



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 283 OF 204

(Before Hon. Lady Justice Maureen Onyango)

GEORGE ISAAC ODESSY.....CLAIMANT

VERSUS

RILEY SERVICES LIMITED.....RESPONDENT

JUDGMENT

The claimant was employed by the respondent, a private security company, as a security guard on 18th November 2005. Initially he was engaged on casual basis before being confirmed. He worked for the respondent until 3rd July 2013 when his employment was terminated.

The reason for termination was that on the night of 1st/2nd January 2013 while the claimant was at work as a night guard at Institute of Advanced Technology (IAT) thieves broke into the office and stole twenty one (21) monitors, twelve (12) CPUs, one (1) PC “42” inch LCD and one (1) PC “50” inch LCD all valued at Kshs.11,246,014.95 the property of IAT.

He was arrested together with three other colleagues who were on night duty with him and locked up at Kasarani Police Station on 2nd February 2018. He was charged at Makadara Magistrate Court with the offence of housebreaking, denied the charge and was remanded in prison as he was unable to raise cash bail/bond until on 10th June 2013 when he was released on cash bail of Kshs.30,000. On 17th June 2013, he reported to the office and was directed to go back on 19th June 2013 when he recorded a statement.

He was again directed to report to the office on 21st June 2013 when he was directed to report on 3rd July 2013. He was issued with a letter of termination of his employment contract on 3rd July 2013.

According to the claimant the termination of his employment was unfair for the following reasons –

- (a) No charges were framed up against the Claimant in the form of a notice to show cause inviting the Claimant to respond and answer them.
- (b) No disciplinary hearing was scheduled and conducted as envisaged in the law before the decision to terminate was arrived at.
- (c) The contents of the termination letter allude to a case of theft at the place of work which was the subject of an instituted criminal case in a court of law which case was yet to be determined and yet the Respondents based on the same claim to terminate the claimant without the conclusion of a lawful and constitutionally recognized judicial process before making a decision on the culpability of the complainant as to form a basis for his termination or reinstatement to his duties as is the norm in the current societal dispensation in Kenya.
- (d) In the circumstances the Respondents condemned the Claimant on account of unproven criminal charges and therefore exposed him to extreme double jeopardy.

In his testimony, the claimant stated that he was manning the gate and did not hear anything. He testified that he handed over to the day guard in the morning but was called back at around 8 am and taken to the police station. He stated that one of the night guards did not report back to work when they were recalled and absconded duty thereafter. He further testified that the thieves gained entry by drilling a wall through the stonewall fence which was about 300 meters from the gate which he was manning. He denied any involvement in the theft.

For the respondent it is contended that the termination of the claimant’s employment was fair, that the claimant was given a hearing before termination of his employment contract and there was valid reason for the termination.

The claimant testified on his behalf at the hearing while the respondent called one witness MARY WEBUYE, the Human Resource Officer who relied on records as she was not working in the same position at the time material to this suit, though she joined the employment of the respondent in 1992.

Determination

I have considered the pleadings, evidence and submissions filed by the parties. The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the remedies sought.

Fair Termination

Fair termination as provided for under Sections 41, 43 and 45 which entail both fair procedure and valid reason for termination.

In the present case the reason for termination is stated in the letter of termination as follows –

“Our Ref. RSL/HR/RD/11189/12

3rd July 2013

George Isaac Odessy

P. O Box 484

LUANDA

Dear Sir

RE: TERMINATION

On 1st January 2013, while assigned duties as a night guard at IAT Kasarani, twenty one (21) monitors, twelve (12) C.P.Us, 1 pc "42" inch LCD and 1 pc "50" inch LCD totalling to Kshs.1,246,014.95 went missing.

Our investigations into the matter reveal that the client's perimeter wall was-drilled and doors broken resulting into the theft of the above items.

