



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1175 OF 2015

JAIRUS MADUGUDA OJINDA.....CLAIMANT

- VERSUS -

SECURITY SEVENS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 07.07.2015 through E.Wafula & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's termination was unprocedural, wrongful, and illegal which amounted to unfair termination.
- b) A declaration that the claimant's fundamental rights to fair administrative action, access to information, right to fair hearing was transgressed on by the respondent, an order for compensation for general damages for breach of Article 47 of the Constitution of Kenya 2010.
- c) A declaration that the claimant's fundamental right to fair labour practices was breached upon by the respondent and an order for compensation for general damages for breach of Article 41 of the Constitution of Kenya.
- d) Payment of Kshs. 392, 883.00 with respect of service from 12.03.2010 to 11.11.2014 being 4 years and 8 months of service and on the headings of salary in lieu of notice Kshs. 10, 91.00; wage underpayment Kshs. 107, 016.00; 15% basic wage for house allowance Kshs. 91, 652.00; accrued leave days 30, 550.00; September and October 2014 salary Kshs. 21, 822.00; 12 months' salaries for compensation Kshs. 130, 932.00.
- e) Costs of the suit to the respondent.
- f) The Honourable Court to make such further order if it deems fit to grant.

The reply to the memorandum of claim was filed on 12.10.2016 through Nyabena Nyakudi & Company Advocates. The respondent prayed for dismissal of the suit with costs in favour of the respondent.

The respondent employed the claimant orally on 12.12.2010 and affirmed in writing on 02.07.2011. The claimant was employed as a security guard at an agreed consolidated pay of Kshs. 9, 000.00 per month.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair.

The claimant testified that he worked until 11.11.2014 when the respondent's human resource officer Doris Ambani told him that there was no more work for him. He testified that he was paid 5, 100.00 for terminal dues. He testified that on 06.09.2014 he had been involved in an accident and thereafter he was on sick leave for 5 days. On 12.09.2014 he went to the office and was told an assignment would be found for his deployment. From 05.09.2014 to 11.11.2014 (the date of dismissal) he had been on standby to be deployed if any job was available. During cross examination the claimant testified that from 05.09.2014 to 11.11.2014 he was not assigned duty but he reported at work. He stated that he had been involved in an accident on 06.09.2014 and he delivered a document to the respondent's human resource manager to show he was sick but a copy of medical record in that regard including the document as alleged was not filed.

The respondent's witness (RW) was one Emmy Musimbi the recruitment and training officer. She testified that she recruited the claimant on 12.10.2010. On 06.09.2014 the claimant failed to report on duty. He came back on 19.09.2014 alleging that he had been involved in a road accident. The claimant alleged that a Good Samaritan had picked him, taken him to hospital and asked the hospital not to give him the record

of treatment. After a month the claimant reported on 11.10.2014 and he was given a warning letter and to be assigned duties on redeployment. He rejected to be assigned and to be redeployed and offered to go back to his previous employer. Later after a month he served a demand letter from Kituo Cha Sheria.

The evidence is that on 19.09.2014 the claimant reported at work and was to be assigned as a reliever guard but he absconded duty until he resurfaced on 11.10.2014 when he refused to be reassigned or redeployed and he signed acknowledging receipt of Kshs. 5, 100.00 in full and final settlement of his outstanding wage and that he had no other claim against the respondent. The Court finds that the claimant resigned from employment orally on 11.10.2014 upon rejecting redeployment and reassignment. While making that finding the Court finds that the claimant had not been trustworthy and coherent in his testimony. In particular he failed to provide medical evidence to confirm the alleged treatment after the alleged accident and further while admitting that he had signed for the terminal dues, he purported to deny that he had verbally resigned - and yet had no alternative reasonable explanation on the circumstances of the payment. The Court has upheld the respondent's coherent evidence on the circumstances of the separation and the termination being at the instance of the claimant was not unfair. The respondent discharged the burden under section 47(5) and proved that the reason for the ensuing separation was a valid reason, namely the claimant left employment voluntarily.

The respondent offered no evidence to oppose the claimant's prayer for accrued leave days **Kshs. 30, 550.00** and the same is awarded accordingly.

The parties agreed on a consolidated pay and the underpayments and house allowance as claimed were not backed with evidence and relevant wage orders as no specific computations were pleaded or submitted upon. The claims will fail as unjustified.

The September and October 2014 pay is not due because the claimant did not work at all and no reasonable explanation was made in that regard - especially that as per the respondent's evidence, the claimant failed to be on standby at the training grounds as he had been instructed. In any event the claimant signed acknowledging final payment for wages and he cannot be allowed to go back on that acknowledgment.

Further the evidence is that while the claimant was absent from September to October 2014, his duties were assigned to another person and he refused to be reassigned or redeployed and he opted to resign.

The 12 months' salaries in compensation are not due as prayed for because the claimant voluntarily left employment and he was not entitled as prayed.

In conclusion the respondent will pay the claimant a sum of **Kshs. 30, 550.00** by 31.12.2018, failing interest to be payable thereon at court rates from the date of filing suit till full payment, and each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE