



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1679 OF 2014

PETER OMONDI..... CLAIMANT

- VERSUS -

G4S KENYA LIMITED.....1ST RESPONDENT

DOMINIC NGUGI.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 31st July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 26.09.2014 through Wesonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. One month salary in lieu of notice Kshs.31, 623.54.
- b. Pay in lieu of leave for 2014 Kshs.31, 623.54.
- c. Gratuity or service pay at 30% for the 14 years worked Kshs. 1, 593, 826.40.
- d. Damages for unfair termination for 12 months Kshs. 379, 482.48.
- e. Damages for defamation.

The statement of response was filed on 25.11.2014 through Hamilton Harrison & Mathews Advocates. The respondent prayed that the claim be dismissed with costs.

It is not in dispute that the claimant was the respondent's employee from May 1999 and he was dismissed from employment on 21.08.2014. It is further not in dispute that prior to the dismissal the claimant had a clean record of service and discharged his duties in accordance with his contract of service.

On 15.08.2014 the claimant was suspended from duty pending investigations. The circumstances of the suspension were stated thus, **"You were night team leader Airport District on 2nd August 2014 when vitafoam Masai road was broken into by criminals and 80 drums of chemicals stolen. Later it was established that the assignment was under deployed with one guard on that previous night (2nd August 2013). It was also established that you removed the regular guard and took him to another assignment leaving the reliever guard to work alone that night. Surprisingly the suspects who attacked the day officers on 3rd August 2014 at around 0650 hours and managed to steal the chemicals were hiding in one of the structures inside the premises. This concludes that the criminals were opened the gate by one of the guards and aided with accommodation while waiting to attack the premises. It is also not clear why you decided to pick the regular guard and allow reliever guard to work alone."**

The claimant was dismissed from employment by the letter dated 21.08.2014 on account of failing to ensure adequate deployment of security officers at vita foam on the night of 2nd /3rd August 2014 as per the Service Level Agreement between the respondent and the client; and redeploying the regular guard for vita foam from his regular assignment to another without informing the management leading to loss of customer's property.

The **1st issue** for determination is whether the termination of the claimant's contract of service was unfair. The evidence is that the theft occurred on the morning of 03.08.2014 when the claimant and his team had already checked out from the assignment of the night of 02.08.2014. The day guard who took over on the morning of 03.08.2014 stated in his statement that he took over after patrolling with the

night officer and confirming that everything was in order. There was a shortage of guards on the night of 02.08.2014 but it was the testimony on record that the claimant notified the manager about failure of one of the guards reporting that evening for the night duty but the respondent failed to provide an extra guard. The Court follows the holding about employer's deficiency in operational requirements or systems and policies in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus, **“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”**

In the present case the respondent failed to provide an extra night guard for the night assignment at vita foam despite the claimant reporting that one of the expected night guard had failed to report. The deficiency in the deployment of the night guards that night cannot therefore be visited upon the claimant with adverse consequences.

Further, as there was no theft on the night of 02.08.2014 and the evidence being that the theft in issue occurred on the morning Of 03.08.2014, the claimant could not be culpable of the theft and the ft cannot be attributed to the deficiency of the night guards because they night team supervised by the claimant had checked out after handing over and after patrolling the entire premises. The Court returns that as at the time of the termination the respondent has failed to show that the termination was genuine as provided for in section 43 of the Employment Act, 2007.

There is no dispute that the claimant had a clean record of service throughout his service with the claimant shown by the promotions he had earned himself. Further the claimant did not contribute to his termination. The Court has considered the aggravating factor that the claimant was in the process arrested upon the respondent’s complaint to the police and returns that the claimant will be awarded the maximum 12 months compensation under section 49 of the Act making **Kshs.379, 482.00** as claimed and prayed for. The claimant is also entitled to **Kshs. 31, 623.54** being one month notice in lieu of the notice of termination.

The evidence was that the claimant was terminated on 21.08.2014. His evidence was that he took leave in April. Thus he had served only 4 months since his last leave in the previous April 2014 and pro-rate per section 28 of the Act, he is awarded leave for only 8 months making **Kshs. 2, 391. 20** for annual leave due but not taken and as submitted for the respondent based on a monthly basic pay of Kshs 11, 957.00 for 12 days of leave accrued by August 2014.

The court has considered the submissions on the fictitious prayer for exemplary damages based on the respondent’s casual, reckless and callous manner ion dealing with the claimant’s issue. The Court returns that the same has already been considered in awarding maximum compensation under section 49 of the Act and the prayer is not justified. As submitted for the respondent it is paramount that the prayer was not pleaded and it must fail as the respondent is prejudiced. It will fail.

As submitted for the respondent, there were no submissions for the claimant on the claim of defamation and the prayer for damages in that respect. The Court finds that the claim and prayer is deemed abandoned and is declined.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The respondent to pay the claimant a sum of **Kshs. 413, 496.74** by 01.10.2018 failing interest to be payable thereon from the date of the judgment till full payment.
- b. The respondent to pay the claimant’s costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Tuesday 31st July, 2018.**

BYRAM ONGAYA

JUDGE