



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.432 OF2016

RICHARD KIBET YEGON.....CLAIMANT

VERSUS

AGVENTURE LTD.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent company as a Watchman from

December, 2011 and paid a wage of Kshs.11, 016.00 per month. On 14th June, 2016 the claimant was terminated in his employment without notice, reasons or a hearing.

2. The claim is that the claimant was at work from 5am to 7pm, a period of 14 hours at work for 7 days each week and was not compensated for the overtime work. Upon termination of employment the claimant was not paid in lieu of notice or for the unfair termination of his employment. There was no payment to NSSF as required in law for several months in 2011, 2012, 2014 and 2014. No annual leave was allocated or paid. The due house allowance was never paid during the entire duration of employment.

3. The claimant is seeking the following;

a) One month notice pay Kshs.8,921.13;

b) NSSF contributions Kshs.10,800.00;

c) House allowances Kshs.99,080.00;

d) Compensations at Kshs.132,192.00;

e) Costs

4. The claimant testified in support of his case.

5. Upon employment of the claimant on 1st December, 2011 he was paid Kshs.7, 157.00 per month without provision for housing or allowance thereof. The claimant

worked until 14th June, 2016 which was his rest day and when the manager called him, Mr Giles Littlewood and advised him that his employment had been terminated. There was no notice or reason(s) given. The claimant was then issued with a letter stating that he would be paid Kshs.23, 691.47 as terminal dues.

6. The claimant also testified that his work hours were 6pm to 6am all 12 hours' work each day.

7. The claimant also testified that some of his NSSF dues were not submitted and should be paid to him.

8. The claimant took his annual leave in the year 2015. In the year 2012, 2013, and 2014 he did not take leave and there was no payment in lieu thereof.

9. The respondent failed to issue notice before termination of employment or give reasons thereof which amounted to unfair termination of employment. Compensation is due.

10. Upon cross-examination, the claimant testified that he was issued with a contract of employment stating that he would be paid a gross salary. The payment statement noted he had a basic wage and a bonus each month. No house allowance was paid.

11. The claimant also testified that in the year 2014 he took leave for 2 weeks. On 14th June, 2016 he was on his off day and was to resume duty on 17th June, 2016.

The claimant also testified that in March, 2016 he took his annual leave.

Defence

12. In response, the respondent's case is that they employed the claimant as a security officer in January, 2012 following an interview conducted in December, 2011 and worked commenced in January, 2012 until 14th June, 2016. The salary was reviewed annually. The claimant began at a gross wage of Kshs.8, 000.00 per month which was increased to Kshs.8, 978.00 and with a monthly bonus of Kshs.4, 000.00 per month.

13. The defence is also that the claimant was terminated in his employment with the respondent having abdicated his duties after failing to be at his place of work without a justifiable cause and as a result of which a drill and grinder were stolen. The claimant was given a chance to explain himself but he failed to give any justifiable reasons as to his conduct and therefore termination of employment. The respondent paid for notice as required under the contract of employment.

14. The defence is also that the claimant did not work overtime as is not entitled to any payment as claimed. The claimant had 48 hours of work each week and any overtime work was compensated by way of bonus.

15. The respondent followed due process in terminating the claimant from his employment with them. The claims made are without ground and should be dismissed.

16. In evidence, the respondent called Giles Littlewood the Operations Manager and who testified that upon employment the claimant was with a contract and the respondent complied with the applicable laws. Each year the claimant received a 13% wage increase. In May, 2012 the wage increased to Kshs.8, 786.00 per month, this graduated to Kshs.9, 147.00 in the year 2013. The contract terms were agreed that such salary was inclusive of a house allowance.

17. In May, 2014 the claimant earned a bonus of Kshs.3, 000.00 giving him a gross salary of Kshs.10, 147.00 per month and in 2016 the salary was increased to Kshs.11, 016.00 per month.

18. Mr Littlewood also testified that the respondent has paid all the due NSF dues with regard to all its employees inclusive of the claimant.

19. Under the law the claimant as a security guard was to work for 60 hours a week but the respondent allowed him 48 hours. The claimant took all his annual leave days and has signed in acknowledgement for taking such time off.

20. On 13th June, 2016 the claimant absconded duty without notice or permission from the respondent and as a result a drill and grinder were stolen. This would have justified a summary dismissal but noting the period in service the respondent in good will paid the claimant for service of 5 years and notice pay to avoid disagreements.

21. When the matter was reported to the Labour office, upon listening to both parties the officer found the respondent had complied with the law.

22. Upon cross-examination, Mr Littlewood testified that the claimant was not terminated following the loss of the drill and grinder but following notice to him and after he failed to explain his absence from work.

23. At the close of the hearing both parts filed written submissions. Only the claimant filed written submissions.

24. The pleadings, evidence and written submissions shall be put into account in addressing the issues as to whether there is a case of unfair termination of employment and whether the remedies sought are due and who should pay costs.

Determination

25. By letter dated 16th June, 2016 the respondent wrote to the claimant as follows;

Re: termination

Your services will no longer be required from the date above.

You will be paid 5 year of severance pay, your salary for June up to this date and a week's notice. The following deductions will be made: ...

26. The Employment Act, 2007 has created a fundamental shift in employment and labour relations in Kenya since 2008 when it took effect

on 2nd June, 2008. Termination of employment must be accompanied by reasons and which reasons must be valid, justifiable and genuine. Even where parties have agreed to a termination clause, such is subject to the application of section 35(4) of the Act and which provides that;

(4) Nothing in this section affects the right—

(a) Of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

(b) Of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

27. Even where notice has been issued or a payment made in lieu thereof, the employee retains the right to challenge the lawfulness or fairness of the termination of his employment based on the rights due under the law. Such provisions are on condition that the employer or employee can justify the reason(s) leading to termination of employment.

