



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 577 OF 2014

BETWEEN

GEORGE KIALA INGATI CLAIMANT

VERSUS

TEXAS ALARMS [K] LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimant

Stephen Oddiaga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 12th November 2014. He states he was employed by the Respondent as a Security Guard on 1st November 2010. He was on a monthly salary of Kshs. 9,000. He was summarily dismissed by the Respondent in October 2013 after the place he was assigned to guard, was invaded by robbers. He was not given notice of termination, or heard following the robbery incident. The Respondent told him to hand over the work uniform and leave. He feels he was unfairly dismissed and prays for Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 9,000.
- b) Service pay at Kshs. 13,500.
- c) Annual leave pay of 1 year at Kshs. 9,000.
- d) Salary for days worked in October 2013 at Kshs. 5,400.
- e) 141 off days at Kshs. 42,300.
- f) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 108,000.
- g) Certificate of Service to issue.

h) Declaration that termination was unfair.

i) Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on the 10th December 2014. It is conceded the Claimant was employed by the Respondent as stated in the Claim. He deserted duty after the robbery incident on 18th October 2014, reappearing at the workplace on 25th November 2014. The Claim has no merit and should be dismissed with costs to the Respondent.

3. The Claimant gave evidence, and closed his case, on 28th September 2016. The Respondent gave evidence through its Human Resources Manager, Bernard Odhiambo Aduda, on 15th March 2017 when the hearing closed. The dispute was last mentioned in Court on 31st March 2017, when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

4. The Claimant restated the contents of his Pleadings in his evidence before the Court. He was a victim of violent robbery on 18th October 2013. He was guarding a petrol station premises. He was attacked by robbers who were armed with pangas, bows and arrows. He was tied in a bundle by the Robbers. Police rescued him. He reported robbery at Changamwe Police Station. The following day, he found another guard had been assigned the premises he had been guarding. He was summoned by the Human Resources Manager and asked to return the work uniform. He was paid nothing.

5. Cross-examined, he testified he was not given a letter of employment. Many robbers attacked and overwhelmed him. It is not true that he absconded. He was told by the Human Resources Manager to go away. He was not issued a letter of termination. He does not wish to be reinstated.

6. Bernard Odhiambo Aduda told the Court that on the night of 17th/ 18th October 2014, the Respondent was informed there was a robbery at the petrol station which was guarded by the Claimant. The Respondent sent its dispatch car and reported the incident to the Police. Police found 2 Guards, who included the Claimant tied with ropes, and the premises vandalized. The Guards had remote alarms which they did not use during robbery. The Claimant reported to work on 25th November 2014 a month after the robbery, demanding for refund of uniform fee of Kshs. 1,000. The Claim has no merit.

7. Cross-examined, Aduda confirmed he received a report on the incident from Respondent's Crew Commander. The report stated the Guards used their alarms. Aduda testified he had suggested the Client needed to strengthen its security infrastructure by erecting an electric fence. He testified on redirection that the alarm used was from the Crew, not from the Claimant.

The Court Finds:-

8. The Respondent and its Witness appear to have repeatedly mistaken the date when the dispute arose, to be in the year 2014. Aduda referred to robbery having taken place in 2014. The Court is satisfied the event took place in late 2013. The Statement of Claim was filed on 12th November 2014. It is not likely as stated under paragraph 4 of the Statement of Response, that robbery took place on 18th October 2014, and the Claimant reappeared at the workplace on 25th November 2014. On the latter date, the Claim was already in the docket of the Court.

9. The facts are that the Claimant was employed by the Respondent as a Security Guard on 1st November 2010. There was a robbery incident at the premises which he was assigned duty, on the night of 17th/18th October 2013. The details of the incident are given in the Investigations Report compiled by Respondent's Operations Manager dated 22nd October 2013.

