



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 531 OF 2014

BETWEEN

WINSTON AMUNABI CLAIMANT

VERSUS

BOB MORGAN SECURITY SERVICES LIMITED.... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. & Company Advocates for the Claimant

Ndegwa Katisya Sitonik & Associates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 30th October 2014. He states he was employed by the Respondent Company as a Security Guard on 22nd October 2010. His position was declared redundant, on 22nd October 2014. He claims redundancy was contrary to the Employment Act and Respondent's internal Procedure. He prays the Court to grant to him against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 16,865.
- b. Unpaid salary for 2 months and 1 week in 2010 at Kshs. 14,728.
- c. Unpaid performance allowance at Kshs. 5,105 per month from December 2012 to April 2014 at Kshs. 86,785.
- d. Payment for redundancy at Kshs. 86,785.
- e. 12 month's salary in compensation for unfair termination at Kshs. 202,380.
- f. Underpayment of salary from May 2010 to May 2011 at Kshs. 325.
- g. Unpaid salary for May to July 2011 at Kshs. 9,180 per month at Kshs. 27,540.

h. Costs and Interest.

2. The Respondent filed its Statement of Reply on the 2nd December 2014. Its position is that the Claimant was employed under a fixed term contract of 1 year, commencing 6th June 2013, and expiring 6th June 2014. He was issued a notice of termination on account of redundancy, dated 26th April 2014. The reasons for termination were clearly spelt out in the letter of termination. The Respondent lost out several security service contracts, rendering Claimant's position redundant. He earned a monthly salary of Kshs. 16,865. He is not owed any underpayments, arrears of salary or other benefits by the Respondent. The Respondent prays the Court to dismiss the Claim.

3. The Claimant gave evidence and closed his case, on the 1st December 2015. Hearing of the Respondent's case was fixed with the consent of the Parties for 15th March 2016. The Respondent did not attend Court to prosecute its case, and proceedings closed on the 15th March 2016. The matter was last mentioned in Court on the 5th October 2015 when the Claimant confirmed the filing of his Submissions and Judgment scheduled for delivery on the 10th March 2017.

4. The Claimant testified he was employed by the Respondent on 22nd October 2010. He had duty schedules showing he worked from the year 2010. These issued on being assigned specific duty. He worked up to 1st April 2014. He was issued redundancy letter dated 22nd April 2014.

5. Prior to termination, he had been issued fixed term contracts on 18th April 2012 and 6th June 2013 titled 'Guarding Annual Contracts.' They were for 1 year each. He had not completed the specific period by the time his position was rendered redundant. He was posted to Crystalline Company in Changamwe as a Clerk. The Respondent posted him there. He was replaced by another Guard who was assigned to Barclays Bank named John Kebut. Other Guards were trained to work as Clerks.

6. At Crystalline, the Claimant worked as a Clerk. He was loading and stock-taking, among other clerical duties. He was to be paid performance allowance while at Crystalline. It was to be paid by Crystalline. It was not paid. It was Kshs. 5,105 per month. It was not paid from December 2012 to April 2014. He was underpaid. He was not paid redundancy dues. He was suspended for 2 months over allegations of forgery. He was cleared of the allegations. He was not paid his salary for the period of suspension. He did not agree with the reasons given by the Respondent in justifying termination. His salary was Kshs. 17,090 per month, not Kshs. 16,865 given by the Respondent.

7. On cross-examination, the Claimant told the Court he was employed in 2010 and worked for 4 years. There were written contracts issued to all Guards. They were standard contracts, matching in all details save for the salary. The last contract was signed between the Parties on the 6th June 2013, to lapse on the 6th June 2014. He left employment on the 22nd April 2014, before the lapse of the contract. About 1 month 6 days remained in his contract. All terms were agreed.

8. Clause 8[b] had a termination clause. Employment could be terminated through 1 month notice or payment of 1 month salary in lieu of notice. Redundancy notice indicated the reason for termination. Barclays Bank and Safaricom had contracts with the Respondent for provision of security. These contracts had lapsed at the time the Claimant's position was rendered redundant. He was to work as a Security Guard under the contracts. He was assigned to do clerical work at Crystalline by the Respondent. The contract showed total remuneration at Kshs. 16,865. It did not provide for performance allowance. He was suspended in 2011 under another contract. He made demand for unpaid salary over the period of suspension from the Respondent. Redirected, the Claimant testified redundancy notice did not mention Crystalline Company. He received salary and allowances from the Respondent.

