



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 551 OF 2016

JUSTUS MUKULU MUASYA.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 19.7.2016 claiming terminal benefits and compensation for unfair termination of his services by the Respondent on 28.1.2016. It is his case that the termination was rendered unfair by being done without prior notice, valid reason and following due process. In total he prays for Kshs.459,687.70.
2. The Respondent has denied the alleged unfair termination of the Claimant's services and averred that she summarily dismissed the Claimant after he refused to obey a lawful command to go on transfer. She averred that the dismissal was fair and procedurally done after according the Claimant a hearing. She therefore denied liability to pay compensation for the alleged wrongful termination.
3. The suit was heard on 27.3.2017 when the Claimant testified as CW1 and the Respondent called her Head of Guarding Mr. Mururu Kanja as RW1. Thereafter both parties filed written submission which I have carefully considered herein.

Claimant's Case

4. CW1 testified that he was employed by the Respondent on 3.3.1998 as a guard in Mombasa and worked for 18 years until 5.1.2016 when he was told to go on transfer at Thika but he refused to go because the transfer was made verbally. He was then served with a show cause letter dated 5.1.2016 which he responded to by his letter dated the same date. He cited the reasons for refusing the transfer as short notice of 4 days, Climatic reasons and little transfer allowance.
5. CW1 further testified that by letter dated 15.2.2016, he was invited to a disciplinary hearing which he attended and he was given a chance to explain the reasons for refusing the transfer to Thika. He was however served with dismissal letter dated 5.2.2016 citing the reason for the dismissal as refusing transfer without proper reason. He was not paid any terminal dues after the dismissal and therefore he instructed lawyer to serve demand letter and file this suit. He ended by praying for the reliefs sought in the suit being Kshs.472,303.
6. On cross-examination, CW1 confirmed that he refused to sign Transfer Dispatched dated 4.1.2016. He contended that the Climate in Thika is cold and it would make him sick but he availed no medical Report to that effect. He further contended that he was offered disturbance allowance of Kshs.7,500 but he was demanding Kshs.20,000 which was more than his salary. He admitted that the Transfer Dispatched proved that some off days would be arranged. He further admitted that he refused the transfer due to domestic reasons and also because it is the junior guards who should have been transferred and he be left working in the Backup vehicle he had been assigned at Changamwe. Finally he admitted that he was invited to the disciplinary with the option of being accompanied by another employee but he chose to go alone.

Defence Case

7. RW1 testified that in 2015 he was the Respondent's Manager in charge of Coast Region. He explained that their main client in Coast, Chai Trading Limited served letter dated 31.7.2015 giving 3 months' notice to terminate their Labour outsourcing contract. As a result many guards were to lose their jobs including the Claimant. Between November and December 2015, the Claimant was utilized in the Back up vehicle in Changamwe area. By end of December 2015, the Respondent's Head office send email saying that there was shortage of guards in Nairobi and Thika and as such the guards who where previously attached at Chai Trading Limited including CW1 were given transfers and paid transfer allowance.

8. RW1 gave the Claimant Transfer Dispatched dated 4.1.2016 but he refused to sign and wrote a letter dated 4.1.2016 citing domestic reasons and stating that it is the junior officers who ought to be transferred. RW1 explained that once a guard agrees to go on transfer an off duty is agreed depending on family needs but in this case, the Claimant did not agree. RW1 further explained that disturbance allowance is payable to all the employees depending on the work station that is Kshs.8,500 for cities and Kshs.7,050 for other areas in addition to transport cost. He contended that there was no good reason to give the Claimant special disturbance allowance.

9. RW1 denied that the Claimant was terminated on account of redundancy and maintained that the Respondent had work available for him in other stations. He further explained that after refusing the transfer, he served the Claimant with a show cause letter and later invited him to a disciplinary hearing. He concluded by stating that the reason given for refusing the transfer were not satisfactory and the Claimant was dismissed.

Analysis and determination

10. There is no dispute that the Claimant was employed by the Respondent as a guard for 18 years until 5.2.2016 when he was summarily dismissed. The issues for dismissal are:-

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

Unfair dismissal

11. Under section 45(2) of the Employment Act, termination of employment contract 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. In this case the reason cited for summary dismissal is failure to receive Transfer notice and subsequently failing to accept and sign the Transfer Dispatch/letter. According to the Respondent the said refusal to obey a lawful command, which is a misconduct warranting summarily dismissal under section 44(4)(e) of the Employment Act. The Claimant admitted the said refusal to sign and proceed to the transfer citing domestic and seniority as reasons for refusing the Transfer. In my view, such reasons were reasonably not valid to warrant refusal to go on transfer and the employer was entitled to summarily dismiss the Claimant as he did.

12. As regards the procedure, I find on a balance of probability that the procedure followed before dismissing the Claimant to be fair within the meaning of section 41 of the Act. He was given a show cause letter which he responded to in writing. Thereafter he was invited to a disciplinary hearing and given the chance of being accompanied by a fellow employee of his choice. He eventually attended the hearing which was also attended by 2 shop stewards and was accorded an opportunity to explain why he refused a lawful transfer. Thereafter his representations were considered but found to be unsatisfactory and a summary dismissal letter was issued outlining the benefits payable to him.

13. The foregoing procedure is on all fours with the mandatory procedure provided by section 41 of the Act which provides that before terminating an employee's service on ground of misconduct, poor performance or physical incapacity, the employer 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 for 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 Respondent having proved the reason for the termination and that fair procedure was followed, I find and hold that the termination was fair within the meaning of section 45 of the Act.

Reliefs

14. In view of the foregoing finding that the summary dismissal of Claimant was fair, I decline to award salary in lieu of notice and compensation for unfair termination under section 49 and 50 of the Act.

15. The claim for gratuity is also dismissed because the termination of the Claimant's services was through summary dismissal for a lawful cause and therefore he was disqualified from that benefit by dint of

Regulation 17(2) of The Regulation of Wages (Protective Security Services) order.

The said Regulation provides:

“(2) An employee who is summarily dismissed for lawful cause or who terminates his own services for reasons other than certified ill-health or retirement age shall not be entitled to gratuity.....”

16. The Claim for Kshs.1,380 for leave days for the year 2016 is also discussed for lack of particulars.

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Dispositi

17. For the various reasons stated above, the suit stands dismissed entirely with no order as to costs.

Dated and signed at Nairobi this 12th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

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JUDGE