



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 159 OF 2016

AMIMU ABDALLA OMARICLAIMANT

VERSUS

TEXAS ALARMSRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant was employed by the respondent as a security guard at Kilifi County from 26/4/2012 earning ksh.9000 per month. On 31/1/2014 he was arrested and later charged with stealing the property of Coast Agency Ltd or in the alternative, neglect to prevent a felony under the Kenya Penal Code. After the trial the claimant was acquitted on 8/1/2016 and he brought this suit against the respondent claiming damages for wrongful dismissal, false imprisonment and malicious prosecution.
2. The respondent has admitted the employment relationship with the claimant but denies that she was involved in the arrest and prosecution of the claimant as alleged. She further avers that the claimant was fairly dismissed for gross misconduct and thereafter he was paid all his lawful dues.
3. The suit was disposed of by written submissions on the basis of the pleadings, witness statement and documentary evidence filed.

ANALYSS AND DETERMINATION

4. The issues for determination herein are:

- (a) Whether the claimant was unfairly terminated.
- (b) Whether the claimant is entitled to the reliefs sought.

UNFAIR TERMINATION

5. Under section 45(2) of the Employment Act, termination of an employee's employment contract is unfair if the employer fails to prove that it was founded on a valid and fair reasons and that it was done after following a fair procedure. However before the employer assumed the foregoing burden of proof, the claimant must first discharge his burden of proving that he was wrongfully or unfairly terminated according to Section 47(5) of the Act.

6. In this case the claimant has stated the following in his witness statement:

“I am Amimu Abdalla Omari of care of post office box number 85921, Mombasa do hereby make a statement and state as follows; I was employed by the respondent on 26/4/2012 as a security guard earning a monthly salary of ksh.9000. I was transferred to Coast Urgency under the same capacity and the same salary agreement made by the respondent and Coast Urgency. On 31/1/2014 while at work I was unlawfully arrested and taken to Mariakani police station where I was incarcerated till when I appeared before the court. Dated at Mombasa this 25th day of February 2016

Signed by Amimu Abdalla Omar”

7. After a careful perusal of the foregoing statement, I see no accusation made against the respondent about the wrongful dismissal, false arrest and malicious prosecution pleaded by the claimant. Consequently I find that no evidence has been adduced by the claimant that is capable of discharging his burden of proving unfair or wrongful dismissal against the respondent. He has neither alleged that there was no good reason for the dismissal nor has he accused the employer of not following a fair procedure. The claimant has also not proved on a balance of probability that he was arrested and prosecuted by the respondent.

8. In this case the respondent has contended that the claimant was dismissed for gross misconduct. According to the written statement by Mr. Bernard Odhaimbo Adunda, the respondent’s HR Manager, the claimant and his colleagues failed to raise alarms to prevent theft at their place of assignment on 31/1/2014. As a result they were arrested by police and booked under OB No. 10/31/01/2014. Thereafter he never reported back to work until 25/1/2016 when he was served with a summary dismissal letter. On 30/1/2016 he went to the office to claim his refund of his uniform levy which was paid on 12/2/2016. The proceedings from the criminal case No. 57 of 2014 confirm that an offence occurred at the claimant place of work. It was a fair ground for the respondent to dismiss the claimant.

9. In addition Mr. Adunda has contended that the claimant was invited to show cause why disciplinary action should not be taken against him but he defaulted. The said allegation of fair procedure was not disputed by the claimant in evidence. Consequently I find that the procedure followed before dismissing the claimant was fair.

10. In view of the finding that the claimant has failed to discharge his burden under Section 47(5) of the Act of the proving wrongful or unfair dismissal and in view of my further finding that there was a good cause for dismissing the claimant and that a fair procedure was followed, I answer the first question in the negative.

RELIEFS

11. In view of the foregoing, I dismiss the claim for one month salary in lieu of notice, and compensation for unfair termination. For the same reasons I dismiss the prayer for general damages for breach of contract.

12. The claim for underpayment is also dismissed for lack of evidence. The claim for leave and pension contribution are also dismissed for lack of particulars and evidence.

13. The claim for legal costs for criminal No. 281 of 2016 and general damages for false imprisonment and malicious prosecution is also dismissed for lack of evidence to prove that it was the respondent who was responsible for his arrest and prosecution and that the prosecution was malicious and unjustified.

14. The claimant will however be paid service pay because he was not a member of NSSF or pension or gratuity scheme. No rate for service pay was agreed under Section 35(6) of the Act, consequently I will grant the conventional rate of 15 days pay per year of service. The claimant worked for about 4 years between 2012 and 2016. He will therefore get ksh.18000.

DISPOSITION

15. For the reasons stated herein above, I enter judgment for the claimant in the sum of ksh.18000 plus a quarter costs and interest.

Dated, signed and delivered this 28th April 2017

O.N. Makau

Judge