



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 26 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th February 2016)

BENJAMIN ANAYA ISAYA.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 12.1.2012 through the firm of Khalwale & Company Advocates. On 30.6.2015, the Claimant filed an amended Memorandum of Claim after getting due leave from Court.
2. The Claimant's case is that on 13.1.1998, he was employed by the Respondent as a Security Guard at a monthly salary of Kshs.3,008/= which was later reviewed upwards and the said salary was deposited in the Claimant's bank Account twice a month. He avers that he used to work 12 hours a day between 6 pm to 6 am without overtime pay.
3. He avers that though he was employed in 1998 May, he was only issued with a letter of employment on 2.1.2004 after 6 years of service.
4. It is the Claimant's case that he undertook his services diligently and that on 8.9.1998 he was issued with a commendation letter for services well done. He depones that he worked at various assignments and the last assignment was at Barclays Plaza Nairobi in September 2009.
5. It is further the Claimant's case that on 7.9.2009 at 8 pm while on duty at Laico Regency, the Control vehicle of Respondents came and the occupants asked the Claimant to accompany them to the office.
6. The Claimant accompanied them to the office where the night manager directed the Claimant to work till morning. In the morning, the Claimant was assigned duties as usual and continued normally.
7. On 16.9.2009, the Claimant went to check his bank account and found no salary had been deposited as was usual. He went to inquire why his advance salary had not been deposited and he was informed he had been sacked on 7.9.2009 for being drunk at work.
8. The Claimant avers that his termination was malicious and unlawful in that his religion forbids taking of alcohol and he has never tasted alcohol in his entire life.
9. He also avers that he was not given a hearing before termination. He was also assigned duties after the alleged termination. No notice was given to him. His salary at time of termination was Kshs.11,920/=.

He seeks for payment of his terminal dues and compensation for unlawful termination all totaling Kshs.332,460/=.

10. The Respondent filed their reply to the Amended Memorandum of Claim on 27.8.2015 through the firm of Wainaina Ireri & Company Advocates. They aver that they employed Claimant as a Security Guard on 13th January 1998 and he worked at various assignments until 17th September 2009 when he was dismissed from service after he reported to work while intoxicated.

11. They aver that the Claimant had been issued with warnings before on 19th June 2009, 27th August 2007, 12th June 2007 and 25th May 2007.

12. The Respondents aver that the summary dismissal was proper owing to the fact that Claimant was drunk and by virtue of the express provision of Section 44 (4) (b) of Employment Act 2007. They also aver that the Claimant is not entitled to any other terminal dues having been paid all his dues upon termination.

13. They also aver that the Claimant was paid standard overtime allowance to cater for the excess hours worked and evidenced by a copy of his payslip. They also aver that they paid him Kshs.3,500/- uniform deposit.

14. The Respondents aver that the Claimant is not entitled to prayers sought and want this case dismissed with costs.

15. I have examined evidence of both parties plus submissions raised. The claim the Respondents have not amended is the claim by the Claimant that he was not drunk and continued to work after the alleged incident until 16th September 2009 when he was told he had been dismissed but he was never issued with any letter of summary dismissal until 18/9/2009.

16. If indeed the Claimant was summarily dismissed on 17.0.2009, as per the pleadings of the Respondent, why is the dismissal letter dated 10.9.2009. The whole story does not add up.

17. In any case Section 44 (4) (d) on summary dismissal would envisage even minimal hearing of the Claimant as rules of natural justice do not envisage situation where a man would be condemned unheard.

18. It is my finding that the way the Respondent handled the Claimant was unfair and they allowed him to continue working after apparently dismissing him without any notice and without a hearing. I therefore find the dismissal unfair and unlawful.

19. I find for Claimant as follows:

1. **12 months salary as compensation for unlawful dismissal = $12 \times 11,920 = 143,040/=$**
2. **1 month salary in lieu of notice = 11,920/=**

TOTAL = 154,960/=

20. Other prayers are not payable as Claimant was a member and contributor of NSSF and he was paid 3,500/=

21. Uniform deposit as per the clearance certificate. There is also proof that he applied for and was granted leave. Overtime was also paid as per his payslips.

22. The Respondents will pay costs of this suit.

Read in open Court this 25th day of February, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Khalwale for Claimant – Present

Kubai for Respondent – Present