



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 158 OF 2013
(Originally Nairobi Cause No. 1494 of 2012)

JACOB OTIENO ODUONGO

CLAIMANT

v

GROUP 4 SECURITY SERVICES (K) LTD

RESPONDENT

JUDGMENT

1. Jacob Otieno Oduongo (Claimant) commenced legal proceedings against Group 4 Security Services Ltd (Respondent) on 29 August 2012 alleging unfair termination of employment and underpayments of wages and in the prayers part of the Memorandum of Claim, he sought some 9 heads of relief.
2. The Respondent filed a Response on 16 October 2012, and this prompted the Claimant to file what he called a *Response to the Memorandum of Response by the Respondent's* on 15 August 2013.
3. The parties in the course of time filed other documents and witness statements. The Cause was heard on 26 May 2015, 21 July 2015 and 26 October 2015.
4. The Claimant filed written submissions on 25 November 2015, while the Respondent's submissions were filed on 17 December 2015.
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the head of claim for underpayments is statute barred, whether the dismissal of the Claimant was unfair and appropriate remedies/orders. The Court will also examine the contractual/statutory entitlements sought by the Claimant and which are not dependent on the manner of separation.*
6. The Claimant did not cite any case law in his submissions.

Whether claim for underpayments are statute barred.

7. The Claimant's employment was terminated on 8 November 2010. In the Memorandum of Claim, he listed underpayment of wages as one of the 2 issues in dispute.
8. The underpayment of wages related to the years 1999 to 2010 and was quantified as Kshs 197,625/35. Both parties agree that the Claimant was employed as a security guard but at some point he became a Courier guard (1998). According to the Respondent, the move from security guard to courier guard was a horizontal movement with no impact on wages.
9. At the time of separation, the Employment Act, 2007 was in operation.
10. Section 90 of the Act provides

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, *no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

11. In my understanding of the said section, underpayments of wages would constitute a continuing injury and because the employment of the Claimant was terminated on 8 November 2010, that is the time the injury ceased and therefore any claim in respect of underpayments should have been commenced on or before 7 November 2011.
12. The proceedings herein were commenced in 2012, and I would therefore find that the head of claim relating to underpayments is statute barred by operation of section 90 of the Employment Act, 2007.
13. Because of the position the Court has taken, it is not necessary to examine whether for purposes of remuneration, a security guard and courier guard are entitled to same remuneration based on the General Wages Order. But the Court observes that the duties of the two occupations are different, based on the evidence tendered.

Whether dismissal was unfair

Procedural fairness

14. Section 41 of the Employment Act, 2007 provides the basics of due process an employer should follow if the employer is contemplating terminating the services of an employee on account of *misconduct, poor performance or physical incapacity.*
15. The Claimant was suspended from work through a letter dated 8 September 2010. The letter made reference to earlier discussions regarding loss of customer goods and also informed the Claimant that disciplinary action would be considered after investigations.
16. A Disciplinary Procedure Record of Misconduct Counseling Form was also filed and countersigned by the Claimant on the date of suspension.
17. Thereafter, a disciplinary hearing was held on 24 September 2010 and the Claimant and a shop steward of a Union he was a member is captured in the minutes as having been present.
18. But there appear to be two different sets of minutes.
19. The minutes produced by the Claimant show that the allegations against the Claimant were read and he was granted a chance and did make representations in his defence.
20. At the end, the Committee agreed that the Claimant be reinstated but be put under observation. The minutes were not signed.
21. Instead the dismissal letter came on 8 November 2010.
22. The minutes produced by the Respondent also indicate presence of a shop steward and that the Claimant was informed of the charges to confront and that he did make a defence.
23. But these minutes indicate that the Committee recommended that the employment of the Claimant be terminated.
24. In his testimony, the Claimant admitted that he received the suspension letter; recorded a statement on 1 September 2010 and that he appeared for the disciplinary hearing on 24 September 2010.
25. The Claimant called as a witness one Joseph Nderitu. Mr. Nderitu testified that he was the Claimant's supervisor at the material time and that he served as the Secretary of the Disciplinary Committee which sat on 24 September 2010. He disowned the minutes produced by the Respondent and stated that the same had been altered, and that the correct minutes were the ones produced by the Claimant which show that the Committee found the Claimant not responsible and recommended he resumes duty.
26. The Respondent's first witness was Robinson Nzavi Mwandai, a District Manager, Nakuru in 2010. On the question of minutes, he stated that Mr. Nderitu was a junior officer who had no mandate of taking minutes. He also stated that the minutes signed by him and produced by the Respondent were the correct minutes.
27. With the inconsistency on the hearing, it becomes necessary to determine which set of minutes are

