



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 301 OF 2015

ETYANG GODFREY ODUMEGU

CLAIMANT

v

ROBINSON INVESTMENT LIMITED

RESPONDENT

JUDGMENT

1. On 23 August 2016, the parties filed the following as the *Agreed Issues* arising for determination
 1. Whether the dismissal was summary.
 2. Whether (if the dismissal was summary) the same was preceded by justified reason justifiable to summarily dismiss the Claimant.
 3. Whether the Claimant had engaged himself with misdemeanour felony during work.
 4. Whether the Claimant admitted to having engaged himself with any misdemeanour to wit forgery.
 5. Whether from issue above (if resolved) the dismissal was unfair.
 6. Whether the Claimant worked
 - a) Overtime
 - b) During Public Holidays
 - c) Off Duties.
 7. Whether (if the Claimant did work as claimed in 8 above) he was compensated.
 8. Whether (if not compensated) the Claimant is entitled to the said reliefs.
 9. Whether the Claimant went for any leave.
 10. Whether if the Claimant did go for leave is entitled to relief.
 11. Whether the Respondent
 - a) Has any salary arrears.

- b) Paid gratuity fully
- c) Refunded uniform money
- d) Paid 1 month notice.

12. Whether the Claimant was heard?

13. Whether the private security order applied to the Claimant?

14. Whether the Claimant is entitled to reliefs in 13 when not paid.

15. Whether the Claimant is entitled to compensation under 49 1 (c).

2. It is quite obvious that the parties' advocates did not put their minds on the drafting of the Issues. The real Issues in dispute are, *whether the dismissal of the Claimant was unfair, whether Claimant worked overtime without compensation, whether Claimant had outstanding leave at time of separation, whether Claimant was underpaid, whether the Claimant is owed certain contractual/statutory entitlements and appropriate remedies.*

3. The Cause was heard on 26 October 2016, 28 February 2017 when the Claimant testified, and on 30 March 2017 when the Respondent's Human Resources Manager testified.

4. The Claimant filed his written submissions on 7 April 2017 while the Respondent filed its submissions on 23 May 2017. The Court has given due consideration to the pleadings, evidence and submissions.

5. The Court will make reference to the facts only as are material and relevant to the *Identified Issues* for determination.

Whether dismissal was unfair

6. Issues 1, 2, 3, 4, 5 and 12 all relate to whether the separation was procedurally and substantively fair.

Procedural fairness

7. Sections 35 and 41 of the Employment Act, 2007 speak as to the process of terminating an employment contract.

8. The Claimant's case and testimony was that he was not issued with any notice prior to dismissal on 2 September 2015. There was no show cause notice or a hearing and therefore the dismissal was unfair.

9. The Respondent on its part contended that the Claimant's employment was terminated on 2 September 2015 (date of 8 June 2015 in the dismissal letter was explained as a typographical error) after being afforded an opportunity to be heard on allegations of forgery, negligence and arrogance.

10. The Respondent's Human Resource Manager admitted he was employed after the separation, and that therefore he was relying on the records available.

11. According to the witness, the Claimant was given an opportunity to make representations before a disciplinary committee on 2 September 2015 and he produced what he stated were the minutes of the hearing.

12. The minutes show that the panel consisted of David Nyabuti, Samuel Omondi and Seth Muganda. The charges are also outlined in the minutes.

13. On the basis of the minutes, the Court is satisfied that the Claimant was made aware of the allegations

to confront and that indeed he was afforded an opportunity to make representations before the decision to dismiss was taken, and that the process was substantially in compliance with the statutory requirements of procedural fairness.

Substantive fairness

14. An employer is under a legal burden to prove the reasons for dismissing an employee and that the reasons are valid and fair. That is the import of sections 43 and 45 of the Employment Act, 2007.

15. Although the Claimant denied receiving the summary dismissal letter, the reasons given in the letter were

1. That on the 20.3. 2015 you signed warning which states that on the 7th and 8th March 2015 while on your normal duties of supervision of guards at Giddo Plaza you performed duties negligently and irresponsibly by forging signatories for one guard Evans Asiago, when by then he was off-duty.

2. That it is also noted that there is arrogance in your language and sometimes you are failing to comply with instructions given to you by operation managers. Thus your behaviour is unbecoming for any intuition to bear with.

3. That you absconded duties quite often knowing well you will agree and forge signatures for guards under you without your appearance at the assigned areas, an example of on the 1st September 2015 by one Michael Oduori who absconded his duties, only the office to be alerted by the client at Old Gilani's Butchery.... According to the employment Act 2007 section 44(4) the committed offences amounts to gross misconduct....

16. These are the reasons the Respondent had not only to prove, but prove as valid and fair.

17. In the Court's view, the first reason given was not a valid reason to warrant dismissing the Claimant because the charge had been dealt with and a sanction issued against the Claimant. The imposition of a *warning* finalised the allegation.

18. On the second reason, the Respondent's witness did not disclose the instructions the Claimant failed to comply with or the particulars of the managers who issued the instructions. Even details of the arrogant language and to whom the same were directed was not revealed.

19. The Court finds that this reason was not proved as required by section 43 of the Employment Act, 2007.

20. The third reason advanced for dismissing the Claimant was forgery of records to show that a guard Michael Oduori was on duty, when he was not on duty.

21. The Respondent's witness produced a copy of *Guarding Night Checklist* for 1 September 2015. The list indicates that the Claimant was the supervisor of the named guard. It also show that the said guard was on duty.

22. However, the Claimant did not interrogate in any meaningful manner the evidence of the Respondent's witness that a client at the particular assignment called to report that no guard had reported on duty.

23. Further, the minutes produced by the Respondent suggest that the Claimant apologised for the forgery.

24. It is apparent the apology was not accepted.

25. Forgery would be a valid and fair reason to dismiss an employee.

26. In the present case, the Court is satisfied that it is probable that it is the Claimant who signed in for an absent employee, and therefore concludes that this was a valid and fair reason to dismiss him.

Overtime

27. The Respondent's witness admitted that the Claimant worked from 6.00 pm to 6.00am, a total of 12 hours per day.

28. It is also a notorious fact that guards in this country work 2 shifts of 12 hours each and the Court can and does take judicial notice of that fact.

29. It can also not be gainsaid that guards work during public holidays and for that they are entitled to payment of overtime pay.

30. The Respondent did not seriously resist the claim for overtime through cross examination or through its witness and the Court will conclude that the Claimant worked overtime without appropriate compensation as claimed in the sum of Kshs 361,742/- (normal overtime, public holidays and off days).

Leave

31. The Claimant sought for leave for period 1 May 2013 to September 2015. And his testimony that he did not go on leave during the term of the employment was not challenged or controverted by the Respondent through employee records.

32. The Court therefore finds that the Claimant had outstanding leave at time of separation as claimed in the sum of Kshs 20,321/-.

Underpayments

33. The Claimant testified that on employment he was earning Kshs 6,500/- and that the prescribed minimum wage in 2013 was Kshs 10,116/15, and that this was increased to Kshs 10,000/- when he was promoted in 2014.

34. A perusal of the applicable Regulation of Wages Order(s) for the material period (Legal Notice No. 197 of 2013) confirm that the Claimant was underpaid.

35. The Court therefore finds that the Claimant was underpaid as claimed by Kshs 47,373/-.

Gratuity

36. The Claimant did not lay any contractual, evidential or legal entitlement to gratuity as opposed to service pay as envisaged by section 35(5) and (6) of the Employment Act, 2007.

37. Under this head of claim, the Claimant also made reference to National Social Security Fund and National Hospital Insurance Fund contributions.

38. These are claims which should appropriately be addressed to the responsible institutions in the first instance.

Salary arrears

39. The Claimant sought Kshs 16,633/- on account of salary arrears for August 2015, but he did not clarify how the arrears rose.

Uniform refund

40. The Respondent's witness appeared to agree that the uniform refund was payable but that the Claimant had not cleared with the Respondent.

41. It would only be fair that the refund of Kshs 1,500/- be paid on clearance.

Compensation

42. Compensation is a discretionary remedy. The Court having found that the dismissal was substantively fair, declines to award any compensation.

Conclusion and Orders

43. The Court finds and holds that the dismissal of the Claimant was substantively fair and declines to award compensation.

44. The Court however finds that the Claimant is entitled to and orders the Respondent to pay him

(i) Overtime	Kshs 361,742/-
(ii) Leave	Kshs 20,321/-
(ii) Underpayments	Kshs 47,373/-
(iii) Uniform refund	Kshs 1,500/-
TOTAL	Kshs 430,936/-

45. The parties did not give much thought to the *Agreed Issues* to enable real issues in dispute come out during hearing, and therefore the Court orders each party to bear own costs.

Delivered, dated and signed in Nakuru on this 31st day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maragia instructed by Maragia Ogaro & Co. Advocates

For Respondent Ms. Wachira instructed by Wachira & Wanjiru & Co. Advocates

Court Assistant Nixon