



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1172 OF 2014
DICKSON MASAKU MBIVII.....CLAIMANT
VERSUS
LAVINGTON SECURITY LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 14th July 2014 and filed in court on 15th July 2014, is for unlawful termination of employment. The Respondent filed a Memorandum of Response on 9th June 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf, and the Respondent called its former Security Manager, Rastus Otieno Arum and Senior Operations Officer, Kennedy Kipkorir Rotich. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 27th January 2006, as a Security Guard. He was elevated to the position of Supervisor in 2010.

4. On 8th November 2013, the Claimant was at home when he received a letter, through a colleague, suspending him from duty. The letter also instructed him to go to the Respondent's Office on 11th November 2013, for further disciplinary action. The Claimant states that when he showed up at the office as instructed, he was locked out. He adds that he was not paid salary for the month of November 2013.

5. The Claimant further states that in February 2014, he received a letter dated 28th November 2013, suspending him on allegations of use of inappropriate language towards his seniors.

6. The Claimant avers that the disciplinary proceedings against him were not concluded and claims the following:

a) General damages

b) Unpaid salaries from 1/1/2013 to 30/6/2014.....Kshs. 84,000 c) 3 months' salary in lieu of

notice.....36,000

d) 12 months' salary as damages.....	144,000
e) 21 days leave pay for 2013.....	8,400
f) Unpaid salary for November 2013.....	12,000
g) Costs plus interest	

The Respondent's Case

7. In its Memorandum of Response dated 5th June 2015 and filed in court on 9th June 2015, the Respondent denies the Claimant's claim and states that the Claimant failed to reply to correspondence issued to him. The Respondent adds that the Claimant continuously absented himself from duty without informing the Respondent.

8. The Respondent pleads that the Claimant's employment was terminated for a justifiable cause, pursuant to due procedure. In this regard, the Respondent states that the Claimant was accorded an opportunity to show cause why he should not be dismissed but he failed to respond.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant was suspended by letter dated 8th November 2013, stating as follows:

"RE: SUSPENSION FROM DUTIES

This letter serves to inform you that you have been SUSPENDED from duties with immediate effect.

The management has noted with great concern your errant behavior and your actions are tantamount to Gross misconduct. You are to handover all company documents and responsibility to Mr. Ananda.

*You are expected to report to the Head office on **Monday 11th November 2013** for further disciplinary action.*

Yours faithfully

LAVINGTON SECURITY LTD

(Signed)

George Onyango

CHIEF MANAGER OPERATIONS & SUPPORT"

11. On 28th November 2013, the Claimant was issued with another letter stating as follows:

“REF: SUSPENSION FROM DUTIES

It has been noted with a lot of disappointment that you have not replied to any of the letters we have been sending you neither taken the initiative to communicate with anyone from the Head Office. You have also not made any efforts to inform the office of your whereabouts nor have you signed any letter of resignation.

Being absent without leave and not following a proper command given by your employer is a very serious offence liable to summary dismissal under the Employment Act (2007) Section 44 subsection 4(a) and (e). Your actions and behavior are assumed (sic) that you have vacated office as from 8th November 2013.

You are further informed to hand over all Company property in your possession without delay.

Yours faithfully,

Lavington Security Ltd.

(Signed)

Raymond Koech

FINANCE MANAGER AND HEAD OF HUMAN RESOURCES.”

12. Although the latter letter is referenced ‘*Suspension of Duties*’ it was in effect a termination letter. The reasons advanced for the termination are; failure to respond to correspondence and unauthorized absence from duty. The Court was unable to understand the basis for these accusations because the Claimant had been suspended on 8th November 2013. Ordinarily, suspension is a neutral action taken by an employer to allow for un-fettered investigations into the conduct of an employee. It ought therefore to be for a limited period.

13. In the instant case, it appears that the Claimant was suspended indefinitely. This is confirmed by the letter dated 28th November 2013, which confirms that the Claimant’s employment had effectively come to an end from 8th November 2013.

14. The Respondent’s witnesses gave varying reasons for the Claimant’s termination. RW 1, Rastus Otieno Arum testified that when he called the Claimant on 7th November 2013, inquiring why he had failed to submit payroll changes for security guards in his team, the Claimant sounded intoxicated. On the other hand, RW 2, Kennedy Kipkorir Rotich, told the Court that the Claimant had deserted duty.

15. In the end, the Court was unable to tell the real reason for the termination of the Claimant’s employment. This inevitably leads to the conclusion that the Respondent had no valid reason for the termination as required under Section 43 of the Employment Act, 2007. Further, from the evidence on record, the Claimant was not subjected to the mandatory disciplinary procedure set out under Section 41 of the Act.

Remedies

16. In light of the foregoing, the Court finds that the termination of the Claimant’s employment was substantively and procedurally unfair and awards him ten (10) months’ salary in compensation. In making this award, I have considered the Claimant’s length of service and the Respondent’s conduct in the termination process.

17. I further award the Claimant one (1) month's salary in lieu of notice, as well as salary for the month of November 2013. I also award him prorata leave for the year 2013.

18. No basis was laid for the claims for general damages and accrued salaries which therefore fail and are dismissed.

19. Finally I enter judgment in favour of the Claimant in the following terms:

a) 10 months' salary in compensation.....	Kshs. 120,000
b) 1 month's salary in lieu of notice.....	12,000
c) Salary for November 2013.....	12,000
d) Prorata leave for November 2013 (12,000/30x1.75x11).....	7,700
Total.....	151,700

20. This amount will attract interest at court rates from the date of judgment until payment in full.

21. The Claimant is also entitled to a certificate of service and costs of the case.

22. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF OCTOBER 2017

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JUDGE

Appearance:

Mr. Mutemi for the Claimant

Mr. Were for the Respondent