- genuine. An answer to the question directly implicates the process, outcome wise.
28. Both sets of minutes indicate that the chairperson of the Disciplinary Committee was a Gabriel Oginga whose position is designated as Branch Manager. Ordinarily, minutes would be signed by the chair and or secretary of the Committee.
 29. In the instant case, the minutes produced by the Respondent, and it is assumed that the Respondent maintained and had custody of formal minutes, were not signed by the chairperson. No explanation was tendered as to why the chairperson did not sign the minutes.
 30. The minutes produced by the Respondent further indicate the same were recorded by Mr. Mwandai. I have gone through his testimony keenly and at no stage did he positively declare that he was the secretary of the Disciplinary Committee or that he was mandated to take minutes.
 31. The Respondent knew long before the hearing that there were 2 sets of minutes. Discerning the genuine minutes therefore became a live issue.
 32. Despite this, the Respondent did not bother to call any of the other persons who were present during the hearing to help unravel exactly the outcome of the hearing. There was equally no suggestion that the members could not be brought to testify.
 33. The Court in the circumstances find that the minutes produced by the Respondent were altered and that the Committee exonerated the Claimant and recommended that he resume duty.
 34. But all in all, in his testimony, the Claimant did not lead any evidence to really challenge the process.
 35. The Court therefore finds that the Respondent was in substantial compliance with the statutory requirements of due process as provided for in section 41 of the Employment Act, 2007.

Substantive fairness

36. The reason(s) given for the termination of the Claimant's employment were that he was implicated in fraudulent activities involving non delivery of courier parcels from Krishna Chemists to intended customers in Nakuru. The particulars given in the letter were that the Claimant failed to apply the Respondent's policies on delivery of customer parcels/negligence.
37. These are the grounds/reasons that the Respondent was under an obligation to prove and prove as valid and fair reasons. That is the requirement of sections 43 and 45 of the Employment Act, 2007.
38. In an endeavour to discharge the burden, the Respondent called 2 witnesses. Of particular interest is the evidence of the first witness and the Claimant's witness, Mr. Nderitu who also carried out investigations at the first instance.
39. The Respondent's first witness explained the process of receiving and delivery of parcels. In the case at hand, the parcels were received by the night shift staff (Claimant was in day shift).
40. The night shift staff received the parcels from Nairobi through consignment sheets and prepared delivery sheets which they handed over to the day shift staff together with the parcels, for delivery within Nakuru.
41. On 19 July 2010, parcels were received in Nakuru through consignment sheet no. 042632. Among the goods received was a parcel (waybill no. 375805) consigned to Midrift Pharmacy.
42. A delivery sheet no. 456274 was prepared by the night shift staff. The delivery sheet had couriers named as Kariuki/Jacob. The witness confirmed that though the delivery sheet had the names of 2 couriers (including the Claimant), it was signed by the courier named James Kariuki.
43. He also stated that the said James Kariuki attempted to explain the delivery of the parcel to Midrift Pharmacy through delivery sheet no 456279 but it was not delivered as the client denied the signatures/stamps purporting to acknowledge receipt.
44. The other parcels were entered into delivery sheet no. 339425, no. 338917, no. 339443 and no. 451693 in favour of Supreme Pharmacy Ltd/Midrift Pharmacy. The couriers named therein were the Claimant and Kariuki.
45. Delivery sheet no. 336310/no. 548279 had no courier names/not signed by night shift staff supervisors).
46. In the same vein, the witness stated that all the delivery sheets with issues were handled at night by 2 particular employees Daniel Mutulika and Lawrence Mungai and were received by 2 day shift staff (Claimant and James Kariuki).
47. Daniel Mutulika was transferred while Lawrence Mungai deserted.
48. In his defence and the Claimant testified as such before Court, there were 3 delivery zones within

