



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 21 OF 2013

ELPHAS OMONDI OTIENO.....CLAIMANT

VERSUS

G4 SECURITY SERVICES KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 9.1.2013 seeking terminal benefits plus compensation for unfair termination of his employment contract by the respondent on 11.7.2011. It is his case that he was terminated for no justifiable reason and without being accorded any hearing.

2. The respondent has denied the alleged unfair termination and averred that she dismissed the claimant for absencing himself from work without cause from 28.6.2011. She further averred that under Regulation 17 of the Regulation of Wages (Protective Services) order, an employee who is dismissed from service for a lawful cause, like the claimant, is not entitled to gratuity. She therefore prayed for the suit to be dismissed with costs.

3. The issues for determination herein are whether the termination of the claimant's contract of service was unfair and whether he is entitled to the reliefs sought. The case was heard on 3.5.2017 and 2.5.2018 when the claimant testified as Cw1 and the respondent called her Security Operations Manager who testified as Rw1. Thereafter both parties filed written submissions.

Claimants Case

4. Cw1 stated that he was employed by the respondent on 30.11.2002 as a Security Guard earning Kshs.15,490 per month. He worked well until 13.6.2011 when he was involved in a Road Traffic accident while on his way to work and was taken to hospital, treated and discharged.

5. On 14.6.2011, Cw1 went to the respondent's office and he was assigned duty as standby guard but his supervisor advised him to apply for transfer from guarding to Escort section. He wrote the application for transfer on 5.7.2011 and it was approved the same day by the HR Manager. He was also given a transfer letter to take to the Manager of the Escort Section who told him to keep checking for area assignment. He contended that he went to see the said Manager 5 times until 10.7.2011 when the Manager of the Guarding Section told him to return his uniform and company property on allegation that he had absconded duty. Thereafter he was given termination letter dated 11.7.2011 without any prior notice of one month as provided in his contract or without being accorded any disciplinary hearing to defend himself. After the termination, he was not paid anything.

6. On cross examination Cw1 contended that on 13.6.2011 he was involved in an accident and from 14.6.2011 to 28.6.2011 he was standby day guard. Thereafter he was assigned day guard duties along Kitsuru Road until 4.7.2011. On 5.7.2011, he was on off duty and that is when he presented his application for transfer to Escort Section to the HR Manager M/s Agnetor who gave him a complementary slip to take to the Escort Section Manager. Thereafter he was dismissed and cleared with the respondent but he was not paid any dues. He admitted that he was a member of NSSF and that he had secured another job in 2017. He denied that he stayed at home waiting for the transfer.

Defence Case

7. Rw1 testified that in June 2011 he was District Manager Operation Department and the Liaison officer between the respondent and her clients. He was also in charge of employees in Runda Area and the Claimant was reporting to him. He confirmed that the claimant was employed by the respondent in 2002 as a security Guard. He contended that the claimant worked upto 28.6.2011 and absconded duty. He tried to reach him through the area supervisor without success until 5.7.2011 when showed up in the office with a letter requesting for a transfer from guarding department to Alarm Response Department. He approved the request for interdepartmental transfer by endorsing on the application letter on the same day the claimant took the letter back to the HR Manager. Thereafter the claimant never reported back to

work but he was not aware whether the Alarms department approved the transfer. He however maintained that the claimant was supposed to continue in the guarding department until he was given a transfer letter but he absconded forcing him to look for another ground to guard from 28.6.2018 to 5.7.2011. Thereafter the claimant was served with termination without being accorded any hearing because he was away and only came to pick the letter from the HR Manager. He admitted that he never asked the claimant where he was. He also admitted that he never knew where the claimant was. He further admitted that the total pay for the claimant in May 2011 was Kshs.15,490.

8. On cross examination Rw1 admitted that the claimant worked for the respondent for 8 years and his salary at the time of dismissal was Kshs.15,490 per month. He further admitted that the claimant was a permanent employee and he was dismissed for desertion. He further admitted that the claimant was never served with a show cause letter or invited to disciplinary hearing before the dismissal. He also admitted that no terminal dues were paid to the claimant after the dismissal. He maintained that he was not aware of the claimant's accident on 13.6.2011 but contended that the claimant sought transfer to Alarms Department on grounds of career and personal growth. He admitted that approved the transfer despite the claimant's absence from work from 28.6.2011 to 5.7.2011. He concluded by admitting that he had nothing to prove that the claimant was absent from 28.6.2011.

Analysis and Determination Whether the termination was unfair

9. Under section 45 of the Employment Act termination of employment contract of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason cited for the termination was absence from work without permission from 28.6.2011 till 11.7.2011 when the dismissal letter was written. The claimant has denied the alleged misconduct and contended that he was transferred to a new department on 5.7.2011 but continued as stand by guard while awaiting for assignment in the new department until he received the dismissal letter on 11.7.2011.

10. After careful consideration of the evidence before me, I find that the respondent has discharged the burden of proving the reason for the termination. According to Rw1, the claimant disappeared from his guarding duties from 27.6.2011 and continued after the approval for interdepartmental transfer was given to him on 5.7.2011 but before a formal transfer letter was issued to him. On the other hand, the claimant has failed to discharge the burden of proving that he had the permission to be away from work or that he was indeed attending work. He has failed to produce evidence or call witness to confirm that he was attending work or he had permission to be away. Consequently, I find and hold that the respondent has proved that the termination of the claimant's contract of service was for a valid and fair reason because under section 44(4) (a) of the Act, absence from work without leave or just cause entitles the employer to dismiss the employee summarily.

11. However, the respondent has failed to prove that the termination was done after following a fair procedure. Under section 41 of the Act, before terminating the contract of service of an employee on account of misconduct, poor performance or physical incapacity, the employer must explain the reason for which termination is being considered. The said explanation must be in a language of the employee's understanding and in the presence of another employee or shop floor union representative of his choice, and thereafter the employee and the companion are entitled to a chance to air defence for consideration before the termination is decided. The said provision is couched in mandatory terms but Rw1 admitted that the claimant was not given such hearing before the termination. He alleged that the reason for not according the hearing is because the claimant was away and he tried in vain to reach him through the area supervisor. The said supervisor was not called as a witness. I therefore find and hold that the termination of the claimant's service by the letter dated 11.7.2011 was unfair within the meaning of section 45 of the Act because it was done without complying with section 41 of Act.

Reliefs

12. Under section 49 of the Act, I award the claimant Kshs.15,490 being one month salary in lieu of notice plus Kshs.123,920, being 8 months' salary compensation for unfair termination. In awarding the said compensation, I have considered his long service of 8 years and also the fact that he contributed to the termination through misconduct.

13. The claim for service pay is however dismissed because the claimant admitted that he was a contributing member of the NSSF and by dint of Section 35(6) of the Act, he is disqualified from that benefit.

Conclusion and Disposition

14. For the reasons that the termination of the claimants contract of service was unfair, I enter judgment for him in the sum of Kshs.139,410 plus costs and interest from the date hereof less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of August, 2018

ONESMUS N. MAKAU

JUDGE