



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 3 OF 2016
BETWEEN
DAN EBUKORO JUMA.....CLAIMANT
VERSUS
BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Chala & Company Advocates for the Claimant

MM Kimuli & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 4th January 2016. He states he was employed by the Respondent Company as a Security Guard, on or about 30th December 2011. His contract was terminated by the Respondent on 23rd December 2015, over an allegation that there was a theft incident at the premises the Claimant was assigned guarding duties, on 7th December 2015. The Claimant was arrested by the Police, investigated and absolved of the allegation. Termination was without notice, and the Claimant was not granted a hearing before termination. He prays for Judgment against the Respondent on the following terms:-

- a) 2 months' salary in lieu of notice at Kshs. 42,000.
 - b) Annual leave over a period of 4 years at Kshs. 84,000.
 - c) Gratuity over a period of 4 years at Kshs. 54,000.
 - d) 12 months' salary in compensation for unfair termination at Kshs. 252,000.
 - e) Severance pay at Kshs. 42,000.
 - f) Underpayment of salary at Kshs. 470,000.
 - g) House allowance at Kshs. 144,000.
 - h) December 2015 salary at Kshs. 21,000.
- Total...Kshs. 1,109,400.
- i) Certificate of Service.

j) General Damages for loss of earnings.

k) Costs.

l) Interest.

m) Any other relief.

2. The Respondent filed its Statement of Response on 18th February 2016. It is accepted that the Respondent employed the Claimant as a Security Guard on 27th December 2011. He was a Dog Handler. He left work on 8th December 2015. He worked for about 4 years. His last basic monthly salary was Kshs. 10,500. He was on duty at the assigned premises on the night of 7th and 8th December 2015 when theft took place. It is not true that the Claimant was arrested by the Police. However, the Respondent reported the matter to the Police. After investigations, the Respondent issued the Claimant a written warning against laxity at work. The Claimant deserted after receiving the warning. His contract was not terminated by the Respondent as alleged. The claim that he was not heard, or given notice before termination is misplaced, as the Respondent did not terminate his contract. He took annual leave for 2 years. He was enlisted to the N.S.S.F and is not entitled to gratuity/ severance. He was paid his full salary, and his claim for underpayment has no merit. He was paid a consolidated salary. The Respondent states that the Claimant did not return his uniform and guarding tools, valued at Kshs. 10,000. He did not give notice of termination of his contract to the Respondent. The Respondent counterclaims that the Claimant is ordered to return Respondent's property; alternatively, he pays the value of the property to the Respondent at Kshs. 10,000; and pays 1 month salary in lieu of notice at Kshs. 10,500. The Respondent prays that the Claim is dismissed, the Counterclaim allowed, with costs to the Respondent.

3. The Claimant gave evidence, and closed his case, on 13th October 2016. Respondent's Branch Manager, Bernard Kyengo Kawea, gave evidence for the Respondent on 17th March 2017 and on 26th September 2017, when hearing closed. The matter was last mentioned in Court on 19th March 2018 when Parties confirmed filing of their Closing Submissions.

4. The Claimant confirmed the averments of his Statement of Claim, on his employment history with the Respondent, and his terms and conditions of service. His salary was Kshs. 10,500 up to October 2015. In November 2015 it was raised to Kshs. 11,200 monthly, which was the applicable rate by the time he left employment.

5. He was not paid house allowance. He did not go on annual leave. He did not receive notice, or pay in lieu of notice. He was arrested and detained at the Police Station on 10th December 2015. He was released and told to report back on 18th December 2015. He did so and was advised by the Police there was no evidence against him linking him to the offence. He was told by the Respondent to report to work on 21st December 2015. He did so, and worked up to 23rd December 2015. On this date he was told by a Supervisor that he had been sacked. Another Guard had been assigned Claimant's duties. He did not receive the warning letter of 9th December 2015. He was at the time, in Police custody. It is not true that he deserted after receiving the warning letter. He was not heard, or given notice.

6. Cross-examined, the Claimant told the Court that termination was for no reason. He was replaced with another Guard at his assigned place of work, Tononoka Petrol Station. The Claimant had recently been moved from Kengen Kipevu premises, where theft is alleged to have taken place. He called his Supervisor and was advised to leave. Branch Manager said theft occurred on the night of 7th / 8th December 2015. The Claimant was questioned by the Police and the Employer. It was concluded he should go back to work. It was alleged by the Respondent, that the Claimant explained to the Respondent, that the dog he was handling had slept throughout the incident. The Claimant was to be surcharged Kshs. 6,000 for loss occasioned to the Client by the incident. He did not know why he was not paid salary for December 2015. His contract indicated salary paid was all inclusive. The pay slip stated it was basic. The Claimant returned his tools of trade. He did not return the boots as he had paid for them. He was a member of the N.S.S.F. He did not go on leave for 4 years. The Counterclaim has no merit.

7. Branch Manager Kawea confirmed the Claimant was employed by the Respondent between 27th December 2011 and 8th December 2015. Thugs penetrated Kengen premises at Kipevu in Changamwe, Mombasa, and made away with 8 kilograms of copper wire. Electric fence was cut. The Guard, who took over shift from the Claimant in the morning of 8th December 2015, did not find the Claimant at the site. This was unusual. Kawea called the Claimant to the site. The Claimant stated he was not aware of the incident which took place under his watch. The Claimant was arrested on 9th December 2015. He was not arraigned in Court because the Respondent paid to the Client Kshs. 8,000 for stolen copper wire. The Respondent's Head Office decided to recover Kshs. 8,000 and Kshs. 4,000 being the cost of repairing the electric fence, from the 2 Guards who were implicated. The total amount of Kshs. 12,000 was to be recovered in equal sums of Kshs. 6,000 from the Claimant and his Colleague, on duty on the night breach took place. This was to be done by way of surcharge on the Guards' December salaries. Kawea did know if the decision was implemented. The Claimant disappeared after this. He was unavailable for redeployment. He was not kicked out by the Respondent. He had been issued with a warning order. There was a letter to the Claimant, informing him about the surcharge. He was not told that his contract had been terminated. He earned a basic salary of Kshs. 10,500 and dog handling allowance of Kshs. 700- total Kshs. 11,200. His salary for December 2015 was put on hold because he had not cleared with the Respondent. He went on annual leave as shown in Respondent's bundle of documents. He did not return Respondent's kits. He does not deserve even a single penny from the Respondent.

8. Cross-examined, the Witness told the Court the Claimant was paid Kshs. 11,200 as of the date he left employment, which included Kshs. 700 for dog handling. His salary was consolidated. Kawea was not able to say what the housing element was, without consulting his Human Resources Department. The Respondent looked for the Claimant after he deserted. He kept saying he would report back to work, but never did.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Security Guard/ Dog Handler, on 27th December 2011, and left employment in controversial circumstances, in December 2015. He worked for 4 years. His last salary was Kshs. 11,200, which comprised Kshs. 10,500 as basic salary, and Kshs. 700 as dog-handling allowance.

10. On the night of 7th/8th December 2015, thugs penetrated Kengen premises at Changamwe, and made away with 8 kilograms of copper wire. They accessed the premises by cutting through the electric fence. The Claimant, and another Guard, had been assigned duty at the premises.

11. Investigation revealed the Claimant was not alert, and shifted blame to his dog, which he claimed, had slept throughout the incident. The alarm was activated, but the Claimant explained he never heard the alarm, which logically would confirm he was fast asleep or chose not to act on hearing the alarm.

12. Copper worth Kshs. 8,000 was stolen. Damage to the fence cost Kshs. 4,000 to repair. There is evidence that the Respondent did not terminate the Claimant's contract. He was advised in a letter dated 9th December 2015, that he would be surcharged for the loss, to the amount of Kshs. 6,000. His Colleague would bear the burden of surcharge for a similar amount. This would be done from the Claimant's and his Colleague's December salary. The Claimant was warned that should he repeat the offence in the future, severe disciplinary action would be taken against him.

13. The Court does not find persuasion in the Claimant's position that he was told not to report to work by the Respondent. Why would the Respondent do this, after issuing warning on 9th December 2015? The most likely scenario is that the Claimant did not report to work after being warned and advised he would be surcharged for the loss occasioned by his negligent performance of duty.

