



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 561 OF 2014**

**JOHN MOKAYA MAIKO.....CLAIMANT**

**VERSUS**

**SECURITY GROUP (MSA) LIMITED.....RESPONDENTS**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair termination of the Claimant's employment contract by the Respondent on 31.7.2016. In total he claims Kshs.1,268,916 made up of two months' salary in lieu of notice, 12 months salary compensation for unfair termination, overtime worked and salary for 10 days worked in July 2014 but not paid.

2. The Respondent admits that she employed the Claimant until 31.7.2014 when she terminated his services on account of poor performance. She however denied the alleged unfair termination and averred that the Claimant was given an opportunity to participate in an interview before the termination and thereafter paid salary in lieu of notice plus terminal benefits. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 12.10.2017 when the Claimant testified as CW1 and the Respondent's HR Manager M/s Mary Kambi testified for the defence as RW1. Thereafter both parties filed written submissions which I have carefully considered herein.

**Claimant's Case**

4. CW1 testified that he joined the Respondent in February 1997 as a Security Guard and he was confirmed in July 1998. From 2009, he was promoted to Crew Commander and worked as such until 2011 when he became Acting Controller. In 2013 he was confirmed to the position of Controller earning a gross pay of Kshs.22,985 per month.

5. On 28.7.2014, he was served with a letter terminating his services effective 31.7.2014. The reason cited for the termination was poor performance. But he denied the same and contended that his performance was good and that is why he earned steady promotion since 1997 when he joined the Respondent as a Security Guard. He further contended that save for a warning letter second in 2006 and suspension in 2009 for sleeping on the job and failing to prevent a robbery by gun wielding robbers respectively, he never had any other indiscipline issues with the employer.

6. CW1 further explained that on 14.3.2014, he attended a meeting for Controllers called by the management to generally discuss challenges which were being faced by the Controllers. During the meeting, the management told them that their jobs will be advertised and they were welcome to apply. Thereafter the jobs were advertised but he refused to apply. However, like the other Controllers he was forced to do the interview on 20.6.2014. Thereafter new Controllers were employed and he was instructed that he should train them and after one month, he was terminated and paid accrued leave, one month salary in lieu of notice and service.

7. He contended that his termination was unfair because he was not a poor performer. He further contended that he was never served with any warning letter for the alleged poor performance and maintained that he was confirmed to the post of Controller on merits and he should not have been forced to do an interview after the confirmation a year earlier. He therefore prayed for compensation for unfair termination.

He also prayed for salary for 10 days worked between 21st – 31st of July 2014. He further prayed for overtime of 4 hours per day from 1997 to July 2014. He explained that unilaterally the employer was paying him a fixed overtime pay per month and not based actual hours worked.

8. On cross-examination, CW1 admitted that his salary was Kshs.22,985 inclusive of fixed overtime pay of Kshs.5,275 per month. He further

admitted that the said fixed overtime pay of Kshs.5,275 was provided for by the letter confirming him as Controller and he never rejected the same. He further admitted that when he attended the meeting of the Controllers on 14.3.2014, the management told them that there was a problem in their department and they should improve performance. He admitted that he said nothing in the meeting and also when their jobs were advertised, he never applied because he was already in the office. Lastly he admitted that after termination he found Kshs.214,225.85 in his bank account deposited as terminal dues by the Respondent but he maintained that the sum was not enough. He prayed for overtime of 4 hours per day from 1997 based on his salary as Controller.

### **Defence Case**

9. RW1 admitted that CW1 joined the Respondent as guard but rose through the ranks to become Controller on 1.12.2013. She clarified that before confirmation to the position of controller CW1 never did any interview but he was confirmed on merit after acting in that position from 19.7.2013. She further explained that in 2014 there was laxity among all the Controllers and clients started to complain about the poor performance.

10. To address the said problem, she called all Controllers to a meeting on 14.3.2014 to discuss their performance but the Claimant remained mute during the meeting. At the end of the meeting the Management told them that their jobs were to be advertised and they were free to apply.

11. The positions were advertised on 19.6.2014 and interviews were done on 28.6.2014. She confirmed that the Claimant never applied but he was invited for the interview but performed poorly. He was offered a lower position of Crew Commander but he refused. Thereafter he was terminated without notice but he was paid one month salary in lieu of notice based on the basic salary of Kshs.15,400.

