



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.129 OF 2015

(Before D. K. N. Marete)

EDWIN ODUOR OCHIENG.....CLAIMANT

VERSUS

RILEY FALCON SECURITY SERVICES LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 24th April, 2015. It does not disclose the issue in dispute on its face.

The respondent in a statement of response dated 8th June, 2015 opposes the claim and prays that the same be dismissed with costs.

The claimants case is that on or about the 1st April, 2011 he was employed as a security guard by the respondent at a gross consolidated salary of Kshs. 6,505.00. He did serve the respondent with loyalty, diligence, full dedication and commitment until 11th August, 2014 when he was wrongfully, unlawfully summarily dismissed and on termination with no payment of terminal benefits.

It is the claimants further case that his services were terminated when he made an application for a transfer from Santram Hardware and Wholesalers to Oldonyo station and that he be allowed to work during the day as he had little children to care for at night, his wife having recently passed on. The Manager informed him that he should pack and leave, feigning the accusation of drunkenness as an excuse for dismissal.

The claimant prays for terminal dues as tabulated by the labour office as follows;

1. One month pay in lieu of Notice.

Basic + House Allowance

9022 + 1353

Kshs. 10,377/=

2. Leave dues

21 days x 3 years x 10377 26 days

Kshs.26144/=

3. Overtime dues

52hrs p.m (normal working hours) for security guards

12hrs x 6days = 72hrs-52hrs= 20hrs OT

20hrs x 4wks = 80hrs

80 x1.5x9024/225 – Kshs. 4812.80 = 7496pm

4812.8 x 36 months

Kshs.173,260.80

4. Underpayment of wages

Kshs. 216,000/=

5. Service benefits

15days x years worked x basic 30 days

15days x 3years x 9024 30 days

Kshs. 13,536/=

6. Compensation for unfair termination

Gross pay x 12 months

10377 x12 months

Kshs.124,524/=

TOTAL

Kshs.550,305.80/=

The claimant further pleads illegality in his termination and prays for;

i. A declaration that the claimant's services were unprocedurally and unfairly terminated.

ii. Kshs. 550,305.80/- as per paragraph 6 (1) to (5) of the memorandum of claim.

iii. Certificate of service.

Iv. Costs of this cause and interest at court rates from the time of filing the memorandum of claim until payment in full and

v. Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondents case is a total denial of the claim. She contends that the termination of employment was legal, rightful and justifiable. In the alternative, the respondent avers that termination was a consequence of gross misconduct as the claimant used to report to work drunk and that he was accorded a hearing whereby he failed to show cause as to why he should not be dismissed.

This matter came to court variously until the 17th July, 2015 when the parties agreed to dispose off the matter by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?

3. Who bears the costs of this claim?

The claimant, in his written submissions reiterates his case as per the claim. It is his position that he worked for the respondent as aforesaid at a gross consolidated pay of Kshs. 6,505.00. It is his further submission that he was not issued with a show cause letter or even invited to dispute the allegations of drunkenness as alleged in the letter of dismissal dated 11th August, 2014. This is as follows;

“The claimant aver that the respondent violated Sections 35, 36, 41 (1), 44(4), 45(2) and 4 (b), 27 (1-2), 49 (1) (c) and 51 of the Employment Act, The Labour Institutions Act, 2007:- Legal Notice No. 64 of 1st May, 2011, Legal Notice No. 71 of 1st May, 2012 and Legal Notice No.197 of 1st May, 2013 and Section 15 of the Labour Institutions Act. That demand letter was issued to the respondent in vain (sic) (Copies of the legal notices annexed herewith as “Appendix VII, VIII and IX”)

The respondent in his defence makes a general denial of the claim. In her written submissions, the respondent poses an issue of the date of employment but this is not especially canvassed. He also introduces a letter dated 6th August, 2014 inviting the claimant to a disciplinary meeting on 7th August, 2014.

I have had occasion to look at all the annextures to the respondents submissions as hereunder;

1. Letter summons vide a letter 6th August, 2014.
2. Disciplinary charge sheet.
3. Minutes of disciplinary committee meeting held on 7th August, 2014.
4. Dismissal letter dated 11th August, 2014

The curious thing is why these were not produced with the defence/response on as a list of documents or annextures in support of the defence earlier on. The respondent in her defence and submissions only denies the claim but does not go out of his way to demonstrate the validity of the termination. The documents annexed to these submissions are unreliable for being shadowy and afterthought. Their authenticity cannot be all together vouched. Moreover, the claimant was not afforded an opportunity to integrate the same, there coming late in the day.

On a balance of probabilities and preponderance of evidence this matter tilts towards a case for the claimant. I therefore find a case of unlawful, wrongful and unfair termination and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to relief sought. Having scored on issue number 1 above, the claimant becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief and declare as follows;

1. That the termination of the employment of the claimant was wrongful, unfair and unlawful.
2. One month's pay in lieu of notice Kshs. 9,039.00
3. Six (6) months compensation for unlawful termination of employment
- 6 x Kshs. 9,039.00 Kshs.54,234.00

TOTAL Kshs.63,273.00

4. That the respondent be and is hereby ordered to issue a certificate of service to the claimant.

5. That the costs of this application shall be borne by the respondent.

Delivered, dated and signed this 17th day of February 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates for the Claimant.
2. Miss. Alinaitwe instructed by Otieno, Ragot & Co. Advocates for the Respondent.