28. The employer must state the reason(s) leading to termination of employment. Such reasons once challenged must be assessed as to their validity, genuineness and or fairness.

29. An employer cannot terminate employment at will. Even where there is agreement to this effect upon employment, the employee retains the right to challenge the same.

30. In this case, the respondent's witness was firm to the effect that on 13th June, 2016 the claimant was absent from work and as a result its property lost, a drill and grinder.

31. Such absence from work and the resulting implications are matters addressed under section 44(43) and (4) of the Employment Act, 2007 as to warrant summary dismissal. The only condition the employer must satisfy is that the matters leading to the summary dismissal were brought to the attention of the employee and there was no satisfactory explanation in terms of section 41(2) of the Act.

32. Mr Littlewood testified that on upon the claimant failing to attend work and when the loss of the respondent's property was noted the claimant was called to explain himself and to avoid disagreements the respondent opted to pay notice and severance pay so as to end the employment relationship. This evidence is confirmed by the claimant in his evidence when he testified that on 16th June, 2016 he was recalled from his off day back at work even though h was only due to report back on 17th June, 2016. Thereupon his employment was terminated.

33. I take it that the recall of the claimant back to work was for a reason. Such resulted from his absence from work and the loss of the drill and grinder. The resulting termination of employment had a basis. The procedures followed in a case that warranted summary dismissal cannot be faulted in the court reading of sections 44 and 41(2) of the Employment Act, 2007. The claimant was notified of the loss of the respondent's property while he was absent from work. When these matters were put to the claimant in cross-examination, he did not give a satisfactory response save to state that he wrote his statement with the respondent.

34. In **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** the court held that internal disciplinary proceedings are not similar to Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. This is reaffirmed in the case of **Joseph Onyango Asere versus Brookside Dairy Limited [2016] eKLR** that 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.

35. A wayward employee must be disciplined on the shop floor and not seek to sanitise his conduct through the court by seeking compensation to alleged unfair termination even in a clear case where the employee is at fault. Where there is clarity of gross misconduct and the fact that the claimant was given a fair chance to defend himself before termination of employment and where such evidence is apparent to the court, the failure by the employer to state the reason(s) therefore in the letter terminating employment cannot be punished with an order for payment of compensation. The lapse is not grave and or sufficient to negate the principle of fair hearing.

36. Accordingly, the court find no good case to warrant a finding that there was unfair termination of employment.

37. On the claims made for notice pay of one month for unfair termination of employment, on the findings above, the claimant was paid for seven (7) days' notice. Though not explained as to the rationale of the 7 days' notice pay, on the finding that under section 44 of the Employment Act, 2007 the respondent was justified to summarily dismiss the claimant for gross misconduct, the payment of notice is found to be a generous payment.

38. On the claim for NSSF contributions not remitted, such dues even where not paid are not payable to the employee. The dues to NSSF are statutory and due to the appropriate body. Where not paid, the requisite claim is for service pay and not for the due contributions not remitted. The claims as couched are declined.

39. In this regard, the respondent paid the claimant for severance pay. It is not clear as to why such payment was found to be due and payable. Severance pay is only payable under the provisions of section 40 of the Employment Act, 2007. This case did not stand out as a case that warranted severance pay as the foundation is not a redundancy. I however take note the respondent was keen on a settlement of the matter and may have made such severance pay by error or as part of a settlement.

40. On the claim for annual leave due, section 10(7) of the Employment Act, 2007 puts the duty on the employer to submit all work records.

In this regard the records with regard to the claimant taking his annual leave have been submitted by the respondent. Though faulted by the claimant, there was no counter-evidence to challenge such records. The claimant also confirmed to taking leave in March, 2016, February, 2015 and such leave can only mean it related to the years of 2015 and 2014 respectively so as to fall due in February, 2015 and in March, 2016. The claimant also testified that in the year 204 he was off work for 2 weeks.

41. Based on the records, the evidence of the claimant, noting the admitted parts of his taking annual leave, I find the claims made on payment for due annual leave are not justified. Such claims are declined.

42. In the pleadings and in his evidence, the claimant stated that he was made to work overtime and was not paid. Though not pleaded as a prayer and also not set out in the written submissions, as this was a matter arose, the court shall address it.

43. The claimant testified that he was terminated from his employment on 14th June, 2016 which was his rest day. Effectively then, the claimant was not at work for 7 days each work without stoppage. I take it he enjoyed a right to a rest day as required under section 27(2) of the Employment Act, 2007.

44. The computation of overtime work pay due is on the grounds that the claimant would be at work from 5am to 7pm all being 14 hours each day at work. However in evidence, the claimant testified that he was at work from 6pm to 6am noting the above that the claimant confirmed that he enjoyed a rest day, I take it the claims for overtime work have no basis and by his own admission, the claimant was not working overtime. Where there was any overtime work, there was provision for a rest day.

45. With regard to house allowance claims, on the wage orders applicable to the claimant from January, 2012 the paid wages by the respondent, the respondent paid within the wage guidelines. With the escalated payments in the noted increments, the added bonus, to claim for house allowances outside would be an unjustified enrichment.

46. On the contract of employment issued on 1st May, 2014 the terms and conditions are that the claimant would be paid a gross wage of Kshs.7, 157.00 inclusive of housing allowance. Such was a generous payment weighed against the applicable wage orders. In addition to such payment the claimant was to receive a monthly bonus of Kshs.3, 000.00 per month.

Accordingly, the claims are found without merit and are hereby dismissed. The claimant ought to pay costs in these circumstances but I take cognisance of the fact that the respondent was keen to settle this matter, however I order the claimant to pay 50% costs due to the respondent.

Orders accordingly.

Delivered in open court at Nakuru this 17th day of September, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants.....

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