



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 300 OF 2016

LINUS IKABUTENI.....CLAIMANT

VS

EXCELLENT SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Linus Ikabuteni, the Claimant in this case, was an employee of Excellent Security Services Limited. He brought this claim following the termination of his employment on 2nd December 2015. The claim is contained in a Memorandum of Claim dated 12th April 2016 and filed in court on 13th April 2016.
2. The Respondent filed a Defence on 17th May 2016 but did not attend the trial in spite of due service. The Claimant testified on his own behalf and further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard from the year 2010. At the time of leaving employment, he earned a monthly salary of Kshs. 7,490.
4. The Claimant avers that on 14th November 2015, he sought and was granted leave to attend to an urgent personal matter in his rural home. Upon resuming duty on 2nd December 2015, he was informed that his services were no longer required.
5. The Claimant's case is that his employment was unlawfully terminated in that there was no reason for the termination and he was not given an opportunity to defend himself, prior to the termination.
6. The Claimant's claim is as follows:

- a) Salary in lieu of notice.....Kshs. 7,490
- b) Unpaid leave for 5 years.....37,450
- c) Severance pay for 5 years.....18,725
- d) Compensation for unfair termination
- e) Certificate of service
- f) Costs plus interest

The Respondent's Case

7. In its Defence dated 17th May 2016 and filed in court on even date, the Respondent denies that the Claimant was in gainful employment with itself as pleaded in the Memorandum of Claim.

8. The Respondent further denies unlawfully dismissing the Claimant who he accuses of deserting duty without lawful cause, thus leading to his summary dismissal.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

10. While denying the Claimant's claim of unlawful termination, the Respondent states that the Claimant himself deserted duty thus occasioning his summary dismissal. Desertion is a valid ground for dismissal but like all other grounds, it must be proved.

11. Jurisprudence emerging from this Court is to the effect that an employer relying on the ground of desertion must not only show attempts made to reach the deserting employee, but must also notify the employee that termination of employment on account of desertion is under consideration (see *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Tirus Kariuki Mungai v Postal Corporation of Kenya [2016] eKLR*).

12. The Court did not see any efforts made by the Respondent in this regard. The desertion line of defence is therefore rejected with the consequence that the Claimant's assertion of unlawful termination is admitted.

Remedies

13. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in effecting the termination. I further award the Claimant one (1) month's salary in lieu of notice in accordance with Section 35(1) of the Employment Act, 2007.

14. The Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed.

15. No basis was laid for the claim for severance pay which consequently fails and is dismissed.

16. Finally, I enter judgment in favour of the Claimant as follows:

- a) 6 months' salary in compensation.....Kshs. 44,940
 - b) 1 month's salary in lieu of notice.....7,490
 - c) Leave pay for 5 years (7,490/30x21x5).....26,215
- Total.....78,645**

17. This amount will attract interest at court rates from the date of judgment until payment in full.

18. The Claimant is also entitled to a certificate of service and costs of the case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MAY 2018

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JUDGE

Appearance:

Mrs. Kariuki for the Claimant

No appearance for the Respondent