



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 697 OF 2013

(Before Hon. Justice Mathews N. Nduma)

MAREREI LELEKONGCLAIMANT

VERSUS

NCHENGO ESTATE LIMITED RESPONDENT

JUDGMENTS

1. The employment of the Claimant was terminated by a letter dated 17th August, 2012 for unlawfully slapping the foreman Mr. Samuel Ndungu on 16th August, 2012. The conduct by the Claimant was termed gross misconduct hence the termination.
2. The Claimant aggrieved by the termination filed the suit by a Memorandum of Claim on 15th May, 2013.
3. The Claimant seeks:-
 - (i) Payment in lieu of one month notice in the sum of Kshs.10,717.
 - (ii) Payment in lieu of leave Kshs.22,191.
 - (iii) Service pay for years served Kshs.21,434 and
 - (iv) compensation for unlawful termination of employment.
4. The claim is opposed vide a statement of defence filed on 11th June, 2013.
5. The Claimant testified under oath whereas the Respondent called three witnesses in support of its case.
6. The Claimant testified that he was employed by the Respondent as a Security Guard from September, 2009. He worked continuously until 15th August, 2012. The Claimant earned a salary of Kshs.10,717 per month.
7. There was an altercation between the Claimant and his supervisor, one Mr. Ndungu on the night of 16th August, 2012. According to the Claimant, Mr. Ndungu insulted him and threatened to beat him up and the Claimant defended himself by pushing the supervisor by his shoulders.
8. According to RW1, RW2 and RW3, the Claimant slapped Mr. Ndungu, when he was asked to go and

close water that was running from the Respondent's tank. That the Claimant objected to being sent to close the water stating that was not his work. The Claimant followed Mr. Ndungu, the supervisor and slapped him. The two were separated. RW1 stated that the Claimant had confirmed to him that he had slapped Mr. Ndungu since he was a problem.

9. RW2, testified that Mr. Ndungu was running towards him while being followed by the claimant in hot pursuit. RW2, saw the Claimant slap Mr. Ndungu before RW2 intervened and separated the two.

10. The Claimant was annoyed for being asked to go and close running water and he stated that was not his work, hence the fight. RW2 reported the matter to the Manager the following day. The two were called and the Claimant admitted having slapped Mr. Ndungu. The Claimant was not immediately sacked but he did not report to work the following day. RW2 stated that he paid the Claimant his final dues. RW2 denied under cross examination that it was the supervisor who started the fight.

11. RW3, Samuel Ndungu, testified how he was slapped by the Claimant after asking him to go and close water that was overflowing from a tank. The Claimant was annoyed when RW3 asked him why he had not closed the water since he was the security guard incharge of the compound that night. RW3 testified that he was slapped as he escaped towards the house of RW2. That this was done in the presence of RW2, who separated them. RW3 did not report the case to the police. RW3 forgave him because he was satisfied with the report made to the Manager. RW3 stated that the Claimant was sacked the following day.

Determination

12. The court is satisfied that the Claimant unlawfully slapped his supervisor RW3 in the course of duty. The matter was reported to Management and the Claimant was found guilty of gross misconduct and dismissed from employment.

13. The Respondent had a valid reason to terminate the employment of the Claimant. The Claimant was given a hearing by management and he admitted the offence.

14. According to the letter of suspension, the Claimant was not summarily dismissed but his employment was terminated. The Claimant is therefore entitled to:-

(i) Payment of one month salary in lieu of notice in the sum of Kshs.10,717.

(ii) The Respondent did not refute that the Claimant had not taken all his leave days. The court awards the Claimant Kshs.27,191 in lieu of leave not taken.

(iii) In the security service, security guard is entitled to service pay calculated at 18 days pay for each year served according to the Collective Agreement for the sector. Accordingly, the Claimant is entitled to service pay in the sum of Kshs.21,434 as claimed.

15. Judgement is entered in favour of the Claimant as against the Respondent as follows:-

(a) Kshs.10,717 Notice Pay.

(b) Kshs.22,191 Leave Pay.

(c) Kshs.21,434, Service Pay.

Total.54,342.

(d) The award is payable with interest at court rates from date of filing suit till payment in full.

(e) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 5th day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 16th day of February, 2018

Maureen Onyango

Judge

Appearances

Mrs. Gakoi Maina for Claimant

M/s. Ngaruiya for Respondent

Anne Njung'e – Court Clerk