



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 473 OF 2015

BETWEEN

MORAA MARCELLA MOTIERI
CLAIMANT

VERSUS

CREST SECURITY SERVICES LIMITED
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Chala & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on 14th July 2015. She was employed by the Respondent as a Guard on 26th January 2016, and thereafter on short term contracts, the last of which was to expire on 29th February 2016. It was terminated before maturity by the Respondent on 11th May 2015. The Respondent alleged the Claimant had deserted work, and/ or performed poorly. These allegations were untrue. The Claimant was not heard. She states termination went against Sections 41, 43 and 45 of the Employment Act 2007. She prays for the following Orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 10,000.
- b) 10 months' salary for the unexpired contract term at Kshs. 100,000.
- c) House allowance at 15% of Kshs. 10,000 for 15 months, at Kshs. 22,500.
- d) Unpaid salary for April 2015 at Kshs. 10,000.
- e) Refund of uniform deductions at Kshs. 5,250.

f) 10 days of Public Holidays worked at Kshs 385 per day x double rate x 10 days = Kshs. 7,692.

g) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 120,000

Total ... Kshs. 275,442

h) A declaration that termination was unfair.

i) Certificate of Service to issue.

j) Costs.

k) Interest.

l) Any other suitable relief.

2. The Respondent filed a Memorandum of Appearance on 29th July 2011, and a Statement of Response, on 17th August 2015. Its position is that the Claimant was its Employee. Her contract was terminated on account of her gross misconduct. She was engaged in an act of insubordination. She was transferred to a different assignment by her Supervisors on 20th April 2015. Rather than report at her new assignment, she went home. She was heard, and a decision made on 27th April 2015 to terminate her contract of employment. She was paid a consolidated salary in accordance with her contract. Her entire Claim is without merit. The Respondent prays the Claim is dismissed, with costs to the Respondent.

3. The Claimant testified and closed her case on the 16th June 2016. Project Security Officer Samson Kaloleni Konde testified for the Respondent on 6th September 2016. Operations Security Manager Jeremy Musembi Syengo testified on 5th October 2016 when hearing closed. The matter was last mentioned in Court on 25th November 2016, when Parties confirmed the filing of their Submissions and the date for delivery of Judgment reserved.

Claimant's Case

4. She testified she was employed by the Respondent as a Security Guard, as shown in the Sub-Contract dated 24th January 2014. Her pay slips are attached to the Claim, further supporting that she was Respondent's Employee.

5. She was not paid house allowance. She was ill on 14th April 2015. She was treated from this date to 17th April 2015. The Doctor gave her a 3 days' bed rest.

6. When she went back on 17th April 2015, her Supervisor advised her to report on 20th April 2015. While away the Operations Manager called her asking why she had not reported to work, and demanded she reports the following day. When she reported, the Operations Manager informed her, he was told by her Supervisor that she had not reported at all. She was summarily dismissed. She was not given a chance to defend herself. She consulted her Advocates and issued demand letter.

7. She told the Court on cross-examination that she was ill. She reported back to her Supervisor Konde on 17th April 2015, who advised she returns on 20th April 2015. She was assigned duty at Milly Glass Company on 21st April 2015. She recorded a statement of absenteeism on this date.

8. She went to her previous post, instead of Milly Glass as advised. She subsequently wrote a letter of apology. She was not compelled to write the letter. She did not reveal this in her Pleadings.

9. She states in her Witness Statement, that the Manager gave her a chance to explain herself. She was given an opportunity to explain. It is not true that she declined to report to work as instructed by her

Employer.

10. Redirected, she told the Court she was to report to her new post on 22nd April 2015. She went back to her previous workplace to pick her personal effects. She gave her explanation in the presence of Konde. No other Person was present.

Respondent's Case: -

11. Konde testified he was Claimant's Supervisor. She guarded at Southern Engineering Company. On 20th April 2014, she went to this workplace to do some clearance. She had been reassigned duty at Milly Glass Company. She did not report at her new assignment. The Supervisor reported her defiance to the Operations Manager.

