



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 126 OF 2016
DAVID SITUMA MUYOI.....CLAIMANT
VS
TEXAS ALARMS (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Security Guard from November 2009 and worked until 11.10.2015 when he was dismissed by the respondent for an alleged theft. It is the claimant's case that the alleged reason for the termination was unfounded and that he was denied a chance to defend himself as required under the law. He therefore prayed for compensation for the unfair termination plus his accrued employment dues.
2. The respondent has denied liability to pay the damages sought and averred that she has never terminated the contract of service for the claimant. According to the respondent a theft occurred in the claimant's place of assignment while he was on duty on the night of 11th/12th October 2015 but although the police arrested him, he was never charged in court, and he never reported back to work.
3. The issues for determination arising from the dispute herein are:
 - (a) **Whether the claimant was unfairly dismissed or he voluntarily deserted his employment.**
 - (b) **Whether the claimant is entitled to the reliefs sought or party thereof.**
4. In answering the said two issues, the claimant testified as Cw1 while the respondent called her HR Manager Mr. Bernard Odhiambo Adunda as Rw1. Thereafter the counsel for two parties filed written submissions.

Analysis and Determination

Unfair Termination vs Desertion

5. Cw1 testified that he attended work as the night guard at the Consulate of Mozambique at Nyali

Mombasa and at night there was a power failure but unlike other days the standby generator never provided any lighting. He noted the problem to a Notebook which had been provided by the Consulate Administrator Madam Diana. In the morning the claimant handed over to the day guard after taking him round and confirming that all the doors were securely locked.

6. Cw1 further explained that while on the way from work he was called back to the Consulate by his night supervisor Mr. Mulama. He arrived there with the Day Supervisor Mr. Ongutu who enquired whether there was a problem and the reply was that there was none and Cw1 was allowed to go home. Later in the day he was called back to the Consulate and was questioned by the police and confirmed that he left the premises intact when he handed over to the day guard.

7. After the questioning by the police he was released to go home but when he reported to work in the evening he found another guard on duty and he was arrested and taken to the police station where he was detained for two nights till 14.10.2015 to continue reporting there daily. On 21.10.2015 he reported back to work after the police found him innocent and told him to go back to work.

8. When he reported to work, the HR Manager told him that he could not work with a thief and accused him of bribing the police to secure his release. He was therefore chased away by the HR Manager without any termination letter but only a threat that he would ensure that the claimant went home poor. The claimant contended that he was constructively, unfairly dismissed for unfounded reason and without being given a fair hearing.

9. He denied the alleged offence and maintained that when he reported to work on the material day the store where the generator was kept was locked and he left the store locked when he handed over to the day guard. He clarified that he had no keys to the store and therefore could not confirm whether or not there was any generator therein when he reported or left work.

10. Rw1 testified that he was told of how a theft had occurred at the claimant's place of assignment but he never went there. He also learned that the claimant was arrested but later he was released after the complainant refused to record statement with the police. He went on to say that Cw1 reported to his office on 21.10.2015 ready to be assigned work but he referred him to the Operations Manager Mr. Amos, who was in charge of investigations and clearance of guards. Thereafter, he never saw the claimant again and upon enquiry, the Operations Manager told him that he told the claimant to wait for him but he disappeared.

11. On 17.11.2015 the claimant came back to the office to serve Rw1 with a demand letter from Transparency International. Rw1 responded to the letter by a phone call and denied that the claimant had not been dismissed. Rw1 maintained in his testimony that the claimant was never dismissed for the theft of generator and stated that he is still employee of the respondent. He however admitted during cross examination that the claimant was not receiving any salary since the day he deserted work.