12. RW1 further stated that the Claimant was paid gratuity at the rate of 18 days pay per year of service for the 17 years served. She further stated that the Claimant was paid for all his rest and public holidays worked, accrued leave and salary for July 2014. She denied the claim for overtime contending that he was getting a fixed overtime pay every month whether or not he worked.

13. On cross-examination, she admitted that the Claimant was terminated for poor performance and for not being cooperative. She further admitted that she did not serve the Claimant with any warning letter for the said offence as a Controller. She also admitted that she had no minutes for the meeting of 24.6.2014 which was referred to by the termination letter. She further admitted that the fixed overtime pay was decided by the management and it was paid whether or not the Claimant worked.

### **Analysis and Determination**

14. There is no dispute that the Claimant was employed by the Respondent as a Security Guard and rose through the ranks to become a Controller. There is also no dispute that his service was terminated by Respondent on 31.7.2014. The issues for determination herein are:

- (a) Whether the termination was unfair;
- (b) Whether the reliefs sought ought to be granted.

### **Unfair termination**

15. In this case, the termination was by the employer. Under section 45(2) of the Employment Act, termination of employment by the employer is unfair if he fails to prove that it was grounded on valid and fair reason(s) and that it was done after following a fair procedure.

### **Reason for termination**

16. The reason cited for the termination was poor performance. The letter dated 28.7.2014 stated as follows:

*“ further to our meeting on 14th March 2014 and 24th June 2014 in which the general performance of the Controllers was discussed, we regret to inform you that your performance has been below the required standards and the company can no longer retain you.*

*In view of the above, your services with the company have been terminated with effect from 31st July 2014. This is in accordance with the provisions of section 41(1) of the Employment Act”*

17. The letter talks of two meetings held on 14.3.2014 and 24.6.2014 to discuss general performance of Controllers. It then jumps to conclude that the Claimant's performance has been below standards. No evidence of such poor performance was adduced. The Claimant is just being condemned using general assessment of department. One would have expected the Respondent to avail warning letters and performance appraisal scores on the Claimant as an individual Controller but she did not. I therefore find that the Respondent has failed to prove on a balance of probability that the Claimant was performing his duties below the expected standards. He was excellent performer in December, 2013 and that is why he was confirmed to the position of Controller. The burden is upon the employer to prove that within 2 months the Claimant's performance went so low that he deserved a summary dismissal. Regrettably, that burden of proof has not been discharged as required by section 43 and section 47(5) of the Act.

### **Procedure followed**

18. In this case, the procedure followed was termination by a notice of 3 days and payment of one month salary in lieu of notice. That procedure was however not in accordance with section 45 and 41 of the Act and it rendered the termination of the Claimant's employment unfair. Section 41 of the Act requires in mandatory terms that, before the employer terminates the services of his employee on ground of misconduct, poor performance or physical incapacity, he shall 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 upon which termination is contemplated and thereafter invite the employee and his chosen companion a chance to air their representations for consideration before the termination is decided. The said mandatory procedure could not be substituted with the meetings allegedly held on 14/3/2014 and 24.6.2014 where general performance of controls department was discussed.

**Reliefs**

19. In view of the finding that the Respondent has failed to prove that the Claimant was a poor performer and that fair procedure was followed before the termination, I make declaration that the termination of the Claimant's services was unfair as prayed.

20. Under section 49 of the Act I award the Claimant Kshs.184,800 being 12 months gross salary compensation for unfair termination as prayed. I have awarded the maximum compensation considering the long period of service by the Claimant. The claim for one month salary in lieu of notice.

21. The claim for overtime is dismissed because it appears from the material presented to the Court that the parties had agreed on a fixed overtime pay of Kshs.5,275 per month whether the Claimant worked or not. It is therefore an after thought for the Claimant to claim overtime after 16 years and more so based on the latest salary.

22. Finally, I grant the claim for Kshs.7,000 being salary for 10 days as prayed because the defence failed to prove that it was paid to the Claimant.

**Disposition**

23. I enter judgment for the Claimant declaring his termination unfair and awarding him Kshs.184,000 plus costs and interest. The award is also subject to statutory declarations.

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

**ONESMUS MAKAU**

**JUDGE**

**Delivered at Mombasa this 2nd day of March, 2018**

**LINNET NDOLO**

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**JUDGE**