was seeking employment, not promotion. He was employed, not promoted.

11. He was employed as a Guard Supervisor, earning a gross monthly salary of Kshs. 19,700.

12. The letter of appointment did not have a probation clause.

13. The Respondent wrote to the Claimant a little over 1 month after employment, on 12th September 2014 stating that the Respondent had

observed the Claimant during his period of probation and found him incapable of discharging the role of Supervisor.

14. The Claimant was demoted to the position of Crew in Respondent's Alarm Response Team. His supervisory allowance of Kshs. 5,000 was taken away. His basic salary of Kshs. 14,700 was reduced to Kshs. 11,220. The Claimant acceded to the new terms and continued to work until 25th April 2015, when he states he was told by the Operations Manager he could not continue working. He also states that he wrote a letter of resignation after he was frustrated, humiliated and locked out by the Respondent.

15. The Respondent agrees that the Claimant stopped working on 25th April 2015, but not through termination at the instance of the Respondent; the Claimant deserted.

16. Although there was no probation clause in Claimant's contract, the Claimant's contract was subject to The Regulations of Wages (Protective Security) Services Order, 1998.

17. Regulation 24 [a] provides that the first 2 months in a Security Guard's contract, may be treated as probationary period.

18. Reference by the Respondent to probation period, in the letter of demotion, was therefore regular, and made within the law. It was not necessary that there be a probation clause in the contract of 8th August 2014, to enable the Respondent treat the Claimant as a probationary Employee, in the letter of demotion dated 12th September 2014.

19. Termination of employment was rooted on demotion. Other causes and/ or reasons given by the Parties are secondary. The root cause was Claimant's demotion from Guard Supervisor to Crew. The Claimant accepted extension and demotion. He went on working, albeit sulkily, and with moments of unauthorized leaves, until April 2015. He felt hard done by the demotion, given his military pedigree. The Respondent on the other hand felt that the former soldier had failed in supervising Guards, his military pedigree notwithstanding. Cracks in the employment relationship occurred, even before the ink had dried on the contract of employment dated 8th August 2014. It was just a matter of time before the Parties separated.

20. The Court does not think the Claimant was constructively dismissed, as pleaded. Demotion cannot have constituted hostile or intolerable work environment. It happened very early in his engagement with the Respondent, and during probation. He did not resign immediately he felt the Respondent had fundamentally altered terms and conditions of employment. For a claim of constructive dismissal to hold, the Employee must show he resigned within a reasonable period, of experiencing the hostile or intolerable changed work environment. The Claimant acquiesced to demotion and other forms of change to his terms and conditions of employment. He did not prove other forms of mistreatment such as being made to undress in public. These were mere allegations meant to incite the mind of the Court to reach a finding that the Claimant was subjected to a hostile work environment.

21. The Claimant is not entitled to notice pay, having in his own evidence, resigned.

22. He has not shown that he was constructively dismissed, and compensation for unfair dismissal is not merited.

23. He worked for 8 months. Regulation 17 of the applicable Wage Order avails gratuity to Guards with at least 5 years' service. 8 months' service does not warrant payment of gratuity.

IT IS ORDERED:-

a) The Claim is declined.

b) No order on the costs.

Dated and delivered at Mombasa this 13th day of December 2019.

James Rika

Judge