



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.187 OF 2014**

**JOSPHAT KYALO NGUMBI.....CLAIMANT**

**VERSUS**

**SECURITY GUARDS SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. On 1<sup>st</sup> January, 2003 the claimant was employed by the respondent as a Security Guard at a wage of Kshs.9,732.00 per month. On 25<sup>th</sup> January, 2012 while the claimant was at work at a residential house in Gigiri, his workmate Mr Wahome and his supervisor told him to report to the head officer the next day. On 26<sup>th</sup> January, 2012 the claimant reported as directed to Mr Mbugua and Ndung'u and was informed that he had been rude to a client and that he should be changed. The claimant was required to do a report and admit he had failed to report that he did not have a phone number.
2. The claim is also that the claimant had earlier on informed Mr Wahome that he had no cell phone and had been assured this would be reported to the office and arrangements be made to get one for him. The claimant thus refused to admit to matters he was being forced to. The manager then told him he had been dismissed. There was no sufficient reason for the dismissal.
3. The claim is for notice pay; service gratuity for 9 years; payment for leave days not taken; and compensation for unfair termination.
4. The claimant testified in support of his claim. Upon employment the claimant worked diligently and his last pay was Kshs.9,732.00 per month. He would work for 7 days a week on night duty. On 1<sup>st</sup> January, 2012 he was allocated work at Roslyn Place for Mr Mackenzie with many flats. He was guarding 3 places which covered the entire place. Mr Mackenzie had other guards and these worked together with the claimant.
5. While at work, the claimant was required to use a cell phone but his was faulty. He had reported this matter to the respondent officer, Mr Wahome and was promised this would be addressed. Other guards at the site had cell phones and the claimant was accused of not giving feedback to various matters while at work.
6. Daily the person on site would ask the claimant if he had a cell phone. He reminded Mr Wahome about this matter.
7. On 25<sup>th</sup> January, 2012 Mr Wahome told the claimant to report at the head office. He was put to task to explain why he was rude to a client and was required to write a letter and admit to the same. That the client had rejected him. He was then dismissed from work for not having a cell phone as it was required

to be used throughout the night and make constant report and since he did not have one, he was rejected by the client.

## **Defence**

8. In defence the respondent's case is that they employed the claimant on 1<sup>st</sup> February, 2005 under pay roll number 0974B on a basic pay together with a house allowance.

9. On divers dates the claimant was allocated work at various sites. On 25<sup>th</sup> January, 2012 the claimant was rejected at his place of work for failing to perform his duties in a satisfactory manner owing to his habitual lateness and sleeping while on duty hence compromising the client's security. His final dues were calculated and he declined to accept. The termination of employment was lawful, procedural and justified. The remedies sought are not available.

10. In evidence, the respondent witness was Earnesto Mawiyo Kigondu. He testified that the respondent is a company providing security services to the public and the claimant was thus employed as a Security Guard. On 28<sup>th</sup> January, 2012 the claimant failed to perform his duties as required by the client. He had been posted to work at Rosslyn Valley Developments when the director Mackenzie called and wrote a letter dated 26<sup>th</sup> January, 2012 to complain about the claimant's performance. He was issued with a warning reprimanding his conduct. The claimant's record had other warnings of 25<sup>th</sup> January, 2012; 17<sup>th</sup> March, 2008; and 11<sup>th</sup> December, 2006. The 3 warnings were sufficient to warrant summary dismissal as these related to his gross misconduct. He was called for hearing for being unruly and abusive in the presence of a workmate and a decision was taken to dismiss him.

11. The witness also testified that the claimant was required to have a cell phone while at work and flash [beep] at intervals to confirm his presence at work and that he was wake while on duty. He was given Kshs.100.00 air time to enable him keep his phone communication.

12. At the close of the hearing both parties filed written submissions. Determination Putting the pleadings, evidence and written submissions into account the issues that emerge are that;

Whether there is a case of unfair termination;

Whether there are any remedies.