12. After careful consideration of the rival evidence and the submissions, it is clear that theft of generator is alleged to have occurred at the Mozambique Consulate where the claimant was assigned to guard; that the complainant never recorded any statement and therefore the claimant was never charged with any offence in court; that the claimant reported back to work after his release from the police but he was not assigned any duty again. It is further clear that the Rw1 who is accused of dismissing the claimant did not visit the scene of the alleged theft; that the day guard who took over from the claimant on 12.10.2015 never gave evidence to deny that he was taken round and confirmed that all the doors to the Consulate were securely locked before the claimant signed off; that none of the officials of the Consular officers gave evidence herein to confirm that indeed a generator was stolen from the store while the claimant was guarding the premises; and that the operation manager Mr. Amos who is alleged to have told the claimant to wait but disappeared never testified to confirm that allegation by Rw1.

13. In view of the foregoing observations from the evidence, it is clear that Rw1 gave hearsay evidence about the alleged theft, investigations by the police and also about the alleged instructions given by the Operations Manager to the claimant on 21.10.2015. Without any evidence from the persons named by the

Rw1, his testimony is on those unverified matters remain hearsay.

14. I however find credence in the claimant's evidence that he handed over the premises he was guarding intact; that he did not have the key to the store and he never saw the generator when he reported to work on the material night; that the police found him innocent and released him to report back to work; and finally, the claimant report back to work but Rw1 dismissed him without any letter, dues and Certificate of Service on ground that the claimant was a thief and that he had bribed the police to release him.

15. The foregoing evidence by the claimant was not rebutted by the hearsay evidence by the Rw1. Consequently I find and hold that as required by Section 47(b) of the Employment Act, the claimant has proved on a balance of probability that he was unfairly dismissed from employment by the respondent for no valid and fair reason and without following a fair procedure. Flowing from the foregoing, I further find that the claimant never deserted work as alleged by Rw1 because Rw1 gave hearsay evidence on that issue.

16. On the other hand, the respondent has failed to prove and justify the reason for dismissing the claimant. Under section 45(2) of the Employment Act, termination of employment by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid reason is one that is true while a fair reason is one that relates to the employees conduct or that which relates to the operational requirements of the employer.

17. In this case the reason for the termination according to Cw1 was theft and bribery to the police. The said misconduct was not proved against the claimant herein as required by the law but instead Rw1 merely denied the alleged dismissal and maintained that he is still in the respondent's pay roll. It is now trite law that if an employer turns away his employee and deliberately fails to assign him any work or pay him salary, the employer is deemed to have constructively terminated the contract of service.

18. Rw1 also never proved that a fair procedure was followed before dismissing the claimant and instead, he gave hearsay evidence to the effect that the claimant disappeared after being told by the Operations Manager to wait for him. Under section 41 of the Act, employer is required before dismissing his employee on ground of misconduct, poor performance or physical incapacity to give him a hearing in the presence of another employee or shop floor union representative of his choice.

19. In view of the finding herein above that the claimant never deserted his employment but was dismissed for no valid and fair reason and without following a fair procedure as required by Section 45(2) of the Employment Act, I hold that the termination of the claimant's employment by the respondent was unfair.

Reliefs

Declarations

20. In view of the foregoing holding, I make declaration that the termination of the claimant's employment was unfair, unjust and wrongful as prayed.

Notice and Compensation

21. Under section 49(1) and 4 of the Act, I award the claimant kshs.12,000 being one month salary in lieu of notice plus kshs.72,000 being 6 months salary as compensation for unfair dismissal. In making the foregoing award I have considered his 6 years of service which is fairly long.

Leave

22. The claimant prayed for leave for the 6 years served but in his evidence he admitted that he went for his 2014 annual leave. Rw1 produced leave records to prove that the claimant also took his leave for 2015. I will therefore award leave for May to October which is 10.5/26 days x12000=4846.15 on pro rata

basis.

Gratuity/Service Pay

23. Under Regulation 7 of Regulation of Wages (Protect security service) Order, I award the claimant kshs.12000 x 15/30 x 6 =36000.

The claim for Service pay is however dismissed as that would accord the claimant double benefit.

Disposition

24. I enter judgment declaring the dismissal of the claimant unfair and unjust and award him kshs.124,846.15 plus costs and interest.

Signed, dated and delivered at Mombasa this 27th day of January 2017.

O.N. MAKAU

JUDGE