14. The Respondent took a disciplinary measure by warning the Claimant and surcharging him. There was justification in doing so. Hearing under Section 41 of the Employment Act is required only when the Employer is considering termination. It was not necessary in the circumstances, as the Respondent did not contemplate termination, and only issued a warning and an order for surcharge. There is no merit to the argument by the Claimant, that he was denied a fair hearing. The prayers for compensation and notice pay are declined.

15. The Respondent exhibited Claimant's Annual Leave Application Form dated 25th June 2013. Balance of Annual Leave is indicated as 'nil' after the Claimant had taken 25 days which he had applied for. The Respondent did not however exhibit any records on leave, with regard to the year 2014 and 2015. **He is granted the minimum statutory 42 days of annual leave, over a period of 2 years, which translates to annual leave pay of Kshs. 18,092.**

16. The Claim for underpayment of salary is unsupported. The Claimant did not state by what amount his salary was underpaid, what he ought to have been earning, and justify his argument based on any wage instrument. He simply pleaded certain figures, without saying what wage instrument the figures are based on. The prayer is rejected.

17. His salary was Kshs. 11,200 monthly. The Respondent prepared a pay slip for days worked in December 2015, but has not paid the indicated sum, on the ground that the Claimant has not cleared with the Respondent. The reason given for withholding of salary is not persuasive, because the Respondent was in a position to counterclaim anything owed by the Claimant to the Respondent as at the time the Claimant left employment, as confirmed by the Respondent's counterclaim filed herein. **The Respondent shall pay to the Claimant December salary, at Kshs. 6,300.**

18. There is no foundation to the prayers for severance pay, gratuity and general damages for loss of earnings. The Claimant did not leave employment on redundancy. He was subscribed to the N.S.S.F. He did not refer to any clause in his contract, or CBA, affording him gratuity. Loss of earnings on termination of employment is redressed through a grant of compensation, not through a separate award of general damages. These prayers have no merit and are declined.

19. Section 31 of the Employment Act compels an Employer, to, at his own expense, provide reasonable housing accommodation for his Employee, at or near the place of work. Alternatively, the Employer shall pay to the Employee sufficient sum as rent, in addition to the salary or wages of the Employee, which will enable the Employee to obtain reasonable accommodation.

20. The contract signed between the Parties under 'remuneration' clause states that the Claimant would be paid basic salary 'all-inclusive.' Basic pay cannot be all-inclusive. It can only be basic. Pay slips on record show the Claimant was paid a basic salary of Kshs. 10,500. It was explained by the Respondent that the Claimant was also paid Kshs.700 allowance for dog handling bringing his gross pay to Kshs. 11,200. There was no provision for housing. It is not reflected in the pay slips. **The Court grants the prayer for house rent allowance at 15% of the Claimant's basic pay at Kshs. 1,575 monthly, for 48 months, at Kshs. 75,600.**

21. **Certificate of Service to issue.**

22. The Respondent did not give sufficient details to prove that the Claimant did not return Respondent's property, whose value is given at Kshs. 10,000. There was no demand made on the Claimant to return such items, prior to the filing of the Counterclaim. The Claimant testified he returned a whistle and sweater on 1st November 2015 because another Guard needed them. The Claimant only needed his dog and an overall. He did not return his boots; he had paid for the pair. The sole Witness for the Respondent did not adequately rebut Claimant's evidence on return of the tools of trade. The Counterclaim for return of items, or payment of Kshs. 10,000, is declined.

23. The Court has concluded that the Claimant left employment of his own volition. Termination was not at the instance of the Respondent. He did not give notice to the Respondent. **The Claimant shall pay to the Respondent, 1 month basic salary in lieu of notice at Kshs. 10,500 as prayed.**

24. No order on the costs.

25. *Interest granted to the Claimant at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED: -

a) The Respondent shall pay to the Claimant annual leave pay at Kshs. 18,092; December 2015 salary for days worked at Kshs. 6,300; and arrears of house rent allowance at Kshs. 75,600 – total Kshs. 99,992.

b) The Counterclaim on notice pay is allowed at Kshs. 10,500, with the result that upon offsetting of obligations under this Judgment, the Respondent shall pay to the Claimant a total sum of Kshs. 89,492.

c) Certificate of Service to issue.

d) Interest granted to the Claimant at 14% per annum from the date of Judgment, till payment is made in full.

e) No order on the costs.

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge