



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 176 OF 2016

GEORGE AMATSIMA TATWACLAIMANT

VERSUS

BOB MORGAN SERVICE LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for ksh.667,688 being terminal dues and compensation for unfair termination of the claimants contract of service by the respondent on 27/2/2015. The respondent admits that the claimant's services were fairly terminated for gross misconduct contrary to Section 1.5 of her Code of Conduct. The issues for determination herein are whether the termination of the contract was unfair and whether the reliefs sought ought to issue. The parties dispensed with calling of oral evidence and instead agreed to adopt their respective written witness statements and documentary evidence. They further filed written submissions.

CLAIMANT'S CASE

2. The claimant stated in his written statement that he was employed by the respondent on 29/2/2008 as a security guard earning ksh.6000 per month. That he was reporting to work at 6am and leave at 6.00pm. In 2010 he was promoted to a Crew in back-up team based in Changamwe. In 2011, he was again promoted to the position of Crew Commander incharge of Kengeleni Backup team and his salary was reviewed to ksh.15400. In 2014 he was posted as Crew Commander incharge of Makupa back-up team on night shift but later given the day shift.

3. He worked as such smoothly until November 2014 when his driver went on his annual leave and another driver Mr. Jilo took over as his driver. According to the claimant the driver was a careless, a matter he had complained of to the management but no action was taken. On 3/12/2017 while in the course of his duty, the claimant was instructed by the controller to move to their base at grain Bulk ltd and Shimanzi. While on the way to Grain Bulk Ltd, he excused himself to answer a call of nature but on returning to where the patrol vehicle had been parked, the vehicle was nowhere. Upon inquiry, he was informed that the vehicle had been involved in an accident with a pedestrian. He then reported the accident to the police and the vehicle was impounded and the victim taken to the hospital.

4. On 27/12/2014, he was summoned to the respondents head office at Nairobi and on 2/5/2015, he was served with a termination letter dated 27/2/2015. He described the termination as unfair and the procedure followed before the termination was not in accordance with the law. He therefore prayed for

the reliefs sought in the suit. Specifically he prayed overtime of 4 hours per day equaling to ksh.5552 for the 20 hours worked per week.

DEFENCE CASE

5. Mr. John Ochuku is the respondent's HR and Administration Manger. He stated in his written statement that the claimant was indeed employed by the respondent as a security guard from 1/3/2008. That on 3/12/2015 he was suspended for misconduct. That on the said day, while working as the Crew Commander with a company vehicle at his disposal, the claimant allowed and directed the vehicle to make unauthorized movements and allowed unqualified Stanger to drive the said vehicle as a result of which the vehicle hit a pedestrian and occasioned financial loss to the respondent.

6. Mr. Ochuku further stated that the claimant was invited to a hearing before the respondent's disciplinary committee consisting representatives from the management and two shopstewards representing the claimant. That after the hearing and deliberations, the claimant's employment was terminated because he had grossly violated his employment terms and Section 1.5 and 2.6 of the code of conduct. According to Mr. Ochuku the claimant had been given four warnings prior to the termination. He concluded by stating that the respondent had promptly processed claimant's dues and certificate of service but the claimant has refused to fill in clearance form and return the company property in his possession.

ANALYSIS AND DETERMINATION

7. There is no dispute that the claimant was employed by the respondent as a security guard and later as the Crew Commander in charge of backup team at Makupa area. There is also no dispute that the vehicle under the command of the claimant was involved in a road accident on 3/12/2014 while the claimant had left it with the crew and the driver while he went to answer the call of nature. There is further no dispute that the claimant was suspended after the said accident and later he was terminated.

Whether the termination was unfair

8. Under section 45(2) of the Employment Act, termination of contract of service by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. The question that pops up is whether in this case the respondent observed the substantive and procedural safeguards guaranteed by the said Section 45 of the Act.

Reason for termination

9. The claimant contends that there was no justifiable reason to warrant his dismissal because he never contributed to the material accident. In his view leaving the vehicle to answer a call of nature is not a reason that justifies termination of his employment. He contended that Mr. jilo the driver who caused the accident was a careless driver and despite earlier complaints to the respondent, no action was taken to him. He therefore urged that the respondent has failed to prove that stepping out of the vehicle for a short call was negligence.

