



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NUMBER 578 OF 2010
SILAS EMOJONG ONGWALI.....CLAIMANT
VERSUS
SECUREX AGENCIES (K) LIMITED.....RESPONDENT
JUDGEMENT

1. By a memorandum of claim filed on 24th May 2010, the claimant averred that he was employed by the respondent as a security guard on 27th February 2006 at a monthly salary of Kshs.18,429/=.
2. He worked until 28th January 2010 when he claimed his services were unfairly and without a just cause terminated by the respondent. According to him, he was dismissed after threatening to sue the respondent for workplace injuries.
3. The respondent on its part denied the claimant's allegations and averred he was dismissed for gross misconduct.
4. The respondent further averred that the claimant was working as a dog handler at a salary of Kshs 6,839/= per month.
5. According to the respondent, on 17th January 2001 the claimants reported to work while intoxicated contrary to work regulations, procedures and instructions. The intoxication was witnessed by several colleagues who were on duty at the time.
6. According to the respondent, the claimant was called upon to record a statement which he did and following the incident the claimant disappeared from work and never came back up to the date of his dismissal.
7. The claimant was asked to collect his salary for January 2010 but declined. He however collected pay in lieu of his two months leave and acknowledge by signing for receipt of the same.
8. In his oral evidence, in court, the claimant testified that on 28th January 2010, he reported to the office to seek clearance to resume work service. He had been injured a week back but was not allocated any duties.
9. According to him, he injured himself while alighting from the respondent's vehicle and sought medical attention. The respondent was aware of the accident and the sick off. It was his evidence that he was

asked for a letter in which he was accused of intoxication while on duty. He complained he was never given a chance to explain himself.

10. By the time of dismissal, he had worked for four years and had receive one warning letter.

11. It was further his evidence that upon termination, he was not paid his terminal dues. He further denied that he drinks.

12. In cross-examination, he stated that he was first of all taken to the office then was to be taken to hospital. He left for hospital on his own after waiting for too long.

13. The respondent's witness Mr. James Mwema informed the court that the worked for the respondent as a dog handler and that the claimant was his colleague and used to relieve him.

14. According to him, on 17th January 2010 at around 5.45 p.m. they were heading to work and the dog master allowed them to ride on the dog van which had only two slots. He waited for the vehicle longer than usual but when the van arrived, he sat between the driver and the claimant. The driver then proceed to pick another guard but the claimant complained why the driver was diverting the vehicle yet he complained the claimant was the one delaying him.

15. According to him the claimant got off the vehicle and he shortly thereafter saw him fall. The driver turned the vehicle to proceed to work but shortly thereafter asked him to call the claimant to find out if they could still proceed together. They drove back and picked the claimant and according to him the claimant looked ok but when he was dropped at Runda he noticed that the claimant was not ok. He was smelling alcohol and the claimant asked him to assist with picking his dong and tie it where it was usually tied.

16. In cross-examination, he denied any accident took place but insisted the claimant looked drunk when he was picked.

17. The respondent's 2nd witness, Mr. Muli Maithya informed the court that on 17th January 2001 he received information that the claimant was injured at work. The nearest back up was sent to collect him and be taken to the office in Parkland. The purpose of taking him to the office according to the witness was to established the injury or sickness and take the guard to hospital.

18. According to him, one Maurice who was sent to perform the task noticed the claimant was dunk and decided to inform his seniors. It was his evidence that Marura where the claimant sought treatment was not one of their authorized facilities. It was further his evidence that they did not receive the request for the sick off. He stated that the office tried to reach the claimant without success. He denied that the respondent ever saw the abstract and the P3. He further ted that the claimant was to be paid his dues upon termination of his series but he never collected the cheque.

19. In cross-examination, he stated that he did not know how long the claimant waited.

20. The respondent allegedly dismissed the claimant on account of being drunk while on duty. According to the claimant however, he got injured and had sought treatment on his own after the respondent took too long to take him to hospital.

21. The respondent's witness Mr. Maithya had stated that when they received a report that the claimant was injured, they sent a vehicle to collect the claimant and bring him to the office to ascertain fit he was sick or injured.

22. According to him, one Maurice told him the claimant was drunk. It is not clear why once the respondent detected that the claimant was drunk no warning or notice to show cause was served on him.

23. It would seem that there was altercation between the claimant and the dog van driver. The

respondent's witness Mr. James Mwema confirmed this. He further stated that the claimant fell down while alighting from the van. The respondent however insisted that the claimant was drunk and not injured.

24. However it is difficult to understand why the respondent did not have the claimant taken to hospital to ascertain whether the claimant was injured or not.

25. There is uncontroverted evidence that the claimant fell down while alighting from the dog van. The nature and extent of his injury if any could only be determined by a medical practitioner.

26. Since the reason for which claimant was dismissed was because of drunkenness, it was incumbent upon the respondent to rule out the claimant's allegation that he was injured by subjecting him to a medical test.

27. The law places the burden of proof of reasons for dismissal on the employer. Failure to do so inevitably leads to a finding that the dismissal was unfair. In the court's view the respondent herein has failed to prove that the validity of the reason for dismissing the claimant.

28. The court therefore enters judgment against the respondent as follows:

(a) One month's salary in lieu of notice	Kshs.6,829/=
(b) unpaid salary for January	Kshs.6,829/=
(c) seven months' salary as compensation for unfair dismissal	<u>Kshs.47,873/=</u>
Total	<u>Kshs.61,531/=</u>
(d) Costs of the suit.	

29. Items (a), (b) and (c) shall be less statutory deductions and money already paid and received by the claimant.

30. Other heads of the claim are disallowed as there have been sufficiently refused by the respondent through documents filed in opposition to the claim.

31. It is so ordered.

Dated at Nairobi this 1st day of December 2017

Abuodha J. N.

Judge

Delivered this 1st day of December 2017

In the presence of:-

..... for the claimant

.....for the Respondent

Abuodha J. N.

Judge