



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT ELDORET**  
**CAUSE NO.74 OF 2017**

**JACOB JUMA MAKOKHA.....CLAIMANT**

**VERSUS**

**RADAR security (K) LIMITED.....RESPONDENT**

**JUDGEMENT**

On 15<sup>TH</sup> May, 2017 the Claimant filed Memorandum of Claim against the respondent company. The claim is that on 1<sup>st</sup> January, 2013 the claimant was orally employed by the respondent as a Security Guard at a wage of Kshs.13, 000.00 per month and which excluded his house allowance. The wage was increased regularly. At the time of termination of employment the claimant was earning Kshs.16, 227.00 per month but exclusive of house allowance.

On 8<sup>th</sup> August, 2016 the claimant was terminated in his employment with the respondent on allegations of theft of scrap metal but there was no proof. The oral termination of employment was illegal; unfair and violated sections 41(1), 44(4), 45 (2) and 43 of the Employment Act, 2007. The respondent failed to discharge its obligations imposed in law to ensure the claimant was issued with notice, was given a hearing and that termination of employment was with valid reasons. It lacked fairness.

The claimant is seeking the following;

- a) *Notice pay inclusive of house allowances Kshs.18,660.05;*
- b) *Compensation Kshs.223,932.60;*
- c) *House allowances unpaid 2013 to 2016 kshs.84,160.00;*
- d) *Service pay Kshs.24,340.50;*
- e) *Overtime Kshs.22,869.33;*
- f) *Leave Kshs.4,667.00; and*
- g) *costs*

The claimant testified in support of his claims. Upon employment, the claimant was placed at various sites and the last was at Raiply where he would work from 6pm to 6am. On 5<sup>th</sup> August, 2016 the claimant was called to the office and sent away. The next day he was informed to wait for two months but there was no communication. No reason was given as to why the claimant was sent away.

The claimant also testified that upon employment he was not issued with a written contract and his salary was paid without a house allowance. Despite long work hours no overtime allowances were paid. He took one (1) rest day per week.

Upon cross-examination the claimant testified that on 8<sup>th</sup> September, 2016 he was called to the office by Mr Hussein and dismissed from work. He was told not to report back to work at his site. No reason was given. Pharis Wanjala had been the supervisor and did not find the claimant stealing anything and the alleged scrap metal the property of Raiply was not true. There was no arrest or criminal charge. The claimant did not run away from work as alleged and if such allegations existed, there was no hearing for the claimant to defend himself.

Defence

In response, the respondent's case is that on 1<sup>st</sup> February, 2013 the claimant was employed as a casual employee and paid kshs.13, 000.00 per month and which was increased to Kshs.16, 227.00 per month. The claimant was caught stealing scrap metal from the premises he was supposed to be guarding. On being caught the claimant managed to escape and was never heard until the filing of this suit.

The defence is also that the respondent is ware of employment laws and their application but was not able to apply the same on the claimant as he vanished from work without trace. The respondent has a disciplinary mechanism in place and in cases which warrant summary dismissal, due process is applied. The claims made by the claimant are without merit and should be dismissed as there was no termination of employment.

In evidence the respondent called 3 witnesses.

Pharis Wanjala Simiyu testified that he worked with the claimant as a supervisor. On 8<sup>th</sup> August, 2016 he reported to work at 1745 hours for the night duty shift at Raiply

Factory Woods Limited as being part of the 3 supervisors, he would patrol on assignment to monitor guard's alertness. At 00300 hours while on patrol along the perimeter wall where the claimant was guarding he saw a person standing on top of a drum next to the wall. The person was trying to lift luggage that was in a sack/ he approached the person and established it was the claimant and upon opening the sack, he found scrap metal belonging to the client company, Raiply. There were two sacks in total.

Mr Simiyu also testified that the claimant pleaded with him not to report the matter as he had taken a loan from the respondent and the little left was not enough to sustain his needs and needed to sell the scrap metal to make ends meet. He called his fellow supervisors to be witnesses and detained the claimant but at 0415 hours when the gate was being opened for Mr Hussein to get into the premises, the claimant dashed off and run away.