- Nakuru and that in his team was James Kariuki and a driver.
49. In cross examination he stated that the alteration in delivery sheet no. 451693 was made by James Kariuki and Lawrence Mugambi.
50. The Court has considered the case of the Respondent and the Claimant.
51. Mr. Nderitu who was called by the Claimant carried out investigations. His investigation report was filed by the Respondent.
52. According to the report, the persons squarely responsible for the undelivered parcels were Mr. Mugambi who disappeared and Mr. Kariuki. The Claimant may or may not have known of what was going on. Perhaps he was not alert enough.
53. It is clear from the investigations report that there was doubt that the Claimant was actively involved. His involvement appears to have been that members of his team were involved in the scheme. The Respondent's systems and controls also appear to have been weak as the supervisory staff were not keen on ensuring adherence to procedures put in place.
54. The termination of his employment was in the circumstances not in accord with justice and equity.

Appropriate remedies/orders

1 month pay in lieu of notice

55. The Claimant sought Kshs 9,495/- being pay in lieu of notice. The Respondent offered him Kshs 6,974/- (basic monthly pay at time of separation) and nothing therefore turns on this relief

Underpayments

56. The Claimant sought Kshs 197,625/35 on account of underpayments. Considering the conclusion on limitation, this relief is declined.

Annual leave

57. Under the claim for leave, the Claimant quantified the same as Kshs 19,827/- on account of leave and leave travelling due for 2009 and 2010. He did not disclose the formula or how he arrived at the figure.
58. According to the final dues schedule produced by the Respondent, the Claimant had 27 accrued leave days and he was offered Kshs 6,277/-. The Court finds the calculation by the Respondent as more plausible.

Gratuity

59. Gratuity is either anchored on contract or statute. The Respondent's final dues schedule show Kshs 46,028/- as gratuity.
60. The Claimant did not lay any evidentiary basis for seeking Kshs 92,030/40 as gratuity. The Court again accepts the computations by the employer.

October/November 2010 wages

61. Under wages for October and November 2010, the Claimant sought a total of Kshs 18,990/-. His employment was terminated on 8 November 2010 and he would be entitled to the earned wages as no proof was given to show he was paid the wages.

Lost prospective earnings

62. No contractual or legal basis for this relief quantified as Kshs 2,086,560 was laid before Court and it is dismissed.

Compensation

63. Compensation is a discretionary remedy. The Claimant served the Respondent for about 14 years.
64. Considering the length of service, the Court assesses 8 months wages as reasonable compensation (based on the gross pay of Kshs 12,401/-).

Conclusion and Orders

65. Considering the foregoing, the Court finds and holds that the termination of the Claimant's employment was not in accord with justice and equity and awards him and orders the Respondent to pay him

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| a. 1 month pay in lieu of notice | Kshs 6,947/- |
| b. Accrued leave | Kshs 6,227/- |
| c. Gratuity | Kshs 46,028/- |
| d. Wages Oct/Nov 2010 | Kshs 18,990/- |
| e. Compensation | Kshs 99,208/- |

TOTAL **Kshs 177,400/-**

66. Claimant is denied costs for having failed to serve submissions as directed.

Delivered, dated and signed in Nakuru on this 12th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mrs. Mbeche instructed by Obura & Mbeche Advocates

Court Assistant Nixon