



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 926 OF 2016

ONESMUS KIMANZI MUTEMI.....CLAIMANT

VERSUS

TEXAS ALARMS (K)LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this Suit on 6.12.2016 claiming terminal dues plus compensation for unfair termination of his contract of service by the Respondent on 18.7.2016. In total the Claimant seeks to recover Kshs.225,395.50, Certificate of Service, Costs and interest. The Respondent has however denied the alleged unfair termination of the Claimant's contract of service and averred that he was summarily dismissed for misconduct. He therefore prayed for the suit to be dismissed with costs.

2. The twin issues for determination are whether the termination of the contract of service was unfair and whether the reliefs sought should be granted. The suit was heard on 29.9.2017 and 7.12.2017 when the claimant testified as CW1 and the respondent called her HR Manager as the RW1. Thereafter both parties filed written submissions which have been carefully considered herein.

Claimant's Case

3. The Claimant testified that he was employed by the Respondent on 12.12.2009 as a security guard without a formal contract and worked continuously until 1.9.2013 when he was appointed Permanent guard. According to him that was just a joke because through his continuous service, he had become permanent security guard and he was being deducted NSSF dues. His salary was however increased from Kshs.6,800 to Kshs.11,604 per month. His last day of work was 16.7.2016 when the Operations Manager Mr. Amos told him not to report for work on 17.7.2016 and instead report to the office 18.7.2016.

4. When he reported to the office 18.7.2016 as directed by the Operations Manager, he was told to go home to pave way for investigations about a box which was close to his workplace and also some strangers who were frequently visiting him. After the suspension he was not paid his July salary or ever called back to the office until 11.8.2016 when he wrote to the employer to enquire about his salary. The letter was not replied to and he construed the prolonged suspension to mean unfair termination and on 11.11.2016 he served a demand letter through his lawyer. He now prays for one month salary in lieu of notice, compensation for unfair termination, refund of the unremitted NSSF deductions and accrued leave for 2010, 2011, 2012 and 2014. He admitted to utilizing his leave for 2013.

5. On cross examination, CW1 stated that he was told by Mr. Amos and his Assistant Operation Manager Mr. Ali that he should go and wait to be called after the investigations. He denied any wrong doing at the work place but admitted that he was served with a warning letter on 14.3.2016 but he was allowed to continue working. He further denied ever being called to the office by the RW1 or ever being served with a dismissal letter dated 28.7.2016. He admitted that on 29.7.2016, he demanded for his salary through Munyithya Advocate and later withdrew his instructions after the counsel failed to update him after the demand letter.

Defence Case

6. RW1 confirmed that CW1 was employed by the respondent as a security guard from 2.12.2009 as a casual employee and on 1.9.2013 he was confirmed. Thereafter he worked well until 16.7.2016 when the owner of the Pan Afric Building, where CW1 was guarding, reported to him (RW1) that a guard was having keys to the store and some two doors had gone missing. RW1 sent the supervisor Mr. Justus Ouma to verify the report and he learnt that the client admitted that he is the one who gave out the keys to the guard by mistake. He then summoned the claimant to see him on 17.7.2016 but he failed to comply and prompting him to leave a Warning letter with the Assistant HR manager to serve the CW1 and tell him to resume duty on 18.7.2016. However, CW1 never reported to the office and the warning letter was never served on him.

7. RW1 stated that on 28.7.2016, he wrote a summary dismissal letter citing Absconding as the reason for the termination of the claimant's

contract of service but the claimant never went for the same. On 29.8.2016, the claimant served a letter through Munyithya advocate demanding for his salary for July 2016 and leave and he responded to the same on 28.9.2016 and notifying him of the claimant's summary dismissal letter for the offence of absconding duty. He also demanded that CW1 returns the uniform before payment of his terminal dues.

8. RW1 admitted that CW1 was entitled to salary up to 16.7.2016 and pro rata leave for January - July 2018. He however counterclaimed one month salary in lieu of notice contending that CW1 deserted employment without notice after he summoned him to the office. He confirmed that the claimant was a good officer save for a warning letter given to him on 14.3.2016 for being rude to the supervisor. He admitted that NSSF was not remitted for CW1 until he was confirmed on permanent basis. He however contended that all the claimant was paid for all his annual leave and leave allowances except for 2016.

9. On cross examination, RW1 clarified that the reason for dismissing the claimant was absconding duty and not for the lost doors because the client had admitted liability for the loss and the matter settled. He stated that he tried to reach CW1 through the supervisor on 17.7.2016 but he never honoured the summons. He further stated that his secretary called CW1 by phone collect the warning letter but again he failed to go for it. RW1 however admitted that he never went to check the claimant at his home. He further admitted that he never invited the claimant for a hearing on the offence of absconding.

10. RW1 admitted that Mr. Justus Ouma was the claimant's immediate supervisor while Mr. Ali is the Operations Manager both dealing with operations and deployment of guards among other duties. He admitted that the claimant had written letters demanding for his annual leave and that he took his last leave from 1.1.2016 to 2.2.2016. He however produced no leave records when challenged by the claimant's counsel. On re- examination, he admitted that the leave for 2014 was never paid for even after the demand on 26.2.2015.