12. Cross-examined, the Witness testified Claimant's contract was not terminated by the Respondent. The Claimant did not sign the contract of employment. There was no letter given to her on transfer. There was no hearing. Redirected, the Witness stated he did not know about the letter of termination. He learnt about it later.

13. Syengo testified the Claimant was given instructions to transfer to another site. She declined and went home. This was on 20th April 2015.

14. She returned on 24th April 2015, and gave a report to Syengo, on her absence. She was rude all through. Syengo issued her termination letter dated 27th April 2015. She wrote an apology on 30th April 2015. The reason for termination was gross misconduct. She refused to transfer.

15. Syengo told the Court on cross-examination that he was given report on transfer of the Claimant, and her refusal to transfer. He was not aware of any sick notes given to the Respondent by the Claimant. He emphasized on redirection that the Claimant did not provide the Respondent with evidence of illness; she just left the workplace and went away.

Submissions:-

16. The Claimant submits that the Respondent did not show valid reason in terminating Claimant's contract of employment, under Section 43 and 45 of the Employment Act 2007. There was no documentation with regard to transfer of the Claimant to a new workplace. Fair hearing was not availed to the Claimant under Section 41 of the Employment Act 2007. The Claimant submits Respondent failed to meet the principles of fair termination as restated in ***Nairobi Industrial Court Cause Number 1050 of 2011 between Loice Otieno v. Kenya Commercial Bank Limited.***

17. She submits she merits notice pay under Section 36 of the Employment Act; 10 months' salary left in her contract; house allowance in arrears under Section 31 of the Employment Act and the General Wages Order; unpaid April 2015 salary; refund of uniform deductions; Public holidays worked; and compensation for unfair termination.

18. The Respondent submits Claimant's contract was terminated mainly for insubordination, which act is defined in The Black's Law Dictionary, as a refusal by an Employee to obey an order that a Superior is authorized to give. She refused to transfer. The Respondent urges the Court to find persuasion in the decision of this Court in ***Joseph Onyango Asere v. Brookside Dairy Limited [2016] e-KLR*** where an Employee who failed to abide by the directions given by his Superior, challenging the Superior to fire him, was found to have been properly dismissed. The Respondent submits the Claim has no merit.

The Court Finds:-

19. The Claimant was employed by the Respondent as a Guard. She was placed on periodic contracts, which are captured in the poorly crafted document titled 'Sub-Contract,' dated 24th January 2014.

20. The document shows the Claimant was to work presumably from 24th January 2014, to 15th July 2014. The latter date is indicated a ‘finishing date’ in the ‘Sub-Contract.’ It is indicated on the same document ‘Extended 31st January 2015.’ It is unclear what happened in the period between July 2014 and January 2015.

21. The Claimant states she was granted renewal of her contract beginning 4th March 2015, to expire 29th February 2016. This has not been disputed by the Respondent, although it is not endorsed in the ‘Sub-Contract.’

22. There is evidence as shown in the Claimant’s medical note from Amani Medical Clinic that the Claimant was taken ill on 14th April 2015, and treated at the facility. She was given 3 days bed rest, which expired on 17th April 2015.

23. The dispute does not relate to the period of her illness and convalesce; it relates to 20th April 2015, when she was instructed to report to work at a different site for guard duties.

24. From her own evidence, it appears the Claimant was assigned work at Milly Glass. She was to report on 22nd April 2014, but did not report. She states she did not report at the new site, but went back to Southern Engineering site, to retrieve her personal effect.

25. She did not report to Milly Glass as instructed. It does not help her case that she may have revisited her old workplace for whatever reason, at the time she was instructed to be at Milly Glass. It does not matter that the instructions to transfer issued by word of mouth, rather than the written word. Oral instruction given by a superior is as good as the written word, as long as it is issued lawfully and reasonably.

26. After termination, the Claimant wrote an apology, acknowledging she had collided with her Seniors. When an Employee collides with her Seniors, not merely with a Senior, it would suggest a degree of incompatibility if not insubordination. Both are valid termination grounds. She also made a snide remark, saying Juniors and Seniors needed to respect each other. The attitude in her letter reinforced the view that the accusation of insubordination against her had some foundation. She had written earlier on 21st April 2015, in her ‘Statement of Absenteeism,’ where she alluded to many obstacles and challenges in relation to her Seniors. In ***Industrial Court of Kenya at Nairobi, Cause Number 635 of 2010 between Dede Esi Annie Amanor- Wilks v. Actionaid International, the Court held:-***

- Termination is fair under Section 45 [2] [b] of the Employment Act 2007, if based on the Employee’s conduct and compatibility.
- Employers are generally entitled to have harmonious working relationships within their organizations, and can do so, by weeding out trouble-makers, eccentrics and disruptive Employees from their Organizations.

27. There are elements of insubordination, incompatibility and disruptive conduct shown by the Claimant with regard to the discharge of her role, which in the view of the Court, justified termination.

28. Was procedure fair? Cross-examined, the Claimant stated:-

“ I say in my Witness Statement that the Manager gave me a chance to explain myself, and I explained. It is true I was given the opportunity to explain.”

29. Section 41 of the Employment Act 2007 however goes much further than merely requiring an Employee to explain herself. There is no record of charges being presented to the Claimant as required under Section 41. She is not shown to have been heard, in the presence of a fellow Employee of her choice, or a shop-floor Trade Union Representative. The explanation she admits to have made, appears to the Court to have been an informal engagement with the Operations Manager and the Supervisor, against whom she had grievances. There was no disciplinary panel set up to formally hear the Claimant. Her

evidence that she was given an opportunity to explain herself, cannot be taken by the Court as being in full satisfaction of the demands of fairness of procedure, under Section 41 and 45 of the Employment Act.

30. To this extent, termination was unfair. ***The Respondent shall pay to the Claimant the equivalent of 3 months' salary in compensation for unfair termination, at Kshs. 11,500 x 3 = Kshs. 34,500. She is granted the prayer for notice pay at Kshs. 11,500.***

31. The rate of monthly salary above includes house allowance of Kshs. 1,500. There is nothing in the 'Sub-Contract' indicating that what was paid to the Claimant was a consolidated salary. The pay slips show a basic salary of Kshs. 10,000. ***The Claim for arrears of house allowance, based on Section 31 of the Employment Act, and the General Wages Order, is allowed at 15% of the basic salary at Kshs. 22,500, for 15 months as prayed.***

32. The Respondent gave no documents discounting the prayer for salary for April 2015. Such evidence should have been readily availed, from the pay roll, pay slip and/or relevant banking slips. ***The Claimant is granted Kshs. 10,000 as salary for April 2015.***

33. The pay slips show the Claimant was deducted Kshs. 350 monthly, meant to go towards purchase and supply of uniforms. This is normally refunded at the end of service, and the uniform surrendered to the Employer. The Respondent does not claim anything from the Claimant with regard to the uniform. There is no reason why the Respondent should retain Claimant's uniform fees. ***The Respondent shall refund to the Claimant Kshs. 5,250 in uniform fees.***

34. Details of the holidays worked were not provided to the Court to enable the Court make a reasonable finding on the item. The pay slips show the Claimant was paid an item described as 'extra days.' She did not come out clearly and satisfy the Court on the claim for holiday pay. The claim is rejected.

35. ***Certificate of Service shall issue under Section 51 of the Employment Act 2007.***

36. No order on the costs.

37. ***Interest granted at 14% from the date of Judgment, until payment in full.***

IN SUM, IT IS ORDERED:-

a) It is declared termination was based on valid ground, but unfair procedure, therefore unfair.

b) The Respondent shall pay to the Claimant: the equivalent of 3 months' salary in compensation for unfair termination at Kshs. 34,500; notice pay at Kshs. 11,500; house allowance in arrears at Kshs. 22,500; April 2015 salary at Kshs. 10,000; and uniform refund at Kshs. 5,250- total- Kshs. 83,750.

c) Certificate of Service to issue.

d) No order on the costs.

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

Dated and delivered at Mombasa this 24th day of February 2017.

James Rika

Judge