10. The robbers used a ladder to scale the perimeter wall. The Investigations Report states they attacked the Claimant and his Colleague, dispossessing them of their alarms. They tied the Guards. They attacked all the Turn Boys who were apparently sleeping in their Trucks within the premises. The Guards were

blamed for not noticing the robbers gain entry, and for not raising the alarm. The Report concludes with the recommendation that the Client erects an electric perimetre fence, and installs CCTV system.

11. From this Report, and the evidence of the Claimant and Aduda, it can be concluded there was failure by the Guards, as well as systemic failures by the Client. The Guards were not alert enough, otherwise they would have noticed the robbers advance, and scale the existing wall. The Claimant did not use the remote alarm button provided by the Respondent. He was instead caught off-guard by the robbers, dispossessed of the alarm button, and tied with ropes.

12. Section 44 [4] [c] of the Employment Act 2007 contemplates Employees should not neglect to perform any work which is, their duty to perform. It is an employment offence to neglect to perform, or to carelessly and improperly perform work, which from its nature is the Employee's duty to perform carefully and properly. The nature of security service requires the Employee is alert all the time. The Claimant did not discharge his guarding role carefully and properly. He failed to detect a pack of robbers advance on the installation; he was dispossessed of his alarm button and raised no alarm; which led to attack on the property and personnel of the Client.

13. The Respondent would have valid reason to summarily dismiss him.

14. The Respondent however does not say termination was on based on the robbery incident. The Respondent based its decision on desertion as indicated in paragraph 4 of the Statement of Response.

15. This ground was not established. The Respondent does not state what action it took against the Claimant if he abandoned duty immediately after the robbery. The Investigations Report, which was compiled on 22nd October 2013, does not mention that the Claimant fled, after a crime was committed at his assigned place of work. If the Claimant fled after the robbery, he reasonably would have been suspected for complicity in the commission of the crime, and hunted down by the Respondent and its Client. Nothing however was done by the Respondent to suggest the Claimant deserted. Even when he is said to have reappeared, on 25th November 2013, he was not taken through a disciplinary process for desertion.

16. The conclusion must be that the Respondent did not justify its decision. The events after the robbery most probably unfolded as narrated by the Claimant. He was asked to surrender his tools of trade the day after the robbery, and make himself scarce. His contract was terminated, the day after the robbery.

17. ***Termination was unfair.***

18. ***He is allowed 1 month salary in lieu of notice at Kshs. 9,000.***

19. ***He is granted the equivalent of 4 months' salary in compensation for unfair termination at Kshs. 36,000.***

20. He prays for annual leave pay of 1 year. He did not specify which year annual leave relates to. The Respondent however did not assist the Court with Claimant's annual leave record, so that there is no good ground to doubt that the ***Claimant is owed annual leave pay of Kshs. 9000 whichever year from. The prayer is allowed.***

21. He left employment on 18th October 2013. ***He merits, and is granted salary for 18 days worked in October 2013, at Kshs. 6,230.***

22. The Claimant prays for service pay. The Court was not told about his N.S.S.F status by either Party. He would nevertheless merit recognition and reward for his 3 years of service under the Regulation of Wages [Private Security] Order. ***He is allowed gratuity/ service pay at the rate of 18 days' salary for each of the 3 years served, at Kshs. 18,692.***

23. He did not show the Court that he worked on 141 rest days. He did not explain to the Court his mode

of computing pay for rest days. He quoted no Wage Order to justify the mode adopted. The item is rejected.

24. ***Certificate of Service shall be released to him under Section 51 of the Employment Act 2007.***

25. No order on the costs.

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

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: notice pay at Kshs. 9,000; equivalent of 4 months' salary in compensation for unfair termination at Kshs. 36,000; annual leave pay at Kshs. 9,000; salary for 18 days worked in October 2013 at Kshs. 6,230; and gratuity/ service pay at Kshs. 18,692- total Kshs. 78,922.

c) Certificate of Service to issue.

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

e) No order on the costs.

Dated and delivered at Mombasa this 21st day of June 2017

James Rika

Judge