



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 192 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**EVANS MAGERO CHUMA.....CLAIMANT**

*VERSUS*

**RILEY FALCON SECURITY SERVICES LIMITED....RESPONDENT**

**JUDGEMENT**

By a plaint dated 11<sup>th</sup> June 2015, the plaintiff avers that he was unfairly dismissed by the defendant and seeks the following remedies–

- a) A declaration that the plaintiff is still a legal employee of the defendant or in the alternative compensation for unfair dismissal.
- b) The immediate and full payment of the salaries inclusive of annual leave salaries since 2009 when he signed the contract, benefits currently outstanding and due to the plaintiff.
- c) An order for the immediate recall and reinstatement of the plaintiff to work.
- d) The costs of the suit.
- e) Interest on the above at court rates.
- f) Any other relief that the court may deem just and expedient to grant.

The respondent filed a reply to the plaint on 21<sup>st</sup> July 2015 denying all the allegations therein.

The case was heard *viva voce* on 14<sup>th</sup> June 2014. The claimant testified on his behalf and the respondent called one witness, Charles Amolo Mac Rege, its Assistant Operations Manager. The parties thereafter filed and exchanged written submissions.

**Claimant's Case**

The claimant testified that he was employed by the respondent as a Security Guard from 2009 to December 2014. As at 8<sup>th</sup> December 2014, he was deployed at Kenya Commercial Bank (KCB), Kisumu Branch.

On that day at around 6.30 p.m., the Operations Manager complained that the claimant had left the door open beyond operating hours. The Bank's Operations Manager reported the incident to the respondent. The following day, the claimant was swapped with the guard at the parking.

On 14<sup>th</sup> December 2014, he handed over to a new guard whom he had inducted from 9<sup>th</sup> December 2014, 14<sup>th</sup> December was a Sunday and was assigned to direct participants of Safaricom Marathon for that day. On 15<sup>th</sup> December 2014, he reported to the office, was called by the Operations Manager who directed the Human Resource Office to issue him with a notice for disciplinary hearing on 17<sup>th</sup> December 2014. After the hearing, he was issued with a letter of suspension for 14 days from 18<sup>th</sup> to 31<sup>st</sup> December 2014.

The following day on 18<sup>th</sup> December 2014, the Human Resource officer summoned him to the office where he was issued with another letter

cancelling the suspension, then sent to the Operations Manager. He was then assigned to work at the respondent's old office at Tom Mboya. After 30 minutes, he was re-assigned duties at United Mall where he worked until 26<sup>th</sup> December 2014, when his one-year contract was expiring. The Supervisor at United Mall instructed him to go to the office carrying his uniforms on 27<sup>th</sup> December 2014. At the office, the Operations Manager instructed the Storeman to receive the uniforms together with all other items issued to the claimant by the respondent. He was not told anything about renewal of his contract.

On 29<sup>th</sup> December 2014, he reported to the office where the Human Resource Officer sent him to see the Director. After explaining what had transpired to the Director, the Operations Manager was instructed to issue him with a last warning and a new contract. He then went home. When he reported to work on 30<sup>th</sup> December 2014, the Operations Manager dealt with all other guards but refused to see him and remarked that the claimant cannot work the way he wants. After that, the Operations Manager closed his office and left. The claimant waited outside the office until 5 pm but was never assigned any duties.

The following day he did not report to work, expecting to be called after being assigned duties. He went to the office to inquire about assignment after a week but nobody attended to him.

The claimant testified that he did not receive any letter of termination or a call to collect the letter of termination or to report to work. He prayed for compensation.

The claimant testified that he never took any annual leave but was given 4 days off every month.

Under cross-examination, the claimant testified that he originally worked on 3 months contracts until 2013 when he was issued with a one-year contract.

