

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 98 OF 2017

CHARLES KARIUKI MWANGI.....CLAIMANT

VERSUS

INTERSECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his termination in November 2016. He averred that he was employed by the Respondent as a security guard in July 2010 and worked at Gatitu Petrol Station. His service was without any incident or warning. He sought 1 month salary in lieu of notice, underpayment of wages from July 2010 up to November 2016, severance pay for 6 years worked, house allowance for 6 years worked at 15% of basic pay, annual leave for 6 years, off days for 6 years and salary for 12 months. To his claim he attached witness statements, a demand letter from the Transport & Allied Workers Union Kenya, bank statement from Equity Bank, letter from the Respondent to NSSF indicating the period the Claimant worked for it and his NSSF provisional statement.

2. The Respondent filed a defence on 7th September 2017 and in the defence averred that the Claimant was employed from 2010 and that he left in September 2010 and was again engaged by the Respondent from August 2012 till December 2016 when he left employment. The Respondent averred that the contract between it and a client NETCO was cancelled with immediate effect and the Claimant was requested through letter of 2nd December 2016 to report to the head office for redeployment. The Claimant failed to report to the head office for redeployment or inform the management of his whereabouts and his services were terminated for absence from duty. The Respondent submitted that under Section 44 of the Employment Act, the employer could terminate the services of an employee who without leave or lawful cause absents himself from the place appointed for the performance of his work. The Respondent averred that the Claimant cannot claim to have been unfairly dismissed when he did not present himself for deployment as directed by the Respondent. To the memo of defence, the Respondent attached the service contract with NETCO, email correspondence with NETCO, letter to Claimant inviting him to head office for redeployment, letter summoning the Claimant for disciplinary hearing for failing to show up for redeployment, letter of summary dismissal for failing to honour the call to report for deployment and failing to attend the disciplinary meeting.

3. The Claimant filed a reply to defence and stated that the Respondent did not send him any letter asking him to report for redeployment and averred that he went to Nairobi seeking to be redeployed and that the letters the Respondent had attached were misleading.

4. The Claimant testified on 31st January 2018 and stated that he was employed by the Respondent from 2010 till 2017 November and was dismissed through the phone. He stated that he was told not to report to work and was not given any reason for that directive and was advised to inform his colleague of the same. He testified that he was a night watchman and was like the supervisor and thus sought payment of notice for the unlawful dismissal, off days, gratuity and all the terminal dues. He stated that in 2010 he earned Kshs. 6,000/- which had been raised to 8,000/- at the time of dismissal. He testified there was no house allowance, no leave pay and no off days given. He denied ever refusing to be redeployed or reassigned. He stated that there was no truth in the allegations by the Respondent that he did not report for redeployment and he was never called to be transferred. The Respondent did not call any witness and indicated it would rely on the written submissions and the documents filed in the defence.

5. The Claimant's submissions were filed on 1st March 2018 while the Respondent's submissions were filed on 13th March 2018. In his submissions, the Claimant submitted that the issues that arose were whether the Claimant had engaged in gross misconduct justifying summary dismissal and what amount was payable to the Claimant as terminal dues. The Claimant submitted that all the documents the Respondent relied upon alleging that the Claimant was advised to proceed to Nairobi for deployment were not received by the Claimant; neither did he have knowledge of intention of the Respondent to deploy him. The Claimant was also not aware of any warnings and/or his being summoned for any disciplinary sittings. It was the Claimant's contention that it is only an afterthought after he sought recourse from this Honourable Court that the Respondent prepared the documents alleged to have been received by the Claimant which paved way for summary dismissal thus making it a lopsided approach to hoodwink this Honourable Court that due process was followed. He relied on the case of **Nicholas Otinyu Muruka v Equity Bank Ltd [2013] eKLR** where the court in considering whether or not there is gross misconduct expressed itself as follows: *"If the reasons for termination are not proved to amount to gross misconduct, then the application of section 41 of the Act will apply. Thus, disputes of summary dismissal will always be subjected to the test of section 41 of the Act whenever employees dispute and claim the circumstances of the case did not give themselves to reasons of gross misconduct. Accordingly, the court finds that employers cannot take the discretion to terminate contracts of service on account of gross misconduct in disregard of due process of notification and hearing under section 41 of the Act. To do so, such an employer must face the wrath and price of unfair determination.*

Under section 43 of the Act it was not the obligation of the Respondent to prove that the reason for terminating the employment of the Claimant amounted to gross misconduct. If the Respondent failed to discharge that obligation, the court will make a finding that the termination was unfair."