13. The letter of summary dismissal submitted by the respondent and dated 28<sup>th</sup> January, 2012 is issued on the grounds that the claimant's performance has not been satisfactory and he had been warned and there was no improvement. That on 25<sup>th</sup> January, 2012 he was rejected at the property where he had been assigned for failing to perform his duties as required by the client and thus his employment had been terminated.

14. This letter is not signed. It is not confirmed as to whether the claimant was issued with this letter.

15. The question of performance of duty is specifically articulated under section 41. of the Employment Act, 2007. The same provides as follows;

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

16. Termination on grounds of performance is thus required to procedurally be addressed through notice to the employee and the employee be allowed to call a fellow employee to be present at the hearing. The questions of performance of an employee are not similar to matters set out under section 44 of the

Employment Act, 2007. The letter of summary dismissal submitted by the respondent and stating the issue of performance as the core reason leading to the termination of the claimant must be put into account. even though not signed, the letter of termination has been submitted by the employer and the witness in support spoke to the same facts.

17. The claimant asserted that his problems revolved around his cell phone and the fact that he could not communicate while at work as it was faulty and he had reported this to his employer. Mr Wahome was required to give the claimant feedback on his request but he was instead summoned to the office and dismissed from his employment.

18. The duty to provide an employee with the tools of trade is upon the employer. Such is to enable an employee undertake his duties with diligence and as required by the employer. To require an employee bring his tools to work without the employer taking charge over the same would defeat the very purpose of employment unless this is a matter specifically set out in the contract of service. otherwise, the employer takes the duty and responsibility to provide the tools and where a replacement is necessary the same must be provided.

19. In this case, where the claimant was required to use a cell phone to communicate while at work or use a same to monitor work activities or the same be used to make log and reports, other than providing the claimant with air time of Kshs.100.00 the respondent had a duty to provide the hand set and cell phone as well. Where such a device was found necessary and important to ensure work performance, then as a matter of course, the employer should provide the employee with this facility. The end use of the same was for the benefit of the employer and respondent herein.

20. Where the claimant was thus found to be rude to a client, no such report has been submitted with the court save for a warning order on a date not reconciled with the stated dates of the claimant's alleged rude conduct. Also the warning order of 2008 is not stated as to the grounds leading to the same.

21. Ultimately, the rationale for summary dismissal on 28<sup>th</sup> January, 2012 is lost. Why was such action necessary? Was it because the claimant had been rejected by a client or because he had failed in his work performance for not having a cell phone? These are aspects not clarified by the respondent and must be applied for the benefit of the claimant as the employee.

22. The resulting summary dismissal was thus unfair in the circumstances of this case.

## Remedies

23. The respondent has admitted to owing the claimant Kshs.8,463.00 for leave days not taken. This is awarded.

24. Notice pay is due in a cause of unfair termination of employment. Section 35 provides for one (1) months' notice or payment in lieu and the claimant is awarded Kshs.9,732.00. the submissions that the claimant was earning Kshs.13,000.00 at the time of submission only arose late and after the parties had closed their case. I take the amount of Kshs.9,732.00 as the last paid salary. The pay slips submitted and attached to the Memorandum of Claim also support the amount of Kshs.9,732.00 at the monthly gross salary.

25. Service gratuity is claimed for 9 years of service. The claimant did not go into this issue at all in his evidence or submissions. From the attached pay statement to the Memorandum of Claim, the claimant's NSSF and NHIF dues were deducted and in terms of section 35 of the Employment Act, 2007 the basis of claiming for service gratuity having not been established, the same is hereby declined.

26. On the finding that the claimant's summary dismissal was unfair, compensation is due. putting into account the previous warning orders in account and noting the claimant does not challenge these warning and taking cognisance of the provisions of section 45(5)(e ) of the Employment Act, 2007 compensation is awarded for 6 months gross salary all being Kshs.58,392.00

**Judgement is hereby entered for the claimant against the respondent with an award of Kshs.58,392.00 compensation; notice pay Kshs.9,732.00; leave days Kshs.8,463.00; and costs of the suit.**

**Delivered in open court at Nairobi this 26<sup>th</sup> day of September, 2017.**

**M. MBARU JUDGE**

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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