



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 338 OF 2015
BETWEEN
EMMANUEL DZOMBO CHAICLAIMANT
VERSUS
NINE ONE ONE GROUP LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

J. A. Abuodha & Company Advocates for the Claimant

Ameli, Inyangu & Partners Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 22nd May 2015. He states he was employed by the Respondent on 6th April 2013, as a Security Guard earning a monthly salary of Kshs. 11,085. He worked up to 10th November 2014, when the Respondent terminated his contract of employment. He avers he was not given a fair hearing, and that termination was not based on valid reason. He seeks Judgment against the Respondent for:-

- a. Unpaid salary for 20 days worked at Kshs. 7,390.
- b. Unpaid Annual leave at Kshs. 11,085.
- c. Service pay at Kshs. 5,542.
- d. Unpaid house allowance at Kshs. 26,604.
- e. Compensation the equivalent of 12 months' salary at Kshs. 133,020

TotalKshs. 183,641

f. Costs and any other suitable relief.

2. The Respondent filed its Statement of Response on 8th February 2015. It is conceded the Claimant was employed by the Respondent as a Security Guard. He was not unfairly dismissed. He was redeployed to work in Mombasa. He refused to sign the new contract, and move to Mombasa from Watamu where he was stationed. He was involved in acts of gross misconduct while at Watamu. He sold water belonging to Respondent's Client, who the Claimant had been assigned to, for guard duties. He was fairly heard, and fairly dismissed. He was paid all his dues.
3. The Claimant gave evidence, and closed his case, on 14th June 2017. Joseph Njoroge, Respondent's Branch Manager Mombasa and Watamu, and Martin Olinyo, Respondent's Controller based at Watamu, both gave evidence for the Respondent on 26th July 2017 when hearing closed.
4. The Claimant told the Court he worked as a Day Guard, at Sun Palm Resort in Watamu. Controller Martin called him on 18th November 2014. He alleged the Claimant had sold water from Sun Palm Resort to 3rd Parties. The Claimant had not done so. The Claimant was suspended for 5 days.
5. At the end of the suspension period, Martin called the Claimant. He was advised Branch Manager Njoroge would visit Watamu from Mombasa. The Claimant availed himself to meet the Senior Officer. A meeting was held, attended by Njoroge, Martin, the Claimant, and Trade Union Representative. The Claimant explained his position, insisting he did not sell Sun Palm Resort's water to 3rd Parties.
6. It was concluded the Claimant had no integrity. He would be issued a warning letter, and continue working. He refused to sign the warning letter, because he did not sell the water. It is not true that the Claimant declined transfer to Mombasa.
7. He was paid terminal dues calculated at Kshs. 19,899. This was stated to be made up of 2 days pending off up to 10th November 2014, and uniform refund.
8. The Claimant testified he does not wish to pursue the prayer for house allowance. He did not absent himself, or engage in any other forms of gross misconduct.
9. Cross-examined, he testified he does not wish to pursue the prayer for salary for days worked as well.
10. Terminal dues paid included annual leave pay of Kshs. 13,540. He testified his prayer for annual leave pay cannot stand.
11. There was complaint by Management of Sun Palm Resort, that the Claimant sold its water to 3rd Parties. The Claimant was issued a letter to show cause on 12th August 2014. He was heard on 15th August 2014. Allegations were tabled. He was given a chance to defend. He was issued a warning letter on his lack of integrity. He declined to sign the warning because he did not sell the water. He reported to Mombasa, as instructed, but could not recall the date of report. On redirection, the Claimant stated he was not facilitated on transfer to Mombasa. He was not reported to the Police for any offence.
12. Joseph Njoroge confirmed the Claimant was employed as a Day Guard by the Respondent, and assigned duty at Sun Palm Resort in Watamu. The Resort complained that the Claimant was selling its water to 3rd Parties. The Respondent issued the Claimant a letter to show cause why he should not be disciplined. His explanation was not satisfactory. He was heard. He was issued a warning letter which he declined to sign. He was asked to work for another Client within Watamu. He declined and deserted work.
13. He appealed against the decision after summary dismissal. The Respondent gave him the option to work in Mombasa. He reported to Njoroge in Mombasa. Njoroge explained to the Claimant why it was necessary to transfer the Claimant. He declined transfer and deserted. This sequence of events is shown

in Respondent's bundle of letters written to the Claimant. He was paid his annual leave days. He deserted and does not merit service pay and compensation.

14. Cross-examined, the Witness told the Court a total sum of Kshs. 19,899, was paid to the Claimant. It included 20 days' worked. His salary was Kshs. 11,065. Salary for 20 days would be approximately Kshs. 8,000. Uniform refund was about Kshs. 6,000. What was paid was 20 days worked, and 2 days off-duty. The Claimant could not be allowed to continue working, without signing the warning letter. The Claimant denied selling water. Redirected, Njoroge told the Court the warning issued upon the Claimant, was the punishment meted after hearing the Claimant. The Respondent evaluated evidence against the Claimant. Terminal dues totaled Kshs. 20,387, less PAYE tax, with net paid at Kshs. 19,899.

15. Martin Olinyo corroborated the testimony of Joseph Njoroge. On cross-examination, he stated that the Claimant did not concede he sold Client's water.

The Court Finds:-

16. Details of the Claimant's employment with the Respondent; the date of employment; the period of service; and the terms and conditions of employment are not disputed. The Respondent concedes it terminated the Claimant's contract after he declined transfer from Watamu to Mombasa and deserted.

17. In his main evidence, the Claimant told the Court he does not wish to pursue the prayer for house allowance. Cross-examined, he stated he does not wish to pursue salary for days worked.

18. He also stated that the prayer for annual leave pay cannot stand.

19. Effectively, the outstanding prayers are on service pay, compensation, costs and any other relief.

20. Njoroge told the Court service pay was denied to the Claimant, because his contract was terminated on account of desertion. There is evidence showing the Claimant deserted. His contract was not terminated by the Respondent under Section 35(1)(c), to warrant that the Claimant receives service pay under Section 35(5) of the Employment Act 2007.

21. The prayer for service pay is rejected.

22. The Claimant was a Day Guard. He was assigned duty at Sun Palm Resort. The Resort complained that the Claimant was selling its water to 3rd Parties. Branch Controller and Branch Manager asked the Claimant to show cause why disciplinary action should not be taken against him. He explained unsatisfactorily. He was called to a disciplinary hearing. The allegations against him were explained to him. He was heard in the presence of a Representative of his Trade Union.

23. In the end the Respondent concluded there was evidence to find the Claimant lacked integrity. The Claimant was issued a warning letter. He was asked to sign the letter, and work for another Client within Watamu. He declined both instructions of his Employer, insisting he did not sell any water

24. He appealed against Respondent's decision. He was given the option to relocate to Mombasa, but this too was not acceptable to the Claimant. He declined transfer, and deserted.

25. The Court finds termination met the standards of fairness under Section 41, 43 and 45 of the Employment Act. The Claimant is not entitled to compensation. The Respondent acted fairly, reasonably and within the bounds of the Law.

IT IS ORDERED:-

a. Termination was fair.

b. The Claim is rejected in its entirety.

c. No order on the costs.

Dated and delivered at Mombasa this 7th day of December 2017.

James Rika

Judge