



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 698 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 4th October, 2018)

JOSPHAT MBITHUKA MUTISO.....CLAIMANT

VERSUS

FIDELITY SECURITY.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 15th May, 2013, through the firm of Gakoi Maina & Company Advocates seeking damages for unlawful termination and payment of his terminal benefits.

2. He avers that he was employed by the Respondent on 27th February, 2001 as a Security Guard but was issued with an appointment letter on 12th April, 2002, earning a monthly salary of Kshs. 9,573/=. He avers that he worked for the Respondent upto 26th November, 2012 when the Respondent without justifiable cause, verbally, unprocedurally, unlawfully and unfairly terminated his services after denying him access to his work station from 1st November, 2012. This was after the Claimant had instructed his advocates to file suit against the Respondent for compensation for injuries sustained while at work.

3. The Claimant avers that he was not paid salary in lieu of notice and his severance benefits that had accrued to him by virtue of the Employment Act as well as wages for public holidays worked. That the Respondent would pay the Claimant a daily wage for public holidays worked but on the other hand deduct the amount from the monthly salary, which was unlawful.

4. The Claimant further contends that the Respondent during the tenure of the employment did not provide him with any gear thus forcing him to procure the same personally using his own funds.

5. He further claims that due process was not followed in effecting the termination and the Court should so uphold and issue a declaration that the termination was unlawful and untimely, an order that the Claimant be paid his dues and benefits of Kshs. 366,830.28 broken down as follows:

a. Wages for public holidays worked	-	Kshs. 70,457.28
b. Payment in lieu of notice	-	Kshs. 9,573.00
c. Compensation for loss of earnings	-	Kshs. 114,846.00
d. Service pay	-	Kshs. 76,584.00
e. Reimbursement for purchased work gear-	Kshs.	95,370.00
Total	-	Kshs. 366,830.28

6. He also prays for costs of the Claim and interest.

7. The Respondent filed a Response to the Memorandum of Claim wherein they admit the employment relationship having subsisted from April 12, 2001 upto November 5th, 2012. That the Claimant voluntarily relinquished his duties from the Respondent by way of resignation

and therefore had to forfeit an equivalent of one month's salary in lieu of notice. Further that the Claimant is yet to comply with the Respondent's clearance procedures to enable them pay for his entitlement for uniform refund and entitlement for leave not taken as per their records.

8. They aver that the claim by the Claimant that the Respondent on 26th November, 2012, terminated his service after denying him access to his work station is not true as he is the one who voluntarily resigned on 5th November, 2012.

9. The Respondent aver that they are law abiding and treat all its employees in accordance with the law. A payslip issued at the end of every month shows earnings and deductions and anything not paid the employee has the right to claim and the same is paid immediately. The Claim that Claimant purchased some items as uniform is out of his own volition as the Respondent provided all its employees with the requisite uniform. Furthermore that the genuineness of the receipt provided as proof of purchase is doubted as no ETR receipts are provided and they also do not indicate where the same were obtained. They plead that the suit is unmerited and should be dismissed with costs.

10. The Parties gave their oral evidence and filed submissions accordingly.

Claimant's submissions

11. It is submitted on behalf of the Claimant that he did not voluntarily resign as alleged by the Respondent but was dismissed from work on 26th November, 2012, on allegation that he had sued the company for an injury he suffered while at work. That he came to work on 1st November, 2012, but was not allowed access to his work place, the Respondent claiming that he was sickly and advised him to resign so he can be given his dues which he did but they failed to pay him.

12. That the Claim for refund for money spent purchasing work apparel should also not be allowed as the Respondent admitted in the response to the Memorandum of Claim that the Claimant is yet to clear with the Respondent's accounts department in order that he may be entitled to a uniform refund.

13. It is further submitted that the Claimant is entitled to payment of public holidays worked for the reason that the Claimant led evidence that he would be paid extra cash but come end of the month his salary would be deducted to the tune of the extra payment. Furthermore, no evidence was adduced in Court to prove that the Claimant was paid for working on public holidays.

14. The Claimant submit that the procedure followed in termination was unlawful as he was not given any warning prior to dismissal. Instead, he was advised to tender his resignation as the relationship had been strained after he had sued the Respondent. That he led evidence that he was injured while on duty and asked to be compensated upon which he was barred from accessing his work place and advised to resign. He was not afforded an opportunity to be heard contrary to Section 41 of the Employment Act, 2007.

15. That even in summary dismissal a hearing and notification is necessary as was held in the case of **Shankar Saklani Vs DHL Forwarding (K) Limited (2012) eKLR.**

16. It is submitted that the payments sought in the memorandum of Claim were admitted by the Respondent's witness that they remain unpaid and as such the same should be allowed with costs.

Respondent's submissions.

17. It is submitted on behalf of the Respondent that the pleadings filed and the evidence tendered did not disclose any termination of employment. That it is the Claimant who resigned without giving notice to the Respondent as indicated in the acknowledgement of resignation and no evidence to the contrary was proffered. They cite the case of **Industrial Court Cause Number 868 of 2010 between Julie Topirian Njeru vs Kenya Tourist Board (UR)** where it was observed that termination may be voluntary, involuntary or consensual. It is voluntary if the employee is dismissed or his position declared redundant. It is consensual if for instance, the Employee's fixed term contract comes to an end. There may also be the narrower 'termination' where the contract may be terminated in accordance with the termination clause contained in the contract through notice and as contemplated under Section 35 of the Employment Act 2007. In all forms, the law requires termination should always be based on limited, objective and demonstrate grounds.

18. They submit that the Claimant was paid his terminal benefits totaling to Kshs. 98,000/= and any other claim for dues unpaid by the Respondent have not been proved and for this reason they pray for the Claim to be dismissed with costs.

19. I have examined all the evidence and submissions of both parties. I note that the Claimant's evidence is that he was denied access at work by Respondents hence terminating his service. These events occurred on 26/11/2012.

20. The Claimant averred this followed his instruction to his lawyer to write a demand letter to the Respondents in respect of injuries sustained whilst at work. The Claimant averred that the Respondents were irked by his decision to sue them for injuries and fired him.

21. The Respondent's position is that the Claimant voluntarily relinquished his duties by resigning as per Appendix FSL 1874/2.

22. I have looked at Appendix FSL which Claimant wrote to the Respondents on 5/11/2012 as follows:-

"To

Operations Manager

Ref: Resignation from Fidelity

Dear Sir,

I Josphat Matiso Mbithuka request to last in good faith so you can do my final dues.

Please Sir,

Yours faithfully

Josephat Matiso

G.NO.1874

Signed”

23. Indeed the Claimant never denied writing this letter. The Respondent acknowledged it and responded on 6/11/2012 allowing the resignation. The averment by the Claimant that he was dismissed is not correct. I find that the Claimant resigned voluntarily and the only prayer he is entitled to are his terminal dues if they were not paid.

24. The Respondent has told the Court that they calculated the Claimant's dues and paid him Kshs.98,000/=. In view of this, I find that the prayers sought are not tenable in terms of notice, compensation and even service pay as the Claimant was a member of NSSF. The prayer for purchase of work gear is also not tenable as there is no evidence that this was also a requirement.

25. The Respondent have stated that they provided uniform and work gear for Claimant and it is not clear why he went on buying shoe polish as per his receipts supplied in Court.

26. It is my finding that the Claimant's claim is not tenable and the same is dismissed accordingly.

Dated and delivered in open Court this **4th day of October, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochieng holding brief for Gakoi for Claimant – Present

Masese for Respondent – Present