10. The respondent has however maintained that the claimant breached the terms of contract of service and Section 1.5 and 2.6 of the Code of conduct by allowing and directing the company vehicle to make unauthorized movements and to be driven by unqualified persons. In the respondent's opinion, that conduct by the respondent was gross violation of his contract and the code of conduct which warrants dismissal especially considering the financial loss it occasioned to her following the traffic accident.

11. After careful consideration of the evidence and the submissions presented by the two parties, I find on a balance of probability that the respondent has proved that the reason for terminating the claimant's contract was valid and fair. Whereas I agree with the claimant that stepping out of the company car to answer call nature does not amount to negligence which warranted his dismissal, I find that allowing and directing the vehicle to make movements was sufficient misconduct that warranted the dismissal of the

claimant. Even though no evidence was adduced by a competent witness to prove that the claimant allowed unqualified person to drive the vehicle leading to the material accident, the claimant has not denied that he allowed and directed the vehicle to be driven to unauthorized places. In his own statements, he confirmed that his station was Makupa but on the material day, he was advised by the controller to go to the respondent's base at Grain Bulk Ltd at Shimanzi. He however allowed and/or directed the vehicle to go to Tudor where the material accident occurred.

12. The said account corroborates the report prepared by martin Mwasame on 4/1/2015 which states that the claimant was on duty with his crew at shell Makupa at 07.35 hours when the shift controller on duty dispatched them to the operational base at GBHL Shimanzi. On their way the claimant instructed the team to change direction and went via Tudor to a kiosk near MM-shah to pick packed food. The claimant has not challenged that report filed by defence and never demanded to cross examine the author. The said reason for termination was therefore not only valid but also fair because it related to the claimants conduct, compatibility and operational requirements of the respondent. As correctly submitted by the defence not many employers would wish to continue employing a Crew Commander who does not follow instructions of the Shift Controller but who instead directs the company vehicle and the Crew to a folic of his own.

Fair Procedure

13. The claimant contended in his evidence that he was never given any fair hearing as required under Section 41 of the Act before his dismissal. The respondent has however maintained that the claimant was invited to hearing at Nairobi where he was represented by two shopstewards. The foregoing contention by the defence is corroborated by the said report by Mr. Martin Mwasame dated 4/1/2015 which indicated the claimant was invited to a disciplinary hearing on 27/12/2014 and that he was indeed given a hearing. The defence case is further corroborated by the claimants own evidence when he stated that he was called to the Head Office at Nairobi on 27/12/2014 and thereafter he was issued with a termination letter dated 27/2/2015. Consequently on a balance of probability I find that a fair procedure was followed before terminating the claimant's contract of service.

Whether reliefs sought should issue

14. In view of the findings herein above that the termination of the claimant's service was grounded on a valid and fair reason and that further that it was done after following a fair procedure, I decline to make declaration that the termination was unfair, unlawful and unjust as prayed.

15. Flowing from the foregoing, the claims for salary in lieu of notice and compensation for unfair termination are dismissed. I however award the claimant salary for the period from 21/11/2014 to 27/2/2015 when the claimant was dismissed equaling to 3 months and 10 days. Applying the salary of ksh.15400 per month, I award the claimant ksh.51,333,33. I also award the claimant the claim for refund of uniforms and equipment of ksh.3500 subject to him returning the said equipment and uniform to the respondent as required under the contract of employment.

16. The claim for gratuity is dismissed for want of evidence to support it. However the claim for overtime pay is granted at the rate of 20 hours per week. Under regulation 6 of the Regulations of Wages (Protective Security Services) Order, a security guard like the claimant is supposed to work for 52 hours spread over six days in a week. Under regulation 7(a) the claimant was entitled to overtime pay at the rate of one and a half times his normal rate of wages per hour in respect of the overtime worked. Using the ksh.15400 monthly salary, the normal pay per hour is ksh.74.038. One and a half of ksh.74.038 is ksh. 111.576 Which when multiplied by 20 hours per week translates to ksh.2221.15 and ksh.111, 057.6 for the 50 weeks in 2013/2014 as pleaded.

DISPOSITION

17. For the reasons that the claimant is entitled to his salary arrears, refund of uniform deposit and pay for the overtime worked, I enter judgment for him in the sum of ksh.165,890.95 plus costs and interests from

the date of filing suit.

Dated, signed and delivered this 13th October 2017.

O. N. Makau

Judge