The other witness was Samuel Omari Onguko who worked with the claimant as a supervisor and testified that he was called by Mr Simiyu to witness the claimant and things stolen from the company he was guarding. He confirmed what was in the sacks and the claimant was left at the guard house to wait for the manager but he escaped as the gates were being opened. Had the claimant waited, he would have been taken through a hearing and pardoned as the respondent required his services and the stolen goods had been recovered. The claimant however opted to run away and avoid justice in his case.

The other witness was Mr Abdullah Hussein, Branch Manager of the respondent and who testified that on the material night he was called by his supervisors in the field after they found the claimant with stolen goods belonging to Raiply. There had been complaints by the client that there were metal rods and bars for electricity poles disappearing and had asked the respondent company to be keen. When the claimant was caught he had such metal rods and bars but before anything could be done, he run away. This matter was reported to the client but they opted not to make criminal charges as the stolen goods had been recovered. Had the claimant not disappeared, the disciplinary mechanisms would have been applied; there is provision for a warning before termination of employment. Efforts to reach the claimant by phone were fruitless.

At the close of the hearing both parties filed written submissions.

The claimant submits that his employment was wrongly and unfairly terminated by the respondent over allegations of theft. Such allegations are not true and such was not subjected to proper hearing. There is no report that was made to the police. There is no link between the claimant and the alleged theft. The claims made are due. The claimant relied on the case of **Walter Ogal Anuro versus Teachers Service Commission [2013] eKLR**; and **Alphonse Machanga Mwachaya versus Operation 680 Limited [2013] eKLR**.

The respondent submits that the claimant initiated the summary dismissal by his own conduct for the reasons that he was guilty of misconduct and his absence from work followed his theft and when apprehended by his supervisor he disappeared. Section 47(5) of the Employment Act, 2007 requires an employee alleging unfair dismissal to prove the same whereas the employer has the burden to prove the same was justified. In this case, the claimant by his own conduct was in breach of his employment duties and by escaping upon being caught, he avoided due process. There was a genuine and valid reason which existed at the time to show misconduct on the part of the claimant and in accordance with section 43(3) of the Act, termination of employment was justified.

The respondent in submissions relied on the cases of **Central News Agency (Pty) versus CCAWUSA & Another [1991] 12 ILJ (LAC)**; **Nzoia Sugar Company Ltd versus Collinsus Faugututi, Civil Appeal No.7 of 1987**.

### **Determination**

The claimant asserts that he was orally employed and without a contract and was equally terminated orally without any notice, hearing or reasons being given. The claimant attached his payment statements for various months and therein is a gross wage

The respondent on their part have attached an employment contract signed by the claimant and that he was caught with stolen goods but escaped before due process could be carried out. Efforts to have the claimant heard and his case addressed have been fruitless and have thus not been issued with a letter terminating employment.

The relevant law that deals with unfair termination is the Employment Act. In regard to the burden of proof, the following provisions from section 43 and 47(5) of the Act are pertinent;

#### *43. Proof of reason for termination*

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the*

termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

...

47. *Complaint of summary dismissal and unfair termination (5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of the employment or wrongful dismissal shall rest on the employer.*

The claimant having denied, the reasons given for his dismissal, discharged his obligation under **Section 47(5)** of the Act by laying the basis for his claim that an unfair termination of employment had occurred. This brought into play **Section 43(1)** and **47(5)** of the Act that places the burden upon the employer to prove the alleged reasons for termination of the claimant's' employment, and justify the grounds for the termination of the employment.

Under **Section 43(2)** of the Act,

*43(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

The evidence before court is that the claimant while on duty was caught by his supervisor stealing scrap metal belonging to a client and who had raised concerns that its property and scrap metal and rods were being lost and had urged the respondent to be keen on the same as the company offering security services. The subject of theft by the claimant is not challenged in a material way. His case is that even where there was the alleged theft, he was not arrested or charged with criminal misconduct. That the client, Raiply never lodged a complaint of theft with the police and he was not given a hearing where such allegations existed.

However, workplace misconduct, where it results in the inclusion of third party proceedings such as criminal charges with the police must first or also be addressed through the internal disciplinary mechanisms of the employer. Section 44(4) of the Employment Act, 2007 gives the employer the parameters within which to address such misconduct as an employee caught stealing or with stolen goods.