Analysis and Determination

11. There is no dispute that the Claimant was employed by the Respondent as security from 2009 to 29.8.2016 when he was summarily dismissed from service by the Respondent. The issues for determination herein are:-

a) Whether the Claimant's contract of service was unfairly terminated.

b) Whether the Claimant is entitled to the reliefs sought.

Unfair Termination

12. The burden of proving unfair termination is placed by section 47(5) of the Employment Act on the employee who alleges that he was so terminated after which the burden shifts to the employer to prove and justify the reason for the termination and the fairness of the procedure followed before the termination. In this case the respondent has admitted that she summarily dismissed the claimant for absconding work from 17.7.2016 to 29.8.2016. The claimant has however denied the alleged absconding and explained that on 16.7.2016, he was instructed by the operations Manager, Mr. Amos not to report on duty on 17.7.2016 and instead report to the office on 18.7.2016 and he complied. He further alleges that when he reported to the office on 18.7.2016, he was suspended by the supervisor Mr. Ouma and the operations Manager Mr. Ali pending investigations about lost items at place of assignment, a box which was near the same place and strangers who were visiting him there frequently. Thereafter he was never called back to know the result of the investigations and he was not paid his salary for July 2016 despite demand through his lawyer. He therefore contends that he was unfairly terminated without prior notice, fair reason, or being accorded any hearing.

13. On other hand the respondent contends that the claimant was directed by the supervisor Mr. Justus Ouma to report to the office on 17.7.2016 but failed to comply and thenceforth absconded duty. He further contended that, he reached him by phone through his secretary and the Supervisor but he neither went to the office to collect his warning letter nor did he resume duty at his place of assignment. Consequently, RW1 wrote to him a summary dismissal letter to him and left it in the office for collection. He however admitted that before writing the letter, he never traced the claimant from his and never invited him for a hearing about his absconding. He further admitted that he only notified the claimant about the dismissal through his lawyer vide the letter dated 28.9.2016 by which he responded to the demand for salary for July 2016.

14. After a careful consideration of the evidence and the submissions by both counsel, I find that the claimant has proved on a balance of probability that he was unfairly dismissed within the meaning of section 45 of the Act. He has proved that he never absconded duty but rather he was suspended by his supervisor and the Operations Manager to pave the way for some investigations at Pan African Building where he was assigned to guard. Thereafter he was never called back to the office and his salary for July 2016 was never paid despite demand through his lawyer.

15. On the other I find that the respondent has failed to prove that the claimant absconded duty as alleged from 17.7.2016. First, RW1 never summoned the claimant to the office personally on 17.7.2016 but he did through the Supervisor. Second, RW1 never called the claimant over the phone but he send his secretary to do so. Third, on 18.7.2016 RW1 left the warning letter with the Assistant HR manage with instructions to serve the claimant and tell him to resume work the same day. All the above officers were never called to testify for the defence to prove that the claimant was to report to the office on 17.7.2016 and not 18.7.2016, that he never reported to the office on 18.7.2016 and got a suspension, that the claimant was notified by phone to collect warning letter and resume duty and ignored. Without evidence from the said witnesses the evidence by the RW1 is rendered hearsay and too weak to prove and justify the reason for the termination of the claimant's contract of service.

16. As regards the procedure followed, RW1 has admitted that he never invited the claimant to any hearing before summarily dismissing him for absconding. Section 41 of the Act requires in mandatory terms that before terminating the contract of service of an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union official of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the dismissal

is decided. Failure to accord the claimant such mandatory fair hearing rendered his termination unfair and wrongful. For the reason that the employer herein has failed to prove a valid and fair reason for dismissing the claimant as required by section 43 and 45 (2) of the Act, and having admitted that the dismissal was done before according the claimant any fair hearing, I proceed to hold that the summary dismissal of the claimant was unfair.

Reliefs

17. In view of the foregoing finding, I make a declaration that the termination of the Claimant's contract of service was unfair as prayed and proceed to award damages under section 49 of the Act being salary in lieu of notice plus compensation for the unfair termination. He will therefore get Kshs.12,680, one month salary in lieu of notice plus six months' salary compensation, being Kshs. 76,080. In making, the said compensation I have considered the length of his service and the fact that he did not contribute to the termination through any proven misconduct.

18. The claim for salary for 15 days worked in July 2016, being Kshs.7,315.50, is granted as prayed. The claim for accrued leave is also awarded for years as prayed being leave for 2014/2015 and 2015/2016 being $2 \times 21/26 \times 11026 = 17811.23$. The claim for refund of the unremitted NSSF from 2010 to 2013 is however dismissed for lack evidence that the same was deducted from the Claimant's salary.

19. Finally, the claim for certificate of service is granted because it is the right of every employee under section 51 of the Act.

Disposition

20. For the reasons that the summary dismissal of the claimant was unfair, I enter judgment for him in the sum of Kshs.113,886.75 plus costs and interest.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JANUARY 2018

ONESMUS MAKAU

JUDGE

DELIVERED AT MOMBASA THIS 22ND DAY OF FEBRUARY, 2018

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JUDGE