



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO. 1678 OF 2014

FREDRICK OWINO OTIENO CLAIMANT

VERSUS

KAZURI 2000 LIMITED RESPONDENT

JUDGEMENT

1. The Claimant, Fredrick Owino Otiemo filed his Memorandum of Claim on 22nd August, 2015.
2. On 3rd October, 2000 the Claimant was employed by the Respondent as a Security Guard and also doubled up as General Worker where he was allocated other duties which included swimming pool attendant. The Claimant was paid Kshs.15, 500.00 per month. On 28th february, 2015 the Respondent through its director, Ms Regina Newman summarily dismissed the Claimant without written notice. There were no reasons given or a hearing. He was never paid his terminal dues despite working 12 hours a day with an overtime of 4 hours daily.
3. The Claimant is seeking payment of;
 - Notice pay at Kshs.15, 500.00;
 - House allowance at Kshs.390, 600.00;
 - Overtime pay Kshs.488, 250.00;
 - Service/gratuity for 7 years Kshs.54, 250.00;
 - Compensation; and
 - Costs of the suit.
4. In evidence the Claimant testified that upon employment by the Respondent he worked diligently without a letter of appointment. He was on day and night shift from am to p.m. or p.m. to am and therefore on 4 hours overtime daily. There was no pay for the overtime work hours. No house allowance was paid and was forced to rent a house outside his work place. He took his annual leave as they were 4 employee but when one colleague failed to attend work he was never given an off day.
5. On 20th february, 2015 while the Claimant was on night duty, power/electricity was off. The generator was on. At am the power came on but the generator was still on. He tried to put off the generator without success. Mrs Newman the wife to the respondent's director called the Claimant to put off the generator

but he could not. She called him on his cell phone but due to noise from the generator there was no good communication. She started querying the claimant. The Claimant opted to go back to his work station at the gate.

6. During the next shift, the Claimant did his handing over and the supervisor, Stephen Kariuki called him later with information that he should not report back to work. This was on a Sunday and was his last day at work. After 3 days he went to the Respondent and asked for his written letter of termination but they could not agree on terminal dues. There was no notice of termination, any hearing or reasons to justify the termination.

7. The Claimant also testified that he was employed by the Respondent to work at the private residence of Mrs Newman. He was paid an all-consolidated salary of Kshs.9, 000.00 which was increased over the years. The salary was later paid with a payslip but no statutory deductions were made. Every 3 to 5 years, upon request one was paid service pay. In 2012 he was paid Kshs.31, 000.00 as gratuity. In 2014 and 2015 he was paid a total of Kshs.20, 000.00 as service/gratuity. The Claimant made an application and service was paid.

8. When he was asked to attend to the generator, he had no training on how to handle it. He did not shout at Mrs Newman when he was unable to handle the generator but as the generator was noisy he had to shout for her to hear him. A technician was called later to attend to the generator.

9. The Claimant also testified that when he was terminated he had a cooperative loan of kshs.16, 000.00 and he paid through his shares. He was never called to receive his terminal dues.

Defence

10. In defence, the respondent's case is that the Claimant was employed as a security guard on a one year contract renewable from time to time. The Claimant was dismissed for gross misconduct and vice letter dated 1st March, 2015 which the Claimant has refused to collect. There was no overtime dues owing and whenever there was such work it was promptly paid each month and the Claimant acknowledged the same. The Respondent was entitled to dismiss the Claimant for refusing to obey lawful orders given to him by the director of the respondent; using abusive language to the director; and being rude, insubordinate and disobedient by refusing to discharge his duties as allocated.

11. The claim for compensation is not due and the salary of Kshs.15, 500.00 was inclusive of house allowance. Upon the expiry of each employment contract service/gratuity for all years was paid and there are no arrears due to the claimant. The Claimant enjoyed his annual leave and off days and cannot claim overtime pay for 14 years. The claim should be dismissed with costs.

12. In evidence, the Claimant called 2 witnesses – Julius Ambani Suchi and John Adrian Newman.

13. Mr Suchi testified that he previously worked for the Respondent as an Accountant until 15th August, 2016 when he left for a new employer. He worked with the Claimant as he was in charge of the human resource that was under his office. The Claimant left his employment with the Respondent due to an incident involving a generator. He defied directions and exchanged abusive words with Mrs Newman, Respondent director. The letter of dismissal was not sent which set out the terminal dues and the cheque. The Claimant refused to collect. The house allowance had been revised to be included in the gross salary. All overtime was paid on the pay roll.

14. The other witness was Mr Newman, son to Mrs Newman. The Claimant was a security guard at the family residence until 27th February, 2015. The events leading to the termination of the Claimant are that while the Claimant was undertaking his duties, he was responsible for the power generator at the residence. On this night power went off but when it came back the Claimant did not attend to the generator. When the witness was at his study, around 11 am power came back but the generator was never put off. Around am he heard his mother, Mrs Newman calling on her cell phone and was asking the Claimant why the backup generator had not been switched off. He could hear the Claimant speaking very

disrespectfully to his mother, that he was hungry, frustrated and did not want to be disturbed. He dared Mrs Newman to fire him to which she asked if was drunk. Later the generator was put off but the witness was not sure whether this was done by the Claimant or the other guard, Ashiruma.

15. Mr Newman also testified that the Respondent had multiple complaints against the Claimant but this night of 27th February, 2015 was most intense. The Claimant was invited for a hearing but declined. When the generator as checked the next day it had no problem which meant the Claimant deliberately refused to put it off.