Section 41(2) of the Act requires the employer to give the employee a hearing on short notice. The proceedings in such a forum are not equivalent to those before a criminal court as held in **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR**

*... indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.*

The respondent called three (3) witnesses setting out the circumstances leading to the claimant leaving his employment. Such evidence was not challenged to the extent that the claimant was caught with a sack of scrap metal and was placed in the guard room to await the manager and who would address the matter. However, when the gates were opened the claimant escaped never to be seen. I take this evidence as true. It was confirmed by 3 employees of the respondent.

However, the respondent has submitted a written contract of employment issued to the claimant. Therein are details as to his address, P.O. Box 17 Funyula. Where indeed the claimant escaped and disappeared from work and having committed gross acts of misconduct and compromising his work with the respondent, then the purpose and subject of his contract demanded that he be recalled back to work for disciplinary action. Where the respondent left the claimant at large, such compromised any defence the respondent may have had in law that the claimant abandoned his duties and escaped. To leave the claimant at large after committing the acts alleged is to fail to meet the requisite threshold set in law under section 41 of the Employment Act, 2007.

The above addressed In the case of **Naqvi Syed Qmar versus Paramount Bank Limited & another [2015] eKLR** the court held that;

*... Where an Employer suspects the Employee of stealing; or where the Employee carelessly and improperly performs his role; the Employer has the right to summarily dismiss the Employee under Section 44 [4] of the Employment Act 2007. The 1<sup>st</sup> Respondent is a Bank, and the industry correctly demands Employees of the Banks, are imbued with a high degree of trust and confidence.*

Employee employed in a bank, such required a high degree of trust and confidence. Just like in the role of a Security Guard, where one is given the responsibility and duty to guard property, to enter therein and engage in acts contrary to what is expected of a security guard would be to lose the trust and confidence of the client and the employer. To award the claimant under section 49 of the Employment Act, 2007 with compensation would be to reward gross misconduct. Such would not be in the interests of justice and good order. As the remedy of unfair termination must put into account the provisions of section 45(5) (5) (b) (b) of the Act in that the conduct and capability of the employee up to the date of termination becomes material. No compensation is awarded in this case.

Despite the findings above, where termination of employment is not procedural, notice pay is due. based on the wage orders and wage due to the claimant, notice pay is herein awarded at Kshs.16, 227.00.

On the claim for house allowances, the pay statement issued to the claimant sets out a gross wage. Despite the contract of employment not

setting out the wage to be paid, by application of the wage guidelines, the respondent paid the minimum wage. On this basis the claims for house allowances are not due. the claimant was dully compensated for his labours.

Service pay is claimed on the basis the claimant was in employment for 3 years. The pay statement sets out the statutory dues paid for the claimant. The claimant has not made any submissions with regard to any other private treaty, collective agreement or provisions on terms and conditions where such benefit accrued outside the provisions of section 35 of the Act. Such service pay claim is not justified.

On the claims for overtime pay, the basis is that the claimant worked for 2 hours each day for 7 days each week. In evidence, the claimant testified that he was at work for 12 hours each day and took a day of rest each week. The computation of such overtime for 7 days each week is erroneous and premised on contradictory evidence.

The respondent has not submitted the work records with regard to the claimant's hours of work. I take it had these records been availed to the court, a proper and correct assessment should have been done. It is however not lost to the court on the circumstances leading to the claimant's leaving his employment. The events leading to the same was a gross misconduct of theft and I take it the claimant has not returned back to the respondent for fear of the repercussions. It has since been established that the client, Raiply does not wish to prefer any criminal charges as its goods were recovered and never left its premises.

The claimant should therefore return back to the respondent, undertake clearance and his due overtime computed and be paid within 30 days. Such will be addressed in the context of the work records held by the respondent.

Leave is a right due under section 28 of the Employment Act, 2007. Without any record that the claimant took his annual leave, he is awarded Kshs.4, 667.00.

**Accordingly and noting the above findings, the claimant is warded notice pay Kshs.16, 277.00 and leave pay due Kshs.4, 667.00. Owing overtime payments shall be computed based on the work records and within 30 days from the date hereof and upon the claimant undertaking clearance with the respondent. Each party shall pay own costs.**

Delivered in open court at Eldoret this 26<sup>th</sup> day of September, 2018.

**M. MBARU JUDGE**

In the presence of:

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