



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 901 OF 2015

BEN NANDASABA MUIYUNDO.....CLAIMANT

-VERSUS-

IDEAL SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed the Memorandum of Claim herein on 26th May, 2015 alleging that his contract of service was unfairly terminated by the Respondent and who also refused to pay his benefits. He therefore seeks the following remedies from the respondent:

- a) Kshs. 702,950.40 as itemised in paragraph 13 of the Memorandum of Claim.
- b) In the alternative the Honourable Court be pleased to order for the Claimant's unconditional reinstatement without loss of benefits
- c) Certificate of service to be issued to the Claimant within 14 days
- d) Costs of this cause
- e) Interest of the cause at court rates
- f) Any other relief which the Court deems fit, just and expedient to grant

2. The Respondent in its statement of Reply to the Claimant's statement of claim dated 10th July, 2015 and filed in Court on 13th July, 2015 denied the allegations in the Claimant's Memorandum of Claim and urged the Court to dismiss the same with costs. She denied ever dismissing the claimant and averred that after it is the claimant who deserted work. She, however, admitted that she could not afford to pay the claimant the statutory minimum wages and contended that the claimant accepted the salary of kshs.5500 per month without any house allowance. She further denied the claim for accrued leave and averred that the claimant enjoyed 4 off days every month.

Claimant's Case

3. The Claimant gave evidence on 20th February, 2018. In his testimony the Claimant stated that he was employed by the Respondent in August 2009 on permanent and pensionable terms as a security guard with a starting salary of Kshs. 5,500. He further stated that he was deployed to work at Sheckmetah Construction Company at Ndumberi, Kiambu.

4. He further testified that he work diligently for the Respondent until 28th April, 2014 when a machine at the premises he was guarding was reported missing and he and 2 other guards were arrested and charged in Court with theft. He contended that on that day the machine was not returned to the site and the Operator never showed up that day. He further stated that after the trial they were acquitted on 9.2.2015 and reported back to work with his colleagues but they were not allowed resume work.

5. He contended that his termination was without notice or payment of salary in lieu of notice and therefore unfair. In addition, the stated that they were not paid anything and instead they were told that their salary was used to pay for the stolen machine. He prayed for the reliefs sought in his claim plus costs and contended that the salary he was paid by the respondent was below the minimum wage gazetted by the government.

6. On cross examination the CW1 stated that the machine was taken out from the site he was guarding in the morning of the material day but it was never returned in the evening. He further stated that after his arrest, he stayed in custody of the police for 14 days. He further maintained that after his acquittal from the criminal case, he reported back to work but he was not allowed to resume normal duty and was informed that his services were no longer required and that the salary due to him was utilized to replace the stolen machine to the respondent's client.

7. In his written submissions, the Claimant stated that his dismissal was unfair and contrary to the Employment Act. He further submitted that the Respondent was paying him a salary of Kshs. 5,500 which was below the minimum wage for security guards being Kshs. 10,116/-.

8. It is further submitted that he had proved his case against the Respondent on a balance of probabilities and urged the Court to enter judgment as prayed with costs and interest.

The Respondent's Case

9 The Respondent closed its case without calling any witness.

10. In its written submissions the Respondent submitted that it did not dismiss the Claimant herein but the Claimant after his arrest failed to resume duty and as such did not avail himself to any disciplinary process.

11. It is further submitted that the Respondent is justified in withholding the salary for the duration in which the Claimant failed to report for duty. In support of this the Respondent relied on the case of **GMV Bank vs Bank of Kenya Ltd (2013) eKLR**.

12. On the issue of underpayments it was submitted that the same is time barred as per the provisions of Section 90 of the Employment Act. To support this position the Respondent cited a total of 5 authorities.

13. It is further submitted that the issue of salary recovery, house allowance, leave allowance as well as accrued salary arrears equally fail as they are time barred.

14. The Respondent prayed for the suit to be dismissed with costs for being vexatious and an abuse to the Court process.

Analysis and determination

15. There is no dispute that the claimant was employed by the respondent as security guard and assigned to guard a client's premises at Ndumberi, Limuru Kiambu County until 28.4.2014 when he was arrested and charged in court with the offence of stealing. The issues for determination herein are:

- a) Whether the Claimant was unfairly terminated by the respondent or he deserted the employment.
- b) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated from employment.

16. Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee who alleges that he has so been terminated. In this case the Respondent has denied ever terminating the claimant's employment and averred that it is the claimant who absconded duties upon being released on bail as the Criminal case was prosecuted. The respondent further stated that she never terminated the Claimant's contract despite the fact that there existed sufficient grounds to justify summarily dismissal of the Claimant under Section 44(4) (a), (f) and (g) of the Employment Act, that is, absenting himself from work without leave or just cause, failing to secure liberty from lawful custody after arrest within 14 days, and committing a criminal offence against or to the substantial detriment of his employer or his property.

17. The Claimant admitted that on 28.4.2014 he was arrested and detained for 14 days and thereafter he charged with theft of property that disappeared at his place of duty. He however contended that his termination was unfair because the procedure leading to his termination was unlawful and wrongful and the charge of theft he was facing was dismissed.

18. After careful consideration of the evidence and submissions presented to the court, I find that the claimant has not proved on a balance of probability that he was unfairly terminated by the respondent as required by section 47(5) of the Act. On the contrary, I agree with the respondent's submissions that it is the claimant who deserted his job. First, the claimant failed to secure liberty from lawful custody within 14 days after arrest and second he failed to report back to work after being released on bail but waited until the time he was acquitted from the said charges.

19. The claimant never pleaded or adduced any evidence to prove that he reported back to work immediately after being released on bail. All what he alleged was that he reported back to work after the acquittal but he was not allowed in. Although in my view, reporting back after acquittal was immaterial in supporting the case for alleged unfair termination, the day and the place he allegedly reported back after the acquittal was not stated and the person who allegedly refused to admit him back was not named. In addition the claimant never called any witness to support his allegation that he reported back to work after the acquittal. The withheld evidence was crucial in this case because the claimant's work station was away from the respondent's office.

Whether the Claimant was entitled to the reliefs sought.

20. In view of the finding hereinabove that it is the claimant who deserted his employment after being arrested and charged with the offence of theft, I dismiss the claim for salary in lieu of notice and compensation for unfair termination.

21. Likewise, the claim for vague and lacking in claimant intended to salary recovery for April 2009 to April 2014 is particulars and it is dismissed. In case the recover salary arrears arising from salary underpayment, the claim must also still fail because the particulars of the minimum wages for the respective years were neither pleaded nor proved. The alleged minimum wage of kshs 10,116 per month was not shown through evidence or submission to be applicable throughout the period from 2009 to 2014. The claim for house allowance of 1517.40 per month for the period 2009 to 2014 is dismissed the forgoing reasons.

22. The claim for leave allowance is also dismissed for lack of particulars and evidence. Leave allowance is not automatic and without basis in the contract of service it cannot be granted by the court.

23. Finally, the claim for salary arrears for April 2014 to February 2015 is also dismissed for lack of merits. Under section 19 (1) (c) of the Employment Act, the employer is authorised to deduct salary for each day the employee absents himself from work without leave.

24. The claim for Certificate of service is however granted as provided by section 51 of the Act.

Conclusion and disposition

25. I have found that the claimant was not unfairly dismissed from his employment but he is the one who deserted the employment after being arrested and charged in court with a criminal offence. I have further found that the claimant is not entitled to reliefs sought or he has not pleaded and proved them specifically. Consequently, save for the prayer for Certificate of Service, I dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 16th day of November , 2018

ONESMUS N. MAKAU

JUDGE