Submissions

16. The Claimant submits that he was summarily dismissed without justification and locked out of his work place. That the reason given by the Respondent in court that he failed to attend work as directed is not proved and in any case where a generator developed problems he was not a technician to handle it. Due to the noise he was not able to communicate well with Mrs Newman and had to shout. The dismissal was without fair procedure as required under section 43 and 41 of the Employment Act. In **KUDHEIHA versus Mombasa Sports Club, Cause No.440 of 2013** the court held that employment must be terminated for a valid and fair reason. In **Donald Odeke versus Fidelity Security Ltd, Cause No.1998 of 2011** the court held that an employee facing disciplinary action must be given adequate time to respond to any charge. The remedies sought are therefore due.

17. The Respondent submits that from their record all dues claimed were paid and as there was no unfair termination the compensation sought is not due. The Claimant was employed on a contract but on 27th February, 2015 he failed to carry out his lawful duties and proceed to use abusive language on the respondent's director. The claimed house allowance was inclusive of the gross pay and therefore not due. Overtime was paid with the monthly salary when due while service pay was paid every year upon request and there are records.

Determination

18. It is a good practice to keep work records as it is also a legal requirement pursuant to section 10 of the Employment Act read together with section 73 and 74 of the Act. Where an employer fails to keep work records, this is at their expense as the word of the employee has to be believed.

19. In this case, the claim is that the summary dismissal was without due cause or procedure. However, the Respondent has produced a termination letter issued to the Claimant who refused to collect the same. In his evidence, the Claimant testified that upon being locked out of his work place, after 3 days he went to the office and his dues were not properly calculated and therefore did not take what was offered. I take it at this point the Claimant was aware of his termination and by refusing to accept his terminal dues, as a result refused to also take with him the termination letter.

20. When the Claimant went to collect his terminal dues, as a consequence he was aware that his employment had effectively been terminated. The reason for termination was that the Claimant refused to take lawful orders and further used abusive language towards the respondent's director. To this the Claimant testified that the generator was faulty and required the technician as he was not professionally trained in that regard. However Mr Newman testified that when the generator was checked the next day it had no problem. That after the bitter exchange between the Claimant and Mrs Newman, his mother, the generator was put off. This in itself show that the generator had no problem and the Claimant either deliberately did not want to put it off or was unable to due to other factors not disclosed.

21. Section 44 of the Employment Act allows summary dismissal for gross misconduct. Where an employee refuses or fails to attend to duties allocated by the employer and also uses abusive language, summary dismissal is allowed. A notice must be issued to the employee in terms of section 41(2) to be heard on his conduct before dismissal. Where the case is of gross misconduct less notice can be given but the employee must be given a hearing. In this regard, Mr Newman testified that the Claimant was with Mr Ashiruma at work on the night of 27th febraury, 2015 he committed acts of gross misconduct. It was not

clarified as to whether this colleague of the Claimant witnessed the claimant's conduct because Mr Newman as the son to the respondent's director would want to protect his mother. However, the immediate conduct of the Claimant also implicates him as after the alleged use of abusive language on Mrs Newman, the generator was put off. The refusal of the Claimant to collect his termination letter implicates him as a person not ready and willing to do as directed.

22. It is not always that an employer is he 'bad' person. Even where an employee has grossly misconducted himself and the employer makes all efforts to address the same but the employee is not willing to change and proceeds to use abusive language or derogatory language on the employer, such should not receive the sanction of the court by finding this is a case of unfair dismissal. A diligent and dutiful employee is required to take lawful instructions from the employer. It was clear from the Claimant that he was aware that there was a generator running when power was off and it was his duty to put it off when power was back. The refusal to attend and only attend upon being called by his employer is a matter of gross misconduct.

Remedies

23. On the finding that the Claimant was not unfairly dismissed, that aside, I find there was no notice issued to him however short. The lock out from work even where there was a justifiable cause does not remove the requirement to issue the Claimant with notice before his dismissal. Whether verbal or written and noting the circumstances of the case, upon return for duty the next day, the Claimant should have been issued with notice over his conduct. In any event this was offered in the termination letter. Kshs.15, 500.00 is hereby awarded.

24. On the claim for house allowance, the defence is that this was paid as all inclusive in the monthly salary. That the Claimant was on a yearly contract but such contracts have not been submitted. Section 19 of the Employment Act requires an employer to issue an employee with a statement of his salary. This is to enable the employee know what dues he has been paid and what deductions have been effected. However in this case where the Claimant was paid Kshs.15, 500.00 and the respondents assert that this was all inclusive, noting all the records submitted, I take it the Respondent was diligent in ensuring adherence to the law. In this regard, the Regulation of Wages (General) (Amendment) Order, 2012 a Night Guard minimum wage is Kshs.9, 571.65. Where the Claimant was paid over and above such basic minimum wage, such I find to be fair and reasonable to compensate him for any additional provisions of housing.

25. Overtime claim is challenged on the basis that the Claimant cannot have been at work continuously for the entire 14 years with the respondent. Indeed the Claimant admitted to have taken annual leave and off days and worked for 6 days. There are records of overtime earned and how such was paid the statements submitted by the Respondent are detailed on the payments made to the Claimant who has duly acknowledged. I have gone through these records and find reasonable cause that no overtime pay is due to the claimant.

26. Service gratuity is due where an employer has not complied with section 35(5) and (6). The Claimant opted to apply for his service pay and receive it before his termination. The applications for such service pay are submitted as pages 65 to 68. Upon such applications various dues were paid. I take by making such applications for advance payment of service gratuity; the Respondent paid the same based on the applicable salary each year. To compute the same at this point based on the last salary of the Claimant would be to lose sight of the advance payments, the immediate benefit that went to the Claimant at the time but his own loss for having taken such monies in advance. To award as claimed would be a double benefit.

In conclusion, judgment entered for the Claimant for the notice pay due at kshs.15, 500.00 if such monies have not already been paid. Each party shall bear own costs.

Dated, delivered in open court at Nairobi this 16th day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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