



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 10 OF 2016

ANTHONY MUNYASYA.....1ST CLAIMANT

DAVID MBITHI MBAU.....2ND CLAIMANT

SAMUEL KATIWA.....3RD CLAIMANT

DONALD MWAMACHI.....4TH CLAIMANT

WAMBUA MUTUKU.....5TH CLAIMANT

ROBERT ATICHI.....6TH CLAIMANT

VS

BRINKS SECURITY SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants’ claim brought by way of Memorandum of Claim dated 12th January 2016 and filed in court on 20th January 2016 is for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Response and Counterclaim on 12th January 2017.

2. When the matter came up for hearing, the 3rd Claimant, Samuel Katiwa and the 6th Claimant, Robert Atichi testified for themselves and for their co-claimants. The Respondent called its Branch Manager, Bernard Kyengo. The parties also filed written submissions.

The Claimants’ Case

3. The Claimants state that they were employed by the Respondent as security guards between 2011 and August 2015 when their employment was terminated. At the time of termination, the Claimants earned a monthly salary of Kshs. 11,000 each.

4. The Claimants aver that the termination of their employment was unlawful and unfair. They therefore claim the following:

1st Claimant: Anthony Munyasya

- a) Notice pay.....Kshs. 11,000
- b) Leave pay.....733
- c) Salary for 1 month plus 6 days.....13,200
- d) 12 months’ salary in compensation.....132,000

2nd Claimant: David Mbithi Mbau

- a) Notice pay.....Kshs. 11,000
- b) Leave pay.....7,700
- c) Salary for 1 month plus 6 days.....13,200
- d) 12 months' salary in compensation.....132,000

3rd Claimant: Samuel Katiwa

- a) Notice pay.....Kshs. 11,000
- b) Leave pay.....15,400
- c) Salary for 1 month plus 6 days.....13,200
- d) 12 months' salary in compensation.....132,000

4th Claimant: Donald Mwamachi

- a) Notice pay.....Kshs. 11,000
- b) Leave pay.....23,100
- c) Salary for 1 month plus 6 days.....13,200
- d) 12 months' salary in compensation.....132,000

5th Claimant: Wambua Mutuku

- a) Notice pay.....Kshs. 11,000
- b) Leave pay.....7,700
- c) Salary for 1 month plus 6 days.....13,200
- d) 12 months' salary in compensation.....132,000

6th Claimant: Robert Atichi

- a) Notice pay.....Kshs. 11,000
- b) Leave pay.....7,700
- c) Salary for 1 month plus 6 days.....13,200
- d) 12 months' salary in compensation.....132,000

5. The Claimants also ask for costs and interest.

The Respondent's Case

6. In its Memorandum of Response and Counterclaim, the Respondent admits that the Claimants were its employees but denies that their employment was unfairly terminated. The Respondent further admits that the Claimants earned a monthly salary of Kshs. 11,000 each.

7. The Respondent avers that the Claimants deserted duty after receiving notice of an intended re-deployment. None of the Claimants tendered a resignation letter nor gave any notice of intention to leave employment. The Claimants were therefore unavailable for any hearing.

8. The Respondent maintains that the Claimants were responsible for their own misfortune.

9. In further response, the Respondent avers the following with respect to each of the Claimants:

1st Claimant: Antony Munyasya

- a) He was employed on 2nd August 2015 with a starting salary of Kshs. 11,000 and had worked for only 19 days before leaving work on 27th August 2015;
- b) He failed to report to work for more than 7 days without notice after receiving a letter asking him to report to the Nairobi Head Office for re-deployment and hence he is not entitled to claim pay in lieu of notice;
- c) He does not have any pending leave days and hence he is not entitled to claim leave pay;
- d) He was not terminated by the Respondent as he voluntarily deserted work and hence he is not entitled to claim compensation;
- e) He is only entitled to Kshs. 6,276 being net pay for the month of August 2015;
- f) He did not return all the property belonging to the Respondent including a whistle, a cap and a baton and hence the Respondent is entitled to claim for the cost of these items.