It was the Claimant's humble submission having had no knowledge of the Respondent's communications of intention to deploy him the

Respondent cannot then insist that he knowingly failed and/or refused to obey lawful and proper command. He argued that this therefore cannot form a ground for gross misconduct justifying summary dismissal and therefore the Respondent's allegation that there are lawful and justified grounds for dismissal should fail. The Claimant submitted that after being terminated on 2nd March 2017, he presented his complaint to the Transport and Allied Workers Union of Kenya which complaint was forwarded to the County Labour Officer Nyeri in terms of section 47 (1) of the Employment Act. The Respondent did not attend the consultation process and did not pay up the Claimant's dues despite request by the union. The Claimant submitted that during the course of his employment, while guarding Total Petrol Station (Gatitu) to the premises was robbed. He was arrested and charged with the offence of theft in the criminal case number 840 of 2011 and he was later acquitted of the charge and was reinstated as a night watchman in the same business premise. He submitted that however, doing dependency of the suit for approximately a year, the Respondent did not pay the Claimant his salary. The Claimant therefore sought his dues based on the Regulation of Wages (General) Amendment Order 2015 and stated that minimum wage applicable was Kshs. 11,330 and that he was entitled to payment of the difference between the amount paid and the minimum wage. He sought annual leave for a cumulative six years, off days which are inclusive of public holidays for six years and salary for 12 months. He also sought underpayment for six years. He submitted the termination did not comply with requirements of section 45 of the Act and that the remedy for wrongful dismissal and unlawful termination is provided in section 49(1)(c) of the Employment Act. He submitted that he was entitled to costs of the suit and judgment in his favour.

6. The Respondent submitted that it was not in dispute the Claimant was its employee and that what was disputed was his date of employment, the manner of his exit together with the terminal benefits payable if any. The Respondent analysed the evidence of the Claimant and stated that assuming the Claimant was never dismissed as he alleged not to have received any letter, the Claimant did not tell the court how he learnt of his dismissal. The Respondent submitted that the Claimant sought the intervention of the union and that it was the involvement of the union was only because the Claimant had a dismissal letter. The Respondent argued that the absence of the Claimant from his workplace was sufficient basis for his dismissal as his absence affected the Respondent's operations and it was necessary to take action to ensure the enterprise operated smoothly. The Respondent submitted the Claimant was not being sincere when you allege that he was unfairly dismissed. He was advised to proceed to the head office in Nairobi for redeployment which he failed to do. The Respondent submitted therefore Claimant is not entitled to the prayers sought in the claim and the suit should fail on that ground. The Respondent was of the view that the dismissal of the Claimant was lawful and within the parameters of natural justice. The Claimant cannot claim to have been unfairly dismissed when he was not present to explain to the Respondent the reason for his absence, nor provide the Respondent a justifiable explanation for the said absence. The Respondent submitted under the provisions of section 44 of the Employment Act, the absence was justifiable grounds for the dismissal. It submitted there was no proof that the Claimant was underpaid as no document was adduced in evidence such as gazette notice and that the Respondent could not defend such an amorphous claim in the absence of particulars. The Respondent submitted the court was left with only one option which was to reject the prayer. It was not submitted that there was no proof that the Claimant did not take annual leave as is there were no particulars provided leaving the Respondent at a loss as to how to respond to the claim on annual leave. The Respondent relied on the case of **Lamathe Hygiene Food v Wesley Patrick Simasi Wafula & 8 Others [2016] eKLR** where the Court of Appeal held that the evidentiary burden of proving the allegations in the claim rested with the respondents in that case. The Respondent also cited the case of **Fred Makori Ondari v The Management Committee of the Ministry of Works Sports Club [2013] eKLR** a decision by Rika J. on the absence of evidence to back the prayers in the claim. The Respondent urged the dismissal of the suit with costs.

7. The Claimant was an employee of the Respondent. He asserts that he was unlawfully dismissed from employment by the Respondent. The Respondent asserts that the Claimant absconded the place of work and was dismissed after failing to present himself for redeployment after the service contract at Gatitu came to an end. The Claimant pursued his claim for terminal dues from the Respondent by initially seeking the assistance of the Transport & Allied Workers Union which wrote a letter of demand on 24th February 2017 headed Termination of Charles Mwangi Kariuki – Night Watchman. The Claimant demanded payment of his dues which were enumerated in the letter indicating that the Claimant had worked for the Respondent from July 2010 till November 2016 when he was dismissed by the Respondent. The Respondent on its part asserts that the Claimant was summarily dismissed on 2nd March 2017 for failing to report to the Nairobi office for redeployment. Prior to dismissal the Claimant was allegedly served with letters inviting him for a disciplinary hearing in Nairobi after he failed to heed the request by the Respondent to appear for redeployment. It is clear the Claimant was dismissed by the Respondent. The Claimant claimed certain sums for leave, underpayment, severance pay for 6 years as well as house allowance and off days for 6 years. Under the Employment Act, the claims one can make are limited to 3 years. Half of his claim would by operation of law be statute barred and unrecoverable. The balance is in the nature of special damages and the same had to be pleaded with particularity and proved. No proof was laid before the Court on the sums claimed to be due. It is trite law that he who alleges must prove. The Claimant had the onus of proving on a balance of probabilities that there was no leave taken and that he was entitled to a higher salary. The claim therefore was not proved by the Claimant and his allegations remained just that, allegations. I will dismiss the suit for want of proof but I will make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 11th day of April 2018

Nzioki wa Makau

JUDGE