



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 450 OF 2014**

(Before Hon. Lady Justice Hellen S. Wasilwa on 9<sup>th</sup> December, 2019)

**FRANCIS ORAMIS.....CLAIMANT**

**VERSUS**

**BESHMON LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed this cause to challenge the termination of his employment while seeking payment of his terminal dues and compensation for unlawful termination. In particular, he seeks the following reliefs:-

*a. An order declaring that the Claimant's termination was unlawful and unjustified.*

*b. An Order that the Claimant be immediately reinstated to his last position or an equivalent.*

*c. An Order that the Claimant be paid in full all his salary, benefits and allowances from date of termination up to date of reinstatement.*

*And/ Or*

*d. An Order that the Respondent does forthwith issue the Claimant an acceptable Certificate of Service.*

*e. Monetary compensation as follows-*

*i. Unpaid salaries for January and February 2012 in the sum of KShs. 54,000.00.*

*ii. 12 months salary being damages for unlawful dismissal (27,000 x 12) amounting to KShs. 324,000.00.*

*iii. 0.5 months' salary in lieu of leave of KShs. 13,500.00.*

*iv. One-month salary in lieu of notice of KShs. 27,000.00.*

*v. Unpaid house allowance (15% of 27,000 x 8 months) amounting to KShs. 32,400.00.*

*vi. Service pay (27,000 x 8/12 x 15/30) totaling to KShs. 9,000.00.*

*f. Costs of the suit.*

*g. Interest on (c), (e) (i) to (vi) and (f) hereinabove at prevailing commercial rates from date of filing the claim.*

*h. Any other relief as this Honourable Court may deem just and fit to grant.*

2. The Claimant avers that he was employed by the Respondent as a security supervisor from 26<sup>th</sup> July 2011 to 4<sup>th</sup> February 2012. On 30<sup>th</sup> January 2012, he was issued with the internal memo dated 27<sup>th</sup> January 2012 requiring him to issue an explanation for the disappearance of metal detectors and erasure of records in the CCTV system. He was suspended the same day and told to await further communication from the Respondent.

3. A week passed without him being called back. Consequently, on 6<sup>th</sup> February 2012, he went to the Respondent's offices to follow up on his disciplinary case. Instead, he was issued with a termination letter dated 4<sup>th</sup> February 2012 yet he was never given the opportunity to defend himself. It is his case that the termination of his employment was premeditated, therefore unfair and unlawful. At the time of termination, he was earning a salary of Kshs. 27,000.00 and had worked for 8 months.
4. The Claimant avers that the Respondent failed to pay his salary for the months of January and February 2012, together with his terminal benefits. He further states that the Respondent never paid him house allowance.
5. During cross-examination, the Claimant maintained that he had called his supervisor to make enquiries but conceded that he did not have evidence of the phone calls or text messages sent. He further conceded that Amos was not his supervisor.
6. He maintained that he never absconded his duties and was absent from work because he was sent home by Amos and told that he would be called back. It was his evidence that the issue of assault was never followed up.
7. The Respondent filed a response on 3<sup>rd</sup> July 2014. They aver that the Claimant served the Respondent for 6 months and 8 days.
8. The Respondent avers that the Claimant was handed the internal memo on 27<sup>th</sup> January 2012. He opted to abscond duty and responded to the memo a week later. The Respondent denies issuing orders to Amos, the accountant, to send the Claimant on suspension and denies knowledge of the Claimant's constant communication with him.
9. The Respondent states that the reasons for terminating the Claimant's employment were set out in the termination letter.
10. It is the Respondent's case that the Claimant has not been denied a certificate of service and the same can be issued to the Claimant provided it is on a weekday and within working hours. Further, that they can only pay the Claimant salary for the days worked in February and not the entire month. Additionally, the Respondent remitted the Claimant's NSSF contributions until the time of his termination.
11. During cross-examination, RW1, Amos Ayua Ongute and the Respondent's Accountant, testified that the Claimant responded to the memo but it was not satisfactory. It was also his testimony that that response was not responded to. He conceded that the termination letter did not mention the Claimant's response to the memo.
12. He also conceded that the allegation of assault was not included in the memo and that there was no show cause on ground 1, 3 and 5 of the termination letter. He also conceded that the employees who recorded statements were not in Court as witnesses.
13. It was his evidence that no theft was reported to the police. He testified that the Claimant was not subjected to any disciplinary hearing.
14. He also conceded that the Claimant did not go on leave and maintained that he was paid a consolidated salary that included house allowance.

#### **Submissions by the Parties**

15. In their submissions filed on 30<sup>th</sup> September 2019, the Respondent submits that the internal memo only required the Claimant to respond to the allegations raised and not to proceed on suspension. The Respondent also submits that there is no evidence of text messages or call logs showing that the Claimant indeed communicated with Amos.
16. The Respondent submits that pursuant to Section 35 (5) and (6), the Claimant is not entitled to service pay because NSSF deductions were being remitted on his behalf. He is also not entitled to an award for house allowance and salary in lieu of leave because they are a continuing injury.
17. The Respondent submits that the Claimant is not entitled to salary for the month of February because he did not work. It is also their submissions that the Claimant is not entitled to notice pay and compensation for damages for unfair termination because he was summarily dismissed.
18. The Respondent submits that due procedure was followed in terminating the Claimant's services because the Claimant did not adduce evidence to prove that he was suspended. They maintained that the Respondent absconded duty.
19. The Respondent submits that the termination was fair and justified as required by section 43 of the Employment Act since the Claimant was responsible for the missing items, absconded duty and assaulted his colleagues.
20. I have examined evidence of both Parties. From the evidence of the Claimant, he was issued with a show cause letter dated 27/1/2012, which he received on 30/1/2012 to explain what transpired in relation to the erasure of records in their CCTV system. The Claimant explains that he responded as per his Appendix 3, dated 6/2/2012. It is worth noting that the show case letter had no timelines within which he was required to respond.
21. He contends that when he went to inquire about his suspension on 6/2/2012, he was served with a termination letter.
22. The Respondent has averred that the Claimant was terminated for gross misconduct and for various reasons listed in the letter of 4/2/2012. There is mention of the show cause letter which indicates he was to respond but he did not and absconded duty. There is

introduced other reasons about him fighting with another guard which he had not been asked to respond to in the show cause letter.

23. The Claimant was never given an opportunity to defend himself against all these accusations which is contrary to Section 45(2) of Employment Act which states as follows:-

**(2) "A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure".**

24. Due to the omission by the Respondent of not giving the Claimant an opportunity to defend himself and therefore also not giving him an opportunity to test through hearing, that the alleged reasons for dismissal were valid, I find that the dismissal of the Claimant was unfair and unjustified.

25. In terms of remedies, the Claimant sought payment of house allowance, which I note was never paid to him. I award him the same as follows =

**1) 15% of 27,000 x 7 months = 27,000/=**

**I also award him:**

**2) 1 Months' salary in lieu of notice = 27,000/=**

**3) Salary earned but not paid for January 2012 = 27,000/=**

**4) Prorata leave for 7 months =  $7/12 \times 27,000$  = 15,750/=**

**5) Service pay prorated at 7 months =  $7/12 \times 27,000 \times 0.5$  = 7,875/=**

**6. 10 months salary as compensation for unfair termination =  $27,000 \times 10$  = 270,000/=**

**Total .... = 369,625/=**

***less statutory deductions***

**7. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.**

**Dated and delivered in open Court this 9<sup>th</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Shejenje for Claimant – Present

Akwabi for Respondent - Present