### **Respondent's Case**

Mr. Rege testified that the claimant was employed on 3 months contracts until 2013 when he was employed on a one-year contract. His last contract commenced on 26<sup>th</sup> December 2014. He testified that on 29<sup>th</sup> December 2014, there were instructions not to give the claimant any assignments after 29<sup>th</sup> December 2014. He testified that the claimant was assigned to Aga Khan Hospital and was supposed to report within 7 days and did not do so until he was dismissed. He testified that he personally called the claimant who was lobbying to be taken back to Kenya Commercial Bank.

Mr. Rege testified that the claimant was paid for leave days every three months together with salary.

Under cross-examination, Mr. Rege testified that the claimant received a final warning letter on 29<sup>th</sup> December 2014. He testified that a dispatch slip was issued to the claimant for deployment at Aga Khan Hospital but he did not have a copy of the dispatch slip which he was not able to prove was issued to the claimant. He testified the dismissal letter was posted to the claimant's last known address. He testified the claimant cleared in March 2015. He testified that as at 29<sup>th</sup> December 2014, the claimant was entitled to 21 days leave and his contract contained a clause for notice.

### **Claimant's Submissions**

The claimant submits that it is the onus of the respondent to prove justification for termination as provided in Section 47 (5) of the Employment Act. It is submitted that the respondent who failed to assign the claimant duties and the claimant was right in assuming that he would be called to report for duty once he had been assigned a new work station.

It is submitted that Section 44 (4) is subject to Section 41, 43 and 45 as was held in the case of **Pamela K. Butalanyi -vs- University Council for Kenya Polytechnic College, Cause 1601 of 2011**. The court held in that case that absence without permission constitutes misconduct for which an employee must be subjected to a disciplinary process.

The claimant further relied on the case of **Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited, Cause 435 of 2013** in which the Judge quoted the case of **Kenya Union of Commercial, Food and Allied Workers -vs- Meru North Farmers SACCO Limited, Cause 74 of 2013** in which the court held that whatever reason or reasons that caused the employer to terminate the employment of an employee the procedure outlined in Section 41 was mandatory. The claimant further relied on the case of **Evans Ochieng Oluoch -vs- Njimia Pharmaceuticals Limited, Cause 1401 of 2011** in which the court opined that desertion amounts to gross misconduct which must be proved. Similar decisions were made in **Geoffrey Mwingi -vs- Ruaken Investments Limited, Cause 1658 of 2012** and **SBI International Holdings Ag (Kenya) -vs- Amos Hadar, Cause 2435 of 2012**.

### **Respondent's Submissions**

For the respondent, it is submitted that Section 44 (4) (b) permits an employer to summarily dismiss an employee for absence without permission. It is submitted that the claimant did not report to his assignment at Aga Khan Hospital, leading to his dismissal.

### **Determination**

I have carefully considered the pleadings, viva voce evidence and the written submission. I have also carefully considered the authorities cited and the laws. The issues arising for determination are in my opinion the following –

1. Whether the claimant deserted duty.
2. Whether the respondent complied with due process in terminating the claimant's employment and
3. Whether the claimant is entitled to the prayers sought.

### **Desertion**

Desertion is provided for in Section 44 (4) (a) as follows

**“without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;”**

Desertion is also defined in Black's Law Dictionary, Ninth Edition as–

*“The wilful and unjustified abandonment of a person's duties or obligations, especially to military service or to a spouse or family.”*

In the present case, the claimant testified that first he was directed to return his uniforms, which he did. He further testified that the Operations Manager told him on 14<sup>th</sup> December 2014 “*Kuja haraka nikufunge*” and finally on 30<sup>th</sup> December 2014, the Operations Manager warned him “*Magero you cannot work the way you want*” before leaving and closing the office.

Throughout the claimant's and respondent's testimonies, it is apparent that there was a very structured communication system in the respondent's company. The claimant testified that on 30<sup>th</sup> December 2014, he waited outside the Operations Manager's office from morning to 5 pm before going home expecting to be called as soon as he had been assigned a new work station but this was never done. He again went to the office after one week but nobody attended to him. This does not reflect a wilful, unjustified abandonment of duty.

