



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1588 OF 2014

STEPHEN BARASA WANDERA.....CLAIMANT

VERSUS

THE WATCHDOG