



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 752 OF 2015

ALEX MASAU NDAISICLAIMANT

VERSUS

TEXAS ALARM [K] LTDRESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's contract of service by the respondent on 24/6/2015. The respondent has denied liability for unfair termination and avers that the termination was done by the claimant by his resignation letter dated 1/7/2015. She further avers that she paid to the claimant all his rightful dues after the resignation.

2. The suit was heard on 5/10/16 when the claimant testified as CW1 and the respondent called Mr. Bernard Odhiambo Aduda as RW1. Thereafter both parties filed written submissions.

ANALYSIS AND DETERMINATION

3. There is no dispute that the claimant was employed by the respondent from 28.8/2014 to 24/6/2015 as a security guard earning Ksh.10200 per month. The issues for determination are:

(a) Whether the claimant was unfairly terminated or he voluntarily resigned.

(b) Whether the claimant is entitled to the reliefs sought or any part thereof.

UNFAIR TERMINATION –VS- RESIGNATION

4. CW1 stated that he fell ill on 20/6/2015 while on duty and attended St. Annes Health Centre at Magongo after work. He was given a prescription of injection for 3 days consecutively which made him to call his supervisor Mr. Wesonga and secured 3 days off. However, the supervisor told him to give him ksh.600 to pay another guard who would stand in for him during the 3 off days. The relieving guard was Mr. Katana who was also the day guard.

5. CW1 further explained that when he reported back to work, he found another guard had replaced him and he was told to report to the office the following day for directions. When he went to the office he met the operations manager and Mr. Wesonga whom he gave his treatment note. He was then told to go home only to be called later by the Accountant Mr. Stephen to collect his cheque. He however declined to sign

for the cheque because it was blank. He then reported the matter to the labour office. CW1 denied ever writing the resignation letter dated 1/7/2015.

6. RW1 is the respondent's HR Manager. He explained that CW1 was employed on 26/8/2014 as a security guard and worked until 19/6/2015 after which he absconded duty from 20/6/2015 to 22/6/2015. When he reported back to work on 23/6/2015, he was referred to see RW1 the following day and show cause why he should not be dismissed for absconding duty. CW1 never reported to RW1 as directed even after being called by phone. He however appeared on 2/7/2015 and presented a resignation letter and returned his uniform. He explained that he was resigning on ground of ill health and that he wished to go home. CW1 however did not produce any medical letter to RW1.

7. Thereafter RW1 received letter from labour officer dated 25/8/2015 summoning him for a meeting about the claimant's dispute. Where it was agreed that CW1 should hand back his Baton and Ring (part of his uniform) before his uniform levy could be refunded. He therefore paid the claimant his dues of ksh.5000 less ksh.700, the value of the Baton and the ring. When the claimant refused to collect the pay, RW1 deposited the cheque with the labour officer.

8. On cross examination, RW1 admitted that the Clearance form indicated that the uniform was returned to the office by the supervisor after the claimant left it at the work station. He further admitted that the letter dated 25/8/2015 summoned him to the labour officer on 8/9/2015 and RW1 wrote the letter dated 12/9/2015 enclosing the settlement cheque. RW1 denied that CW1 was dismissed and maintained that he resigned voluntarily. He further maintained that the claimant was not disciplined even after absconding duty because he had no previous record of indiscipline.

9. After careful consideration of the evidence before the court, I find that the claimant has not discharged his burden of proving unfair termination as required under Section 47(5) of the Employment Act. Although he has denied that he wrote the resignation letter dated 1/7/2015, I find on a balance of probability that he wrote the said letter. The reason for the foregoing is the similarity of the signature thereon with the undisputed signature by the claimant appended on his verifying affidavit sworn on 23/9/2015 and the instruction note to his lawyer dated 18/9/2015 annexed to the memorandum of claim. For the same reason, I find that the respondent has proved on a balance of probability that it is the claimant who terminated his contract of service by the resignation letter dated 1/7/2015.

RELIEFS

NOTICE AND COMPENSATION

10. In view of the foregoing finding that it is the claimant who terminated his on contract of service, I dismiss the prayer for salary in lieu of notice and compensation for unfair termination.

SALARY UNDERPAYMENT

11. The claimant has explained that he was earning ksh.10200 per month. The respondent has not disproved the said term of the employment contract by any employment records as required under Section 10(7) of the Act. I consequently find that the salary the claimant was receiving was ksh. 10200 from August 2014 till June 2015, a period of 10 months. According to the Wage Order published vide Legal Notice No. 197 of 2013, the minimum wage for a night watchman was ksh.10911.70 exclusive of house allowance. The underpayment of salary to the clamant was therefore Ksh.711.70 for 10 months served equaling to ksh.7117.00

HOUSE ALLOWANCE

12. The rate for calculating house allowance is not provided in the statutes but the courts have been using 15% of the basic salary as the reasonable rate. I therefore award to the claimant arrears of his house allowance at the rate of ksh.15% of ksh.10911.70 per month equaling to ksh.16,367.76 for the ten months worked.

LEAVE

13. The claimant worked for 10 months and as such he is awarded 1.75 leave days per month on pro rata basis totaling to 17.5 leave days equaling to Ksh.7344.42.

UNIFORM

14. The claim for uniform is also granted being ksh.5000 less ksh.700 for baton and ring equaling to Ksh.4300.

NHIF AND NSSE

15. This claim is dismissed for want of evidence that the sum deducted was never remitted.

DISPOSITION

16. Judgment is entered for the claimant in the sum of ksh.35,129.20 plus half costs and interest.

Dated, Signed and delivered this 31st March 2017

O.N. Makau

Judge