9. The Claimant filed his Closing Submissions on 1st April 2016. The Court must admonish the Claimant for filing very untidy Submissions. The first page has drafts on the overleaf, unrelated to the Claim. Why

would the Claimant bring such material before the Court? These drafts are expunged from the record. The Claimant submits declaration of his position to be redundant, was not justified. The Respondent had service contracts with Barclays Bank and Safaricom among other Companies. The Claimant was assigned to Crystalline. The contract between Crystalline and the Respondent had not lapsed, unlike the contract with the other Companies, at the time of redundancy. The Claimant's contract had not expired. Guards assigned to Companies whose contracts with the Respondent had expired, ought to have had their positions declared redundant. It should not have been the Claimant's position, as Crystalline, where the Claimant worked, retained its contract with the Respondent.

10. Termination was unfair because the Respondent did not follow Section 40 of the Employment Act 2007, in declaring the Claimant's position redundant. Other Employees were assigned to Crystalline after the Claimant left. He was not paid his redundancy dues, before termination. Termination was unfair. The Respondent received Kshs. 5,105 performance allowance from Crystalline, which was supposed to be paid to every Guard who worked at Crystalline. The Respondent failed to pay this to the Claimant. He was denied his salary for the period on suspension. He was not paid severance pay in accordance with the Employment Act 2007. The Claimant submits the Respondent did not call evidence to support its position on non-availability of work.

The Court Finds:-

11. The Duty Schedules attached to the Claim as exhibit 1, support the Claimant's position that he worked for the Respondent from the year 2010. The fixed term contracts introduced by the Respondent came after the Claimant had already served from 2010. His salary as captured in the contract was Kshs. 16,865 per month.

12. He left employment on his position being declared redundant. The letter communicating the decision is dated 22nd April 2014. The effective date is back-dated to 1st April 2014.

14. The Respondent explained in its letter of 22nd April 2014 that it had failed in bidding for contracts for provision of security services, with Barclays Bank and Unilever Company. Further, the Respondent alleges to have lost contracts with Kenya Data Networks and Safaricom.

15. The Claimant's position is that he worked with Crystalline, whose contract with the Respondent was still alive. Guards assigned to Companies whose contracts with the Respondent had expired, ought to have had their positions declared redundant. The Court cannot disagree with the Claimant on this, in the absence of evidence from the Respondent. It was essentially a matter of the wrong Employee being selected for redundancy. The Company which he was assigned to, which he worked for, still had a contract with the Respondent. The Claimant's contract was about 1 month and 6 days to lapse. Why prematurely terminate through redundancy, while sparing Employees who worked for Companies whose contracts with the Respondent had ended?

16. The Respondent did not show to the Court that redundancy was in conformity with Section 40 of the Employment Act. The notice issued to the Claimant and copied to the Labour Office and the relevant Trade Union, is dated 22nd April 2014, and took effect 1st April 2014, before it issued. It was not a notice at all, but communication of *a fait accompli*. It served no purpose. No severance was paid to the Claimant in accordance with the law. There is no record of any other payments under Section 40. The procedure as shown in the selection of the Claimant, and the notification of redundancy was flawed. Redundancy was unfair. ***The Claimant is granted 5 months' salary in compensation for unfair termination at Kshs. 84,325.***

17. ***He is granted 1 month salary in lieu of notice at Kshs. 16,865.***

18. He did not satisfy the Court on his prayers for unpaid salary in 2010, unpaid performance allowance, underpayment between May 2010 and May 2011, and unpaid salary for 2011. It was not clear in his evidence how these items arose, and why there were no demands upon the Respondent to pay the items, at the time they arose. There was no clear evidence on performance payment. It is not captured in the

contracts under which the Claimant worked. There was no document from the Claimant, the Respondent or Crystalline supporting performance payment. He did not convince the Court how a monthly salary of Kshs. 16,865, amounted to underpayment. No wage instrument was brought to the attention of the Court, establishing underpayment. These prayers are declined.

19. Severance pay was pleaded as Redundancy Payment. The Claimant ought to have been more specific. Redundancy payment denotes any of the forms of payments under Section 40 of the Employment Act. Lack of specificity nonetheless, cannot justify denial of the item, which is a core benefit under Section 40. The Court is satisfied the Claimant worked on aggregate for a period of 3 years and about 6 months. He merits severance pay based on his 3 complete years of service. ***He is granted severance pay at 15 days' salary for 3 complete years of service, at Kshs. 29,189.***

In Sum, IT IS ORDERED:-

[a] Termination was unfair.

[b] The Respondent shall pay to the Claimant: Kshs. 84,325 in compensation for unfair termination; 1 month salary in lieu of notice at Kshs. 16,865; and severance pay at Kshs. 29,189- total Kshs. 130,379.

[c] Costs to the Claimant.

[d] Interest granted at 14% per annum from the date of Judgment.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge