



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**SUIT NO. 246 OF 2017**

**JOSEPH KORIR.....CLAIMANT**

**VERSUS**

**RACE GUARDS LIMITED.....RESPONDENT**

**JUDGMENT**

1. In this suit, the Claimant sued the Respondent for the verbal termination of his contract of service on 1<sup>st</sup> August 2016. His supervisor one Mr. Irungu did this without any prior warning or notice. The Claimant averred that he was not issued with a notice to show cause prior to the termination. The Claimant in his amended claim therefore sought compensation, outstanding benefits under the pension scheme rules, one month salary in lieu of notice Kshs. 7,150/- as well as costs of the suit.

2. The Respondent averred that the Claimant absented himself from work by deserting duty from 31<sup>st</sup> July 2017 of his own volition notwithstanding the Respondent never officially intended and/or communicated the termination of the Claimant's services. The Respondent denied that the Claimant sought annual leave. It was averred that the Claimant did not serve a notice of resignation nor return the Respondent's property issued to him or clear with the Respondent. The Respondent denied that it was obligated to make good the claim or any sum at all and denied any demand or notice of intention to sue was issued. The Respondent averred that the suit was vexatious and an abuse of the court process fit for dismissal with punitive costs assessed on the higher scale.

3. The Claimant testified that he was employed by the Respondent as a security guard and was terminated verbally by the supervisor known as Irungu in August 2016. He stated that the termination was without notice and was on grounds that the assignment was over. In cross examination, he testified that he was with other employees when they were notified of the termination and that he called the Nairobi office and spoke to someone but did not go to the office. He was not given notice and when pressed about calling Nairobi he stated that he was in the office of the manager named Cyrus and was told to go to Nairobi. He confirmed that he had not mentioned Cyrus in previous statements made. He was surprised by the suggestion that the Respondent tried to look for him as the Respondent has his number.

4. The Respondent called 2 witnesses. Paul Ngei Ndolo testified that he was the general manager of the Respondent and stated that he knew the Claimant who was an employee of the Respondent from 2012 till 2015 at the Nyeri branch. He testified that the Claimant guarded boosters and cables for Telkom (K) and that when the contract ended in 2015, the Claimant was paid his terminal dues. He stated the Claimant was not dismissed and that the Respondent did not refuse to pay the Claimant his terminal dues and the failure to pay was because the Claimant never went to the Respondent's office. He said the Claimant's certificate of service was at the office uncollected and if the Claimant went there they would give it to him.

5. In cross-examination, he testified that the Claimant had been given some work on contract basis and he had a contract which expired. The Claimant did not go to the office after the expiry of the contract. He maintained that the Claimant was not dismissed. He did not produce the employment records. He stated that it was a security firm and they did not know the Claimant would not come. The Claimant was not given a show cause letter and they did not reach a point of dismissal as he had only absconded. They did not write to him as his phone was off. In re-exam he testified that they did not know where to reach the Claimant as his phone was off.

6. The second witness for the defence was Daniel Munguti. He stated that he was the operations manager at the Respondent and he knew the Claimant who was their former employee at Nyeri. He had been employed from 1<sup>st</sup> September 2012 and the Claimant no longer worked for the Respondent as he had not been seen at work from 1<sup>st</sup> August. He testified that the Claimant's colleagues had been given their certificates of service and paid their dues.

7. In cross-examination he stated that the Claimant did not report to work and the Claimant was called through the senior guard who said the Claimant could not be reached on phone. He testified that he did not call him to collect the certificate but for his absence. In re-exam, he testified that the certificate of service was signed on 31<sup>st</sup> December 2016 and the Claimant was called but for other reasons he had not collected his certificate of service.

8. That marked the end of oral testimony and the Claimant was to file submissions within 14 days and the Respondent had a corresponding period to file theirs. Only the Claimant filed written submissions and in his submissions he stated that the Respondent pleaded that the Claimant had absented himself from duty on 31<sup>st</sup> July 2016 while in oral testimony they stated the Claimant had absented himself from work and was untraceable. The Claimant submitted that the duty of proving the existence of a contract is imposed on the employer. The Claimant cited Section 10(7) of the Employment Act and submitted that he was on an indefinite contract of service. The Claimant submitted that the Respondent's witness testimony was at variance with its pleadings contrary to the requirements of Order 2 Rule 6 of the Civil Procedure Rules. It was submitted that the Respondent alleged absenteeism from work yet there was no show cause notice issued or disciplinary proceedings undertaken. The Claimant submitted that the procedural fairness envisaged by the Employment Act Section 43 was lacking. It was submitted that the Claimant was entitled to the maximum compensation under Section 49(1)(c) having worked for the Respondent from 1<sup>st</sup> August 2012 to 1<sup>st</sup> August 2016 a period of 4 years. He thus sought leave pay for the year 2016 a fact that was not disputed by the Respondent. It was submitted that the provisions of Section 73 of the Employment Act impose a duty on the employer to keep records and none was availed to show the Claimant had gone on leave in 2016.

9. The Claimant is alleged to have absconded from work while alleges he was unfairly dismissed. The Respondent is obligated under Section 73 of the Employment Act to keep employee records. The employer has to maintain these records for purposes of record and in this case no record was availed to indicate that the Claimant absconded from work or that he took his 2016 leave which was claimed. The witnesses for the Respondent indicated that they attempted to reach the Claimant through the supervisor at Nyeri. No effort was made to write a letter to the Claimant and that somewhat sullies the argument by the Respondent that it made all effort to trace the Claimant to no avail. No documents other than the NHIF and NSSF remittances for some months in 2015 and 2016 were presented. The purported certificate of service issued did not have an end date of the Claimant's service. It indicated that the Claimant was employed from 1<sup>st</sup> September 2012 till some unknown date in 2016. It was purportedly issued on 31<sup>st</sup> December 2016. It was not delivered to the Claimant or his lawyers upon demand being made for his terminal dues. His terminal dues were not paid as confirmed by the 2 defence witnesses.

10. The Claimant's contract of service came to an end abruptly as no prior notice was given. In light of Section 43 of the Employment Act, it was incumbent for the employer to show the reasons for the termination and none was availed. The termination of the Claimant's contract of service is therefore unfair and unlawful in the circumstances. The Claimant was entitled to notice as well as payment of his terminal dues. He was entitled to leave for 2016 which leave is not shown to have been taken. He therefore is entitled to the following in this award:-

- a. One month's salary in lieu of notice Kshs. 7,150/-
- b. Salary in lieu of leave earned but not taken Kshs. 7,150/-
- c. Maximum compensation for unlawful dismissal Kshs. 85,800/-
- d. Certificate of service in terms of Section 51 of the Employment Act.
- e. Costs of the suit
- f. Interest on the sums in (a), (b) and (c) above at court rates from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 26<sup>th</sup> day of September 2018**

**Nzioki wa Makau**

**JUDGE**