You were later arrested on the 2nd January, 2013 and taken to Kasarani police station where you were detained until 4th January, 2013 when you were arraigned in Makadara Law Courts and charged with breaking into a building and committing a felony.

You were further remanded at Industrial Area Remand Prison until 10th June 2013 when you were released on a cash bail of Kshs.30,000. The case is still pending in court.

Following the above incident, among other factors, our client, IAT has terminated its services with us.

Your services have subsequently been terminated with effect from 1st July, 2013 in accordance with Part VI, Section 35, 1 (c) of the Employment Act 2007.

You are required to return all company property in your possession upon which your dues shall be paid to you as follows:

- 1. Days worked*
- 2. One month notice*
- 3. Leave days accrued if an/*
- 4. Uniform refund as appropriate*
- Less*
- 5. Loans and advances if any*

We take this opportunity to thank you for your services to the company and wish you well in your future endeavours.

Yours Faithfully

RILEY SERVICES LIMITED

SIGNED

J. N. MUSOMBA

DIRECTOR OPERATIONS AND ADMIN

It is not clear from the letter whether the reason for termination was the theft, the arrest and charges preferred against the claimant, the remand or the termination of the IAT contract.

On procedure, the respondent has submitted hand written minutes of a meeting held on 26th June 2013. The minutes do not reflect what charges were preferred against the claimant or the evidence adduced against him. The minutes states what the claimant stated, observations and conclusion. In the observations, what is stated is a restatement of what the claimant stated.

It is further observed that –

“The dog handler failed to report back to the assignment and has since deserted duties.

The perimeter wall was drilled and considering that the wall is made of stone, there had to be effort put in by the thieves to enable them to do the drilling.”

In the recommendations it is stated that –

“Following the magnitude of this incident and the fact that the items lost were many, it is an incident that could have been noticed on time and prevented. The guards on duty were evidently negligent in the performance of their duties, which resulted into the loss of these items. I therefore recommend the termination of this guard’s services.”

There is no evidence that the claimant was notified prior to the disciplinary hearing of the date of the hearing and the charges against him. Although the minutes indicate that there was an employee representative, it is not indicated that the claimant was the one who went to the disciplinary hearing with the representative. The minutes further reflect that the claimant appeared before the Human Resource Officer and not a disciplinary committee.

In his evidence, the claimant denied attending a disciplinary hearing. He stated that he was only asked questions which he responded to and that there was no pre-arranged hearing. The fact that the claimant was terminated and not dismissed means he was not guilty of gross misconduct.

From the foregoing I find that there was no hearing as envisaged under Section 41 of the Employment Act. I further find that the claimant was never informed of reasons for which he was terminated. The termination was therefore unfair in terms of Section 45(2) of the Employment Act and I declare accordingly.

Remedies

Upon termination of his employment the claimant was paid salary for 32 days worked, outstanding leave, one month’s salary in lieu of notice and three months’ uniform refund in the sum of Kshs.1,500 instead of Kshs.5,500 as stated at paragraph 3.2 of his contract. No mention was made about the difference of Kshs.4,000.

Having been unfairly terminated and taking into account both the circumstances under which the claimant was terminated and his length of service of eight years, I award the claimant eight months’ salary as compensation in the sum of Kshs.95,544.

Under the Regulation of Wages (Protective Security Services) Order, the claimant is entitled to gratuity of 18 days per year worked in the sum of Kshs.66,148.80 which I award him under the provisions of Section 26(2) of the Employment Act and Section 49(1)(b) of the Labour Institutions Act.

Conclusion

In conclusion I declare the termination of the claimant’s employment by the respondent unfair and award him the following –

- 1... Uniform refund Kshs.4,000.00
- 2... Compensation Kshs.95,544.00
- 3... Gratuity Kshs.66,148.80

Total Kshs.165,692.80

- 4... The respondent shall pay claimant’s costs.

5... Decretal sum shall attract t interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018

MAUREEN ONYANGO

JUDGE