2nd Claimant: David Mbithi Mbau

- a) He was employed on 29th March 2014. His salary was Kshs. 11,000 by August 2015 and had worked for 30 days before leaving work on 27th August 2015;
- b) He failed to report to work for more than 7 days without notice after receiving a letter asking him to report to the Nairobi Head Office for re-deployment and hence he is not entitled to claim pay in lieu of notice;
- c) He entitled to the claim for Kshs. 7,700 as outstanding leave pay;
- d) He was not terminated by the Respondent as he voluntarily deserted work and hence he is not entitled to claim compensation;
- e) He is only entitled to Kshs. 10,400 being net pay for the month of August 2015;
- f) He did not return all the property belonging to the Respondent including a whistle, a cap and a torch and hence the Respondent is entitled to claim for the cost of these items.

3rd Claimant: Samuel Katiwa

- a) He was employed on 10th October 2011. His salary was Kshs. 11,000 by August 2015 and had worked for 30 days before leaving work on 27th August 2015;
- b) He failed to report to work for more than 7 days without notice after receiving a letter asking him to report to the Nairobi Head Office for re-deployment and hence he is not entitled to claim pay in lieu of notice;
- c) He is entitled to the claim for Kshs. 15,400 as outstanding leave pay;
- d) He was not terminated by the Respondent as he voluntarily deserted work and hence he is not entitled to claim compensation;
- e) He is only entitled to Kshs. 10,400 being net pay for the month of August 2015;
- f) He did not return all the property belonging to the Respondent including uniform, a reflector, a belt, a whistle, a cap, a baton and a torch hence the Respondent is entitled to claim for the cost of these items.

4th Claimant: Donald Mwamachi

- a) He was employed on 1st May 2012. His salary was Kshs. 11,000 by August 2015 and he had worked for 30 days before leaving work on 27th August 2015;
- b) He failed to report to work for more than 7 days without notice after receiving a letter asking him to report to the Nairobi Head Office for re-deployment and hence he is not entitled to claim pay in lieu of notice;
- c) He has 25 days outstanding leave and is only entitled to Kshs. 9,166.66 as leave pay;
- d) He was not terminated by the Respondent as he voluntarily deserted work and hence he is not entitled to claim compensation;
- e) He is only entitled to Kshs. 10,400 being net pay for the month of August 2015;
- f) He did not return all the property belonging to the Respondent including a cap, a torch and a baton and hence the Respondent is

entitled to claim for the cost of these items.

5th Claimant: Wambua Mutuku

- a) He was employed on 24th September 2014. His salary was Kshs. 11,000 by August 2015 and he had worked for 30 days before leaving work on 27th August 2015;
- b) He failed to report to work for more than 7 days without notice after receiving a letter asking him to report to the Nairobi Head Office for re-deployment and hence he is not entitled to claim pay in lieu of notice;
- c) He is entitled to the claim for Kshs. 7,700 as outstanding leave pay;
- d) He was not terminated by the Respondent as he voluntarily deserted work and hence he is not entitled to claim compensation;
- e) He is only entitled to Kshs. 10,400 being net pay for the month of August 2015;
- f) He did not return all the property belonging to the Respondent including 2 raincoats, a whistle, a helmet, a baton and a torch and hence the Respondent is entitled to claim for the cost of these items.

6th Claimant: Robert Atichi

- a) He was employed on 24th September 2014. His salary was Kshs. 11,000 by August 2015 and he had worked for 30 days before leaving work on 27th August 2015;
- b) He failed to report to work for more than 7 days without notice after receiving a letter asking him to report to the Nairobi Head Office for re-deployment and hence he is not entitled to claim pay in lieu of notice;
- c) He is entitled to only 10 months accrued leave pay which is Kshs. 6,416.55 (10*1.75*366.66);
- d) He was not terminated by the Respondent as he voluntarily deserted work and hence he is not entitled to claim compensation;
- e) He is only entitled to Kshs. 10,200 being net pay for the month of August 2015;
- f) He did not return all the property belonging to the Respondent including a lanyard, a whistle, a cap, a baton and a torch and hence the Respondent is entitled to claim for the cost of these items.

