



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1169 OF 2014

BERNARD KHABUCHI CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED RESPONDENT

JUDGEMENT

1. The claimant pleaded that on or about 5th October, 2004 he was employed by the respondent as a guard at a monthly salary of Kshs 7,488/= which was later increased to Kshs 8,463/=. He averred that for the period 2004 to 2006 he was never issued with a contract of employment. Between April, 2006 to September, 2010 the claimant was issued with a yearly contract of service.

2. On 4th September, 2011, the claimant pleaded that he was arrested and arraigned in Makadara Law court in Criminal Case No 4232 of 2011. The case proceeded to hearing and on 16th September, 2013 the claimant was acquitted of the charges. After completion of this case the claimant averred he was neither assigned any duties nor paid any salary. The claimant consequently on February, 2014 tendered his resignation and was paid Kshs 17,705/= as terminal dues for the 10 years worked.

3. The respondent on its part pleaded that the claimant was employed as a casual on 1st October, 2004 and his employment converted to renewable annual contract on 17th February, 2005. On 20th August, 2011 whilst in the course of employment, the claimant was arrested with others following theft at his duty station. The claimant did not report to work after his arrest and subsequent release on bond and by a letter dated 15th September, 2011 the respondent was constrained to suspend the claimant from employment pending investigations into the theft.

4. On 16th September, 2013 the complainant withdrew the criminal case but the claimant neither reported to work after the acquittal nor did he notify the respondent of the same until 11th February, 2014 when by a letter of even date the claimant notified the respondent of the criminal case and voluntarily resigned for payment of his terminal dues. According to the respondent, the claimant was paid the salary for September, 2011 as part of his terminal dues.

5. In his oral evidence the claimant reiterated the averments in the claim and further stated that the criminal case lasted for 36 months and that after being charged he was refused work and put on suspension pending the outcome of the criminal case. He further stated that he was never paid during the suspension and that the suspension was for 36 months. He admitted being paid Kshs 17,000/= as terminal dues. According to him, he worked for 9 years and 4 months.

6. In cross-examination, he stated that he went to the respondent several times after being in court but was never allocated work. He was issued with a suspension letter which stated he should not be paid during suspension. After the termination of the criminal case, he went to the respondent several times seeking reinstatement but without success. He therefore wrote a letter of resignation. The letter was written 6 months after the case was finalized.

7. Respondent's witness Mr Denis Micheka stated that the claimant's salary for September 2011 was paid to the claimant. He further stated that the claimant was in police custody and was unable to work during the period. According to him, the criminal case ended on 16th September, 2013 and the claimant ought to have made himself available for duties but he came after five months. According to him, the claimant said he had no interest in continuing to work for the respondent. He denied the claimant was forced to resign.

8. In cross-examination he stated that the claimant was arrested and was in custody hence was unavailable for duties. He further stated that the suspension was on account of the claimant being in custody following an incident at his duty station. He stated that the claimant was not supposed to earn any salary until the criminal case was finalized. He further stated that the claimant never told them he was out on bail.

9. The suspension letter dated 13th September, 2012 informed the claimant that as a result of this arrest and being put in police custody he

was not to earn any salary until the case was finalized and that the claimant would not be required to report on duty but should leave his contact for any communication.

10. The claimant herein was released from custody around 9th September, 2011. His suspension was done on 15th September, 2011. He was not required to report to work until the criminal case was concluded. The claimant's contract does not make any provision for suspension. The claimant however obliged to the suspension. The respondent does not in the circumstances seem honest to claim that the claimant absconded duties upon arrest. The fact that the respondent knew the claimant was undergoing prosecution and over which he was suspended, the respondent had a duty to follow up the case and get to know the progress thereof.

11. The court therefore seem more inclined to believe the claimant's version that upon his acquittal he returned to the respondent who refused to allocate him duties making him to despair and resign. The court in the circumstance considers the claimant's resignation as constructive dismissal and orders compensation as follows:

i. Salary for September 2011 13,014.72

ii. Salary during suspension 468,529.92

iii. Seven months salary as

compensation for unfair dismissal 91,103.04

572,648.00

iv . Costs of the suit.

12. Items (a), (b) and (c) shall be less terminal dues already paid and subject to tax.

13. It is so ordered.

Dated at Nairobi this 6th day of July, 2018

Abuodha Jorum Nelson

Judge

Delivered this 6th day of July, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.