



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1377 OF 2014

RICHARD MAINGICLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

JUDGMENT

1. By a Memorandum of Claim filed on 18th August, 2014, the Claimant averred that he was employed by the Respondent as a Security Guard on 22nd September, 2008 at a salary of Kshs.14,641 per month.
2. On or about 11th January, 2012 he was suspended by the Respondent from duty following allegations of theft of property belonging to Biersdorf East Africa located along Lunga Lunga Road.
3. He was subsequently arrested and charged with a criminal offence of theft at Makadara Law Courts. The Claimant further averred that when he got released on bail he returned to work but was advised that he remained until the conclusion of the Court case. On 7th March, 2014 the charges were withdrawn and his advocate informed the Respondent, seeking his reinstatement to duties but the Respondent did not respond making him conclude that he had been constructively dismissed.
4. The Claimant therefore averred that in the light of the foregoing facts, the Respondent's actions amounted to unlawful, unfair and inhumane dismissal. He therefore sought judgment against the Respondent for unfair termination of employment and payment of his terminal dues.
5. The Respondent admitted employing the Claimant as alleged. The Respondent further admitted the Claimant was arrested and charged in Court in connection with theft of property.
6. The Respondent however denied the Claimant ever reported back to work from the date of arrest as alleged and indeed the Respondents attempt to trace the whereabouts of the Claimant were futile hence he was declared a deserter effective 23rd January, 2012.
7. The Respondent admitted receiving the letter from the Claimant's advocate but averred that since the Claimant had terminated his employment through desertion there was no justification to claim reinstatement.
8. In his oral testimony in Court the Claimant further stated that he used to work 6 days a week from 6.00 am to 6.00 pm but during the criminal case he was not working. He was asked to surrender uniform until the criminal case ended when he would resume duties. It was his evidence that he went back to work

after he was acquitted but was issued with a letter of desertion of duties. He denied knowledge of any investigations by the Respondent on the matter and further that, he received no letter asking him to go back to work. It was the Claimant's evidence that the Respondent had his contact details. The Claimant further stated that he was not paid during the period he was undergoing trial.

9. In cross-examination he stated that he was not issued with a suspension letter but denied he feared going back to work.

10. The Respondent's witness Mr. Stephen Kangethe informed the Court that the Respondent did not give verbal suspension and that suspensions were for a duration. It was further his evidence that if there was a suspension he or one of his officers was the one to sign it.

11. According to Mr. Kangethe, the Claimant never came back after his arrest hence a decision had to be made. He stated that the line officers tried to contact the Claimant without success and that the desertion letter was issued after two weeks absence and further that the disciplinary procedure could not take place because the Claimant never came to work.

12. In cross-examination he stated that he had no documentation about efforts to contact the Claimant.

13. Dismissal on account of desertion requires that the Respondent produces evidence showing reasonable steps were taken to contact the employee accused of desertion. The Respondent's witness Mr. Kangethe informed the Court that attempts were made to contact the Claimant however he did not have in Court the evidence of such attempts. Further the letter of desertion dated 24th January, 2012 allegedly addressed to the Claimant used the Respondent's own postal address. No evidence was produced to confirm if the letter was taken to the Claimant or he was called to collect it but refused or ignored.

14. The Respondent is a renowned security company employing a large number of security guards. They ought to have a system of keeping their personnel data including their home addresses. It is therefore unbelievable that the Respondent's Human Resource Manager Mr. Kangethe could not produce any evidence in Court showing on which address or telephone number were attempts made to reach the Claimant without success.

15. It is becoming common that wherever employees of the security companies are accused and charged with any criminal offence, they tend to claim they were advised to stay away until the case is heard and determined. The only way the security companies can counter this allegation is by documenting any communication with such employees from the time they are arraigned in Court to the time the case is heard and determined or discontinued.

16. There has to be proper documentation on whether a decision was taken to dismiss, suspend pending the outcome of the criminal trial. It is not enough to wait until the matter becomes litigious to produce a letter accusing such employee of desertion yet addressed to the Respondent's own postal address as evidence of attempt to contact such employee. The Court, since the law places the burden of proof of reasons for dismissal on the employer, easily considers it failure on the part of the employer to do so in such circumstances with the consequence that the employee's version becomes easily believable since the burden of proof of the reason for termination or dismissal is not on such employee.

17. From the forgoing the Court finds that the Respondent did not sufficiently prove that the Claimant deserted employment after his arrest and arraignment in Court. The Court therefore reaches a finding that the termination was unfair and enters judgment against the Respondent as follows: Kshs.

(a) One months pay in lieu of notice 14,641

(b) Payment in lieu of untaken leave 14,641

**(c) Salary for the period the Claimant remained on suspension @Kshs.14,641 x 30 months
439,230**

(d) six months salary for unfair termination of service 87,846 556,358

(e) costs of the suit

(f) items (a), (b), (c), and (d) shall be subject to taxes and statutory deductions.

18. It is so ordered.

Dated at Nairobi this 3rd day of November, 2017

Abuodha J. N.

Judge

Delivered this 3rd day of November, 2017

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent

Abuodha J. N.

Judge