



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 479 OF 2015
BETWEEN
EDISON WANJE ZIRO CLAIMANT
VERSUS
VIPINGO RIDGE LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Lewa & Associates, Advocates for the Claimant

Maina Njanga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 14th July 2015. He was employed by the Respondent Company as a Security Guard on 1st May 2008. Initially he was employed on 3 months' contract, until 1st March 2010, when he was employed indeterminably. He was arrested by the Police on 13th August 2012, on the allegation he had stolen 2 metal rods from the Respondent. His pay slip of July 2012 shows he earned a gross monthly salary of Kshs. 10,276. Overtime seems to have been paid as an invariable benefit of about Kshs. 2,600 monthly. He was charged and tried at the Criminal Court in Shanzu Mombasa. He was acquitted on 4th August 2014. He was not allowed to resume employment. After the Claimant made a demand for remedial action before filing this Claim, the Respondent replied alleging the Claimant was dismissed on 17th August 2012 for stealing. The Respondent offered to pay the Claimant salary for 17 days worked in August 2012, 65 days of accrued annual leave and overtime of Kshs. 2,070. The Claimant states termination was unfair and prays for Judgment against the Respondent for what the Respondent offered above, together with compensation for unfair termination, notice pay, certificate of service, costs and any other suitable remedy.

2. The Respondent filed a Statement of Response on 28th May 2016. It is conceded the Respondent terminated the Claimant's contract of employment. Termination however was fair and lawful. The Claimant is not entitled to the prayers sought.

3. The Claimant testified, and closed his case, on 16th November 2016. The Respondent did not attend Court, and hearing closed on the same date. The matter was last mentioned on 14th July 2017 when both Parties confirmed the filing of their Closing Submissions and Judgment Scheduled for delivery.

4. The Claimant restated the facts surrounding his employment; the terms and conditions of service; his arrest, trial and acquittal before the Magistrate's Court; and his summary dismissal by the Respondent. He had been told by the Personnel Manager to stay away from work until the criminal case was finalized. After acquittal, he was not allowed to continue working. He was not given any form of hearing at the workplace. He was paid nothing by way of terminal dues.

The Court Finds:-

5. The history of Claimant's employment with the Respondent, and his terms and conditions of service with the Respondent are not disputed.

6. He was suspected of being involved in theft of Respondent's metal rods. He was arrested and arraigned in Court on 14th August 2012 for the offence of stealing by servant and handling of stolen goods. The Respondent did not institute any internal investigations or disciplinary process. There was no letter of summary dismissal given to the Claimant. Instead he was advised by the Personnel Manager to stay away from the workplace, until there was a determination made on the criminal process. The Respondent therefore surrendered its right to have its own administrative process, to the Police and the Court, in the criminal process. It became bound by the outcome of the criminal trial.

7. The Claimant was acquitted. He asked the Respondent to allow him continue in service. The Respondent first asked for time, to respond to Claimant's request, as shown in Respondent's letter dated 23rd September 2014. On 7th November 2014, the Respondent replied stating the Claimant was summarily dismissed on 17th August 2012 for stealing. Rather than honour the outcome of the criminal trial and return the Claimant to work, the Respondent shifted position, alleged there was a dismissal decision made way back in 2012.

8. There is no evidence of dismissal which took place on 17th August 2012. There is no evidence that the Respondent attempted to contact the Claimant for settlement of terminal dues, without success, as alleged in the letter of 7th November 2014. Was the Respondent, as the complainant, not involved in the criminal trial? Why was there was no contact made during the criminal trial between 2012 and 2014?

9. Termination was not in accordance with Section 41, 43 and 45 of the Employment Act 2007. The Claimant is entitled to compensation for unfair termination and notice pay.

10. ***He is granted 6 months' gross salary in compensation for unfair termination at Kshs. 61,656.***

11. ***He is allowed 1 month salary in lieu of notice at Kshs. 10, 276.***

12. ***He is granted salary for 17 days worked in August 2012 as offered by the Respondent. This adds up to Kshs. 6,718.***

13. ***Parties agree the Claimant was owed 65 days of annual leave on exit. He is granted annual leave pay of 65 days at Kshs. 25, 690.***

14. ***There is consensus overtime pay is owed, and therefore allowed, at Kshs. 2,070.***

15. ***Certificate of Service to issue.***

16. ***Costs to the Claimant.***

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

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 61,656; notice pay of Kshs. 10,276; salary for 17 days worked in August 2012 at Kshs. 6,718; annual leave pay of 65 days at Kshs. 25,690; and overtime pay of Kshs. 2,070 – total Kshs. 106,410.

c. Certificate of Service to issue.

d. Costs to the Claimant.

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

Dated and delivered at Mombasa this 28th day of June 2017.

James Rika

Judge