10. By way of counterclaim, the Respondent claims the following from the Claimants:

1st Claimant: Anthony Munyasya

- a) Pay in lieu of notice (7 days).....Kshs. 2,566.66
- b) NHIF.....150.00
- c) NSSF.....200.00
- d) Uniform.....2,200.00
- e) Whistle.....65.00
- f) Lost cap.....331.00
- g) Baton.....160.00

2nd Claimant: David Mbithi Mbau

- a) Pay in lieu of notice (1 month).....Kshs. 11,000.00
- b) NHIF.....150.00
- c) NSSF.....200.00
- d) Whistle, cap & torch.....876.00

3rd Claimant: Samuel Katiwa

- a) Pay in lieu of notice (1 month).....Kshs. 11,000.00
- b) NHIF.....150.00
- c) NSSF.....200.00
- d) Lost cap.....331.00
- e) Uniform, reflector, belt, whistle, baton & torch.....3,412.00

4th Claimant: Daniel Mwamachi

- a) Pay in lieu of notice (1 month).....Kshs. 11,000.00
- b) NHIF.....150.00
- c) NSSF.....200.00
- d) Cap, baton & torch.....971.00

5th Claimant: Wambua Mutuku

- a) Pay in lieu of notice (1 month).....Kshs. 11,000.00
- b) NHIF.....150.00
- c) NSSF.....200.00
- d) Lost cap & whistle.....396.00
- e) Raincoats, helmet, belt, baton & torch.....2,140.00

6th Claimant: Robert Atichi

- a) Pay in lieu of notice (1 month).....Kshs. 11,000.00
- b) NHIF.....150.00
- c) NSSF.....200.00
- d) Uniform.....200.00
- e) Lanyard & whistle.....150.00
- f) Lost cap.....331.00
- g) Torch.....160.00

11. The Claimants' claim and the Respondent's counterclaim were partially settled by consent recorded before my brother, **Makau J** on 19th October 2017. The only issues pending determination are whether the Claimants have made out a case for unlawful termination of employment and which party, if any, is entitled to notice pay.

12. Section 47(5) of the Employment Act, 2007 states as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

13. The Respondent's Branch Manager, Bernard Kyengo told the Court that following expiry of the Respondent's service contract with its client, *Buzeki*, a decision was made to re-deploy the Claimants to Nairobi. The Claimants themselves admitted being notified of this decision.

14. The Claimants gave varying reasons as to why they were unable to report to Nairobi. First, the re-deployment letters issued to them were

not signed by the Human Resources Manager; second, the said letters were not on the Respondent's letterhead; third, the Claimants did not have transport to nor accommodation in Nairobi; fourth, their families were based in Mombasa. This litany of reasons gave the impression that the Claimants were uncomfortable with their re-deployment.

15. What is important however is that the Claimants were made aware of the end of their assignment at *Buzeki* and the decision to re-deploy them to Nairobi. They made no effort to report to Nairobi and they cannot now turn around and say that their employment was unlawfully terminated. The Court was referred to the decision in *George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR* where my brother, **Radido J** stated the following:

“The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the Employment Act.....An employee therefore has the burden of proving that an unfair termination of employment has occurred.”

16. What emerges in the present case is that the Claimants decided not to take up an offer of re-deployment. They walked away from their employment and cannot lay a claim for unlawful termination. The result is that the Claimant's claims for compensation for unfair termination and notice pay fail and are dismissed.

17. Regarding the counterclaim for notice pay by the Respondent, the only thing to say is that the Respondent's decision to summarily dismiss the Claimants after their failure to report to Nairobi dissipated such a claim.

18. In the end, the Claimants' claim and the Respondent's counterclaim fail save for the consent recorded before **Makau J** on 19th October 2017.

19. Each party will bear their own costs.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Okanga for the Claimants

Miss Kimuli for the Respondent