



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 565 OF 2016

VINCENT NYOGESA AKHENDA.....CLAIMANT

VERSUS

CREST SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent as security guard under one year fixed term contract from 8.3.2014. The contract was renewed from 2.4.2015 to 31.3.2016 but thereafter no further contract was signed between the parties but the employment relationship continued. On 1.6.2016, the Claimant applied and he was given leave for 18 working days and resume duty on 22.6.2016. However when he reported on the said date, he was not assigned duty and instead he was kept as until 26.6.2016 when he was given a letter stating that his contract had lapsed and it would not be renewed due to his misconduct. The Claimant has brought this suit alleging that his contract of service has been unfairly terminated and he prays for compensation amounting to Kshs.167,428 made up of one month salary in lieu of notice, compensation for unfair termination, and 21 days leave.

2. The Respondent admits that she had employed the Claimant but denies that she unfairly terminated the contract of service. According to the respondent, the contract of employment between the two was for one year starting 1.4.2015 and ending on 31.3.2016 after which it was extended up to 15.6.2016 when it expired and it was not renewed. She therefore prays for the suit to be dismissed with costs for lack of merits.

3. The suit was heard on 24.7.2017 and 11.12.2017 when the claimant testified as CW1 and the respondent called her Area Commander Mr. Gilbert Murara Nyaburi the RW1. Thereafter both parties filed written submissions, which I have carefully considered herein.

Claimant's Case

4. CW1 testified that he was employed by the respondent on 8.3.2014 as a Night Guard earning a salary of Kshs.12,221 per month. He worked until May 2016 and proceeded on leave from 1.6.2016 until 21.6.2016. When he reported back on 22.6.2016, he was told to report on 23.6.2016, then 24.6.2016 and finally on 26.6.2016 when he was given a termination letter dated the same date. The reason for the termination according to him was that he pressed to go his leave when there was shortage of guards.

5. He denied validity of the said reason and contended that after applying for the leave he never forced the employer to let him go. He there contended that the termination was unfair because he did nothing wrong by going on his annual leave, and he was denied a fair hearing before the termination. He therefore prayed for compensation and terminal dues as prayed in the suit.

6. On cross-examination, CW1 admitted that he signed a contract for the period starting 2.4.2015 and ending on 31.3.2016. He further admitted that he signed an undertaking that the employer had the discretion in extending or renewing of the contract. He also admitted that after the expiry of the contract it was renewed until 31.5.2016 and again to 15.6.2016. He further admitted that he was told that there was shortage of guards but still insisted on going on leave. He also admitted that his initial contract had expired in March 2016 but contended that after that he continued serving without signing any other contract until he was given the termination letter.

Defence Case

7. RW1 admitted that CW1 was employed by the respondent on 2.4.2015 as a security guard and signed one year contract which lapsed on 31.3.2016. Thereafter the contract was extended to 15.6.2016. In the meanwhile, CW1 applied for his annual leave and despite being told that there was shortage of guards, he insisted on going for 18 working days from 1.6.2016 and resume 26.6.2016. Come the 26.6.2016, his contract was not renewed and he was given a letter to that effect. Thereafter he was paid his terminal dues and issued with certificate if

service.

8. On cross-examination RW1 admitted that the Claimant never signed anywhere for the extension of the contract of service. He further admitted that the leave form was signed by the administrator and the Claimant was to resume duty on 22.6.2016. He further admitted that the leave application was approved without any conditions. He however contended that the Claimant's performance was not satisfactory and previously been suspended for misconduct.

Analysis and Determination

9. After considering the pleadings, evidence and submissions, it is clear that the Claimant was employed by the Respondent as a security guard under a renewable one year fixed term contract starting 2.4.2015. The issues for determination herein are:

- a) Whether the contract of service was unfairly terminated by the Respondent.
- b) Whether the reliefs sought should be granted.

Unfair termination

10. Under section 45 (2) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case, the employer alleges that the Claimant's fixed term contract was never terminated but it just lapsed after she declined to renew it citing misconduct on the part of the Claimant. On the other hand, the Claimant alleges that after the contract lapsed in March 2016, he never signed another contract but he continued with his employment until 26.6.2016 when he received a letter notifying that his contract would not be renewed.

11. After careful consideration of the material presented to me, I find clear that after the one year term contract expired on 31.3.2016, the parties never signed another contract but continued in their employment relationship until 22.6.2016 when the Claimant reported back from his annual leave only to be barred from resuming duty. Thereafter he was given the letter dated 26.6.2016 informing him that the contract had lapsed and it would not be renewed. That was true but in my view the conduct of the parties was such that the contract had been renewed under the same terms as the expired contract.

12. The foregoing view is supported by the Respondent's own pleadings and evidence when she contended that she had so much shortage of guards by June 2016 that she didn't want the Claimant to proceed on his annual leave. In other words, the respondent had intended to continue employing the Claimant but changed midway after the latter pressed to go for his annual leave. The said change of mind amounted to breach of contract.

13. It also amounted to unfair termination because the Respondent has not proved any valid and fair reason for terminating the contract. All what the employer herein has done is to blame the Claimant for pressing to go on leave when there was shortage of staff. That might have a bearing on the operational needs of the employer, with due respect, she must blame herself for approving the leave without any conditions.

14. In addition to the substantive unfairness, the termination was procedurally unfair. The employer has failed to prove that the claimant was accorded a fair hearing within the meaning of section 41 of the Act. All what the defence pleaded and testified is that the contract lapsed automatically and she had no obligation to renew it. Under the said provision of the Act, an employer is barred from dismissing his employee on ground of misconduct before first explaining to her, in a language she understands and in the presence of Shop Floor Union Representative or a fellow employee of her choice, the reason for the intended dismissal and the accord them a chance to air their views for consideration before the dismissal is decided.

Reliefs

15. In view of the fact that the respondent has failed to prove substantive and procedural fairness in terminating the Claimant's contract of service, I declare the termination to have been unfair as prayed. In addition, I award the Claimant Kshs.12,221 being one month salary in lieu of notice, Kshs.48,884 being 4 months' salary as compensation for the unfair and premature termination of her employment contract. In making the said award, I have considered the fact that the Claimant had served the Respondent for a fairly short time and also the fact that he had the reasonable expectation that she was to earn that money during the remainder of her contract term.

16. Finally the claim for 21 leave days is dismissed because the reason he was dismissed is because had gone on his annual leave.

Disposition

17. For the reasons stated above judgment is entered for the Claimant in the sum of Kshs.61,105 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