



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 363 OF 2016

BETWEEN

EVANS OSIEMO MARITACLAIMANT

VERSUS

RADAR LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno B.N & Associates, Advocates for the Claimant

Mulwa Nduya & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 24th May 2016. He states he was employed by the Respondent as a Security Guard, from 7th December 2010 to 4th August 2013. His monthly salary was Kshs. 11,000. He was on duty at KRA warehouses within the Port of Mombasa on 4th August 2013. A lorry left the premises, ferrying suspected stolen property. The Claimant and his Colleagues were arrested and charged, on allegations of conveying stolen property. He was suspended by the Respondent, pending the outcome of the criminal trial. The trial ended on 15th October 2015 with the acquittal of the Claimant and his Co-Employees. The Claimant asked the Respondent to lift suspension and allow him to resume work. The Respondent refused to return the Claimant to work. He was denied salary for days worked; leave pay, off-duty days, public holidays, service pay and notice pay. He prays the Court to grant him Judgment against the Respondent in the following terms:-

- a) A declaration that termination was unlawful.
- b) 1 year salary for wrongful and unjustified termination at Kshs. 132,000.
- c) Salary for the period of suspension till termination at Kshs. 297,000.
- d) 1 month salary in lieu of notice at Kshs. 11,000.
- e) Service pay at Kshs. 16,500.

Total...Kshs. 456,000.

- f) Certificate of Service to issue.
- g) Costs and interest.

2. The Respondent filed its Statement of Response on 10th January 2017. It is agreed the Claimant was employed as a Security Guard by the Respondent on terms and conditions of service stated in the Claim. He was charged for criminal activities which took place at KRA warehouses where the Claimant had been assigned guarding duty. He was handed suspension subject to the outcome of the criminal trial. He

did not report the outcome of the criminal trial to the Respondent. He did not report back to work after suspension. He did not return to collect his Certificate of Service. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified, and closed his case, on 20th February 2018. Assistant Operations Manager Philip Sannie Mwangunga testified for the Respondent on 24th July 2018. The matter was last mentioned on 20th September 2018 when Parties confirmed filing of their Submissions.

4. The Claimant confirmed in his oral evidence, the contents of his Pleadings, Witness Statement and Documents on record. He was assigned duty at KRA warehouses within the Port. It was alleged that sugar was stolen from the warehouses while the Claimant and his Co-Employees were on guard. He was arrested and arraigned in Court. He was in the end acquitted. He reported back to work at the start of the criminal process, on being bonded. The Respondent refused to have the Claimant back. He went again after acquittal. The Respondent did not allow him back.

5. Cross-examined, the Claimant told the Court that the criminal trial ended in his acquittal. It is not true that he deserted work after he was acquitted. He reported back and was turned away. Redirected, the Claimant told the Court there was no letter of termination, giving him any reason why he should not resume work. He was never heard by the Employer.

6. Philip Sannie Mwangunga told the Court it is true that the Claimant was employed by the Respondent as a Security Guard. His terms and conditions of employment are not in dispute. He was arrested with bags of sugar. Philip last saw the Claimant at the Police Cells. The Respondent waited for the Claimant to be cleared by the Police. He never went back to Respondent's workplace. If he had gone back, the Respondent would have listened to the Claimant, and resolved the dispute. He deserted. Cross-examined, Philip testified that the Respondent did not issue a written letter of suspension to the Claimant. There are no documents showing that there was a disciplinary hearing. Philip did not participate in the criminal trial, and did not know the outcome. The Claimant did not receive his salary from the date he was arrested. There were no disciplinary proceedings. The Witness reiterated on redirection, that the Claimant did not return to work after his arrest and acquittal.

The Court Finds:-

7. There is no dispute about the Claimant's employment by the Respondent, and his terms and conditions of employment. It is common ground that the Claimant was assigned guard duty at KRA warehouses at the Port of Mombasa. On 4th August 2013, it is agreed sugar was allegedly stolen from the warehouses, while the Claimant and other Guards were on duty. The Claimant and his Colleagues were arrested and charged for the offence of conveying stolen goods. The Respondent suspended the Claimant pending the outcome of the criminal trial. The Claimant states at paragraph 8 of his Statement of Claim, that he was suspended pending the outcome of the criminal trial. This is the same statement made by the Respondent at paragraph 3 [b] of the Statement of Response. It is not disputed that the Claimant was suspended, pending the outcome of the criminal trial.

