



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1617 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 8th March, 2018)

DANIEL KIPKURUI KETER CLAIMANT

VERSUS

SECUREX AGENCIES (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim on 16th September, 2014, seeking damages for wrongful dismissal and refusal to pay terminal dues.
2. He avers that he was employed by the Respondent on 1.12.2004 as a daytime security guard at a monthly basic salary of Shs. 9,572 but was not issued with a contract of service then but later confirmed into employment by a letter.
3. That he performed his duties diligently and honestly working on a daily basis from 6.00am to 6.00pm until 26.5.2012, when he was arrested while on duty at Mayfair and taken to Capital Hill Police Post. That he was arraigned in Kibera Law Courts on charges of stealing and released on bond a few days later.
4. That thereafter he proceeded to the Respondent's office to be assigned duties and found the Personnel Manager who advised him to return after 4 days which he did but was told to await conclusion of the criminal case in Court.
5. That on 27.5.2014, the charges against the Claimant were dropped and he proceeded to forward a copy of the proceedings and ruling of the Criminal Court to the Respondent whereupon he was informed that he had been dismissed. That he was not paid the salary for May 2012 and the 25 months that preceded the determination of the Court case. He was terminated on 18.12.2013.
6. He contends that the dismissal was contrary to the law and principles of natural justice and prays for the Claim to be allowed as drawn.
7. In the Memorandum of Response, the Respondent admits the employment relationship and the fact that the Claimant was arrested on 26.5.2012 whilst on duty at Mayfair Centre Nairobi and arraigned in Court on charges of stealing.
8. The Respondent also admits that the Claimant came to their offices on 25.6.2012 seeking to be assigned duties but deny advising him to return after four days and to await conclusion of the Criminal case. They contend that to date they are not aware of the outcome of the criminal case.
9. The Respondent aver that the Claimant was dismissed for:
 - 1. Having been arrested for a cognizable offence punishable by imprisonment under the Employment Act.**
 - 2. Having not reported to work for a continuous period of 14 days.**
 - 3. Having absconded from duty for than the stipulated 14 days.**
10. The Respondent also admits that the Claimant was summarily dismissed and was not issued with any notice or accorded any hearing. That the Claimant absconded duty during the pendency of the Criminal case and as such he is not entitled to the prayers sought.

Evidence

11. The Claimant led evidence according to his pleadings and urged the Court to allow his claim. In cross-examination, however he stated that he was never given any dismissal letter as the dismissal was verbal.

12. RW1 in evidence also reiterated the contents of their pleadings and stated that he was not aware that the Claimant had been arrested because he just stopped coming to work on 26.5.2015. That he discovered about the Claimant's absence after 14 days and upon asking the Operations Manager and that's when he learnt that the Claimant had been arrested. That they proceeded to write a show cause letter and sent it to his last known address and there was no response.

13. It is his contention that the Claimant showed up after 2 years with a judgment showing that he had been acquitted. They proceeded to process his final dues, which he refused to collect. RW1 urged the Court to dismiss the Claim with costs.

Submissions

14. It is submitted on behalf of the Claimant that he was dismissed unfairly contrary to Section 45 (1) of the Employment Act. That no notice was given and the reason that the Claimant absconded for a period of 14 days is not accurate as the Claimant was held at the police station for two days only and on the 3rd day, he was taken to Court and released on bond on the same day. He proceeded to the Respondent's premises for assigning of duties where he was advised to await the outcome of the Court case. That all along the Respondent was aware of the Claimant's whereabouts. It is also submitted that during the pendency of the Criminal case the Claimant did not work elsewhere as he considered himself an employee of the Respondent.

15. The Claimant's cites the **case no. 1228 of 2014 Josiah Ariko Omutoko vs Securex Agencies (K) Limited** which is similar to the instant case where Abuodha J awarded the Claimant 25 months salary which is the period that the Claimant therein attended a criminal trial. Counsel prayed for the Claim to be allowed as drawn.

16. The Respondent in submissions submit that the Claimant absconded duty. That his employment records show that for the years 2007 to 2012 show that the Claimant was consistently absent during the month of February in each of those years having taken his annual leave. It is urged that the Claimant is being untruthful by failing to tell the Court that he was actually on leave during the period in question herein and thus he could also be misleading the Court by stating that he was advised to report to work after conclusion of the criminal case.

17. Counsel submits that the Respondent owes the Claimant a sum of Kshs. 14,374/= representing his net basic salary. That the demand for one month salary in lieu of notice, leave pay and severance pay are not payable as the Claimant was summarily dismissed and that it was a termination not a redundancy. It is urged that the Certificate of service is available for collection at the Respondent's offices. Counsel prays for the claim to be dismissed with costs.

18. I have examined the evidence and submissions filed by the parties. The Respondent admits employing the Respondent but state that he absconded duty in 2012 just to reappear in 2014. The Respondents produced employment records for year 2007 to 2012 but there is no indication that these records are in respect of the Claimant.

19. The Respondent having admitted to an employment relationship, they ought to have issued him with an employment letter stating terms and conditions of service but this was never done nor is there any proof of such a letter.

20. The Respondent on their part aver that they exercised their right to terminate the Claimant when he failed to report to work for 14 days. They aver that they send him a letter of dismissal on 10.6.2012. No such letter was even exhibited in Court.

21. The Claimant having been an employee of the Respondent on permanent and pensionable terms, he could not just be dismissed without due process even if he had absented himself from duty. There is no indication that he was served with a letter to show cause why he had absconded duty. He was also not taken through the hearing process as envisaged under Section 41 of Employment Act which states as follows:-

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

22. Under Section 45 – a termination is unfair and unjustified if due process was not followed before the termination and no valid reasons are given for the employer's actions. I do make a finding that the Claimant's termination herein was unfair and unjustified and I declare it so.

23. I find for Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 9,572/=.

2. 12 months' salary for unfair and unjustified termination = 12 x 9,572=114,864/=.

3. Salary for May 2012 = 9,572/=.

4. Service pay of 15 days salary for each year worked = $\frac{1}{2} \times 9,572 \times 8 = 32,288/=$.

Total = 166,296/=.

5. Certificate of service.

6. Costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 8th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Waigwa holding brief for Nganga for Respondent – Present

Claimant – Absent