



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 206 OF 2016

JOSHUA MBENGO ORORICLAIMANT

VERSUS

KARIBU RAFIKI LIMITEDRESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 18.3.2016 claiming Kshs.299,923 made up of accrued terminal benefits plus compensation for unfair termination of employment. It is the Claimant's case that his contract of employment was unfairly terminated by the Respondent on 19.11.2015. The Respondent has however denied the alleged unfair termination and averred that the termination was done after following due process and reason explained to him.

2. The suit was disposed of by written submissions after the parties agreed to adopt all their witness statements and the documentary evidence filed. The issues for determination are whether the termination of the Claimant's services was unfair and whether he is entitled to the reliefs sought.

Claimant's Case

3. The Claimant stated that he was employed by the Respondent as a Security Guard from 7.1.2014 for a monthly salary of Kshs.10,000. He worked until 19.11.2015 when he was served with a letter terminating his services effective from 19.12.2015. Despite the indication that the effective date was 19.12.2015, he was send home immediately without payment of salary in lieu of notice.

4. He contended that he was summarily dismissed without justification and without being accorded a fair hearing. He further contended that during his employment he was never served with any warning letter and there was no theft report made when he was on duty or made against him. He therefore prayed for the reliefs pleaded in his suit.

Defence Case

5. Andrea Lange, the Respondent's Director stated that in August 2015, there was serious security lapse and property for the office and clients were lost while under the watch of the Claimant and other security guards but the Claimant denied liability. Again on the night of 2.11.2015, while the Claimant was on duty with another guard, another theft occurred this time involving two laptops but the Claimant and his colleague failed to report. The other guard disappeared but the Claimant who was housed by the

Respondent went to sleep in his house.

6. Mr. Lange further stated that due to recklessness, theft, drunkenness and non punctuality by the guards, the management decided to lay off the guards by giving them one month notice and paying them terminal dues. He contended that the reason for the termination was explained to all the guards verbally and the notice made in handwriting because the laptops had been stolen. However according to him, the Claimant refused to sign termination letter, which offered him terminal dues and certificate of service.

7. Suleiman Amazu is the Respondent's Head of the Restaurant. He stated that on 3.11.2015 he spoke to the Claimant and he confirmed that he found the dog alone and his colleague Amos missing and two laptops stolen but made no report. He further stated that Amos has never been found again after the incident and on 19.11.2015, the Claimant was served with termination letter on ground of theft on 2.11.2015. He contended that all the other guards were terminated and they collected their dues and certificate of service but the Claimant refused.

8. Ali Azuga is the Respondent's Head of Maintenance. He stated that he was told by the day guard that when he reported to work at 6.00 a.m., he found security dog lying on the grass and the guards missing. Mr. Azuga further stated that the night guards including Claimant went to sleep before handing over to the day guard as required. It was then discovered that a theft had taken place and two laptops were missing and the guards failed to report.

Analysis and Determination

9. There is no dispute that the Claimant was employed by the Respondent as a Security Guard from 7.1.2014 until he was terminated by the letter dated 19.11.2015. The issues for determination are as framed herein above:

- a. Whether the termination was unfair;
- b. Whether the reliefs sought should be granted.

Unfair termination

10. Under section 45 of the Employment Act, termination of employment by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

Reasons for termination

11. In the present case, the reasons for the termination according to the defence witnesses was theft of two laptops on 2.11.2015 while under the custody of the Claimant as the night guard then. The second reason was the general laxity among the Respondent's team of guards from August 2015, which lead to all the guards being laid off. The Claimant has denied that any theft occurred on the night of 2.11.2015 and further denied the alleged general laxity at work. He contended that he was never served with any warning letter or show cause letter until his termination.

12. After careful consideration of the evidence and submissions presented to the Court, it is my finding that the Respondent has not proved on a balance of probability that there was theft of two laptops on 2.11.2015 while the Claimant was on guard and that the Claimant was to blame for the said theft. She has also failed to prove that another theft took place at the hotel in August 2015 while the Claimant was on duty and that he was responsible for the same. Finally she has failed to prove that the Claimant was generally a poor performer and negligent in his performance of his duty.

13. The foregoing observations are fortified by the fact that the police allegedly investigated the alleged theft of 2.11.2015 and failed to charge the Claimant with any offence. In addition, the Claimant's evidence that he was never served with any warning letter during his service has not been rebutted by the

defence. Finally, the Respondent has not produced any evidence in the form of performance appraisal to prove that the Claimant was a poor performer and negligent as alleged.

Procedure followed

14. Under section 41 of the Act, before terminating the employees services on ground of misconduct, poor performance or physical incapacity, the employer is required in mandatory terms to first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative 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 termination is decided.

15. The Claimant's evidence that he was not accorded fair hearing as contemplated by the said provision was not rebutted by the defence. The defence has not proved the place and the date when the hearing was accorded to the Claimant as alleged. The defence witnesses have also not even named the employee who accompanied the Claimant to the hearing and no minutes of the proceedings were produced as exhibits. Consequently, I find that the Respondent has failed to prove that she followed a fair procedure before terminating the Claimant's employment which in addition to the failure to prove a valid and fair reason for the termination, rendered the said termination unfair within the meaning of section 45 of the Act, and I so hold.

Reliefs

16. Under section 49 of the Act, I award him Kshs.10,000 and Kshs.60,000 being one month salary in lieu of notice plus 6 months' compensation for the unfair termination. In making the said award, I have considered the fact that the Claimant served the Respondent for a fairly short period and he did not contribute to the termination through proven misconduct.

17. The Claimant is further awarded Kshs.1,154 being the wages for work done from 17th to 19th November 2015 as prayed. He is further awarded Kshs.14,237 from 37 leave days as prayed and disproved by leave records. He will also get service pay at the rate of 15 days per completed year of service. He completed one year and as such, he will get Kshs.5,500.

18. The claim for over time has also not been contested and it is allowed as prayed. It has not been disputed that he was working from 6.00 p.m. to 6.00 a.m. He however worked for 22 months and hence 26 days x 4 hours x 22 months equals to 2288 hours overtime worked. The hourly pay was $Kshs.10,000/26 \times 8 = Kshs.48.10$ equaling to Kshs.110,000 as prayed. The claim for house allowance is however dismissed because he has not rebutted the defence evidence that he was provided with housing by the employer.

Disposition

19. I enter Judgment for the Claimant in the sum of Kshs.200,891 plus costs and interest. He will also be issued with a proper certificate of service as provided under section 51 of the Act.

Dated and signed at Nairobi this 23rd day of February, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 2nd day of March, 2018

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JUDGE