8. The criminal trial culminated in Claimant's acquittal on 15th October 2015. The Respondent did not lift suspension at any time before, during, or after the criminal trial. It was the Respondent who tied down the fate of the Claimant's employment, to the outcome of the criminal process. The Respondent was not bound to peg suspension and any other disciplinary steps, on the outcome of the criminal trial. Once the Respondent took the decision to abide by the outcome of the criminal trial, it was Respondent's duty to know what the outcome was, and make a decision on Claimant's suspension as had been advised by the Respondent from the date the Claimant was suspended. It cannot have been the obligation of the Claimant to appraise the Respondent about the outcome of the criminal process. The Claimant states, and the Court finds no reason to disbelieve him that, he returned to work twice, and was told by the Respondent to keep away. First, he went back on being bonded, at the commencement of the criminal trial. He was, expectedly, told to keep away as he was still under suspension, and the trial had not taken off, little less abated. The trial culminated in Claimant's acquittal. He asked to return after acquittal. It was the second time he was asking to resume duty. He was not allowed to return. He was told nothing by the Respondent about suspension. Suspension became indefinite. The Court does not agree with the evidence of the Respondent that the Claimant deserted. He was under indefinite suspension, and his plea to resume work, fell on deaf ears.

9. There was no hearing of any nature at the workplace before, during or after the criminal trial. Philip conceded there was no disciplinary hearing. The Claimant was subjected to an indefinite suspension, without any form of disciplinary hearing. There was no decision communicated to him either summarily dismissing him, or in any other way, terminating his contract.

10. The event which was expected to inform the Respondent's decision was the outcome of the criminal trial. The Respondent did not lift suspension or allow the Claimant back to work, after the occurrence of the event. The Claimant considered his contract terminated from 15th October 2015. The Court agrees with him that once he was acquitted; there was no lifting of suspension; and he was not allowed to continue working, his contract can only be considered to have been terminated at the instance of the Respondent.

11. The Court accepts that the Claimant's contract was terminated on 15th October 2015.

12. Termination was not preceded by any disciplinary hearing at the workplace. The criminal process, over which the Respondent pegged its decision at the workplace on, ended in Claimant's acquittal. The Respondent did not establish valid reason justifying termination. If it was intended the criminal trial should establish the guilt or innocence of the Claimant at the workplace, it ended in acquittal and there should have been a decision taken by the Respondent, based on the Claimant's acquittal. There was no reason shown by the Respondent, justifying termination as required under Section 43 and 45 of the Employment Act 2007.

13. The Claimant is allowed the prayers for 12 months' salary in compensation for unfair termination at Kshs. 132,000; and notice pay of Kshs. 11,000.

14. He exhibited N.S.S.F Statements showing the payments for the period 2013 to 2016. The period does not tally with the period the

Claimant states he was an Employee of the Respondent. The Statements do not indicate who the Employer was. It is not possible for the Court to determine in favour of the Claimant on service pay. The prayer is declined.

15. Lastly, the Claimant was still an Employee of the Respondent, until the criminal process ended. There is no reason why the Respondent should have treated the Claimant's contract as terminated, upon arrest of the Claimant on 4th August 2013. Communication made to the Claimant by the Respondent, was that he would know his fate at the end of the trial. The employment relationship did not end with the Claimant's arrest. The Court has accepted it ended with the acquittal of the Claimant. ***He should have his arrears of salary for the period under suspension, between 4th August 2013 and 15th October 2015, at the rate of Kshs. 11,000 per month x 25.5 months = Kshs. 280,500.***

16. ***Certificate of Service shall be released to the Claimant by the Respondent, under Section 51 of the Employment Act, forthwith.***

17. ***Costs to the Claimant.***

18. ***Interest granted at 14% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: equivalent of 12 months' salary in compensation for unfair termination at Kshs. 132,000; notice pay at Kshs. 11,000; and arrears of salary at Kshs. 280,500- total Kshs. 423,500.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 23rd day of November, 2018.

James Rika

Judge