Mr. Rege testified that the claimant was assigned duty at Aga Khan Hospital where he did not report to. He however did not have any proof of the assignment or proof of communication of the assignment to the claimant. There is no letter informing the claimant to report to Aga Khan Hospital at all.

I find no proof of desertion of duty by the claimant.

### **Fair Termination**

Fair termination is provided for in Sections 41, 43 and 45. Under Section 41, an employee must be given a hearing before termination. In the present case, I have already found that there was no desertion of duty. However before the respondent summarily dismissed the claimant for desertion, he was not subjected to a hearing. There was no attempt to give the claimant a hearing, as was done earlier when he was accused of not performing his duties properly at KCB.

As was stated in the case of **Evans Ochieng Oluoch -vs- Njimia Pharmaceuticals Limited and Kenya Union of Commercial, Food and Allied Workers -vs- Meru North Farmers SACCO Limited**, an employee must be given a hearing for whatever reason the employer contemplates termination as outlined in the mandatory provisions of Section 41 of the Employment Act.

In the present case, there was no hearing and there is no proof of desertion. The claimant was not even issued with a letter of termination making the termination of his employment both procedurally and substantively unfair and I find and hold accordingly.

### **Remedies**

The claimant prayed for a declaration that he is still a legal employee of the respondent or in the alternative compensation for unfair dismissal. The claimant cannot be deemed to be still an employee of the respondent. After surrendering his uniforms and failure to assign him duties by the respondent, it was obvious that his employment had been terminated as I have already held. The fact that he cleared with the respondent means he also deemed his employment to have been terminated.

The claimant further prayed for compensation. Taking into account his length of service and the manner in which his employment was terminated as well as all other factors set out in Section 49 (4), it is my opinion that compensation equivalent to 6 months' salary is reasonable. I therefore award him compensation in the sum of Kshs.84,691.20 equivalent to 6 months' gross salary.

The claimant further prayed for immediate payment of salaries since 2009 inclusive of benefits. This has not been expounded. The claimant testified under cross-examination that he was paid full salary for the period he was in employment. I find no basis for award of this prayer and dismiss the same.

The claimant prayed for one year's gross salary. This is a duplication of compensation, which I have already awarded him.

The claimant further prayed for recall and/or reinstatement. As pointed out by the respondent, reinstatement is only available in exceptional circumstances, which the claimant has not proved. In any event, in his testimony the claimant stated he wished to be compensated. He did not seek reinstatement.

I find that there is no justification for the grant of the prayer for reinstatement and decline to grant the same.

The claimant further sought payment of benefits outstanding, which in the submissions has been stated to include notice. The letter of summary dismissal states the claimant would be paid final dues upon clearance. The respondent did not prepare the final dues upon clearance even though Mr. Rege testified that the claimant cleared in March 2015. He however admitted that the claimant was entitled to leave of 21 days.

In accordance with Section 24 of the Employment Act, terminal benefits would constitute the minimum basic terms of employment as set out under the law. For the private security industry, the Regulation of Wages (Protective Security Services) Order provides for annual leave at the rate of 26 days a year and gratuity at 18 days per year worked where the employee has worked for a minimum of 5 years which the claimant had completed having been in continuous employment from 2009 to December 2014 according to the testimony of the respondent's witness Mr. Rege.

I therefore award the claimant shs.8,270 being 26 days annual leave based on his last basic salary of shs.9,542 and gratuity at shs.28,626 also based on his last basic salary. He is also entitled to one month's gross salary in lieu of notice which I award him at Kshs.11,394/=.

The respondent shall also pay the claimants costs of this suit and the decretal sum shall attract interest at court rates from date of judgment.

### **Conclusion**

In conclusion, I declare the summary dismissal of the claimant by the respondent unfair and enter judgment for the claimant against the respondent in the total sum of **Kshs.132,981.20/=** with costs and interest.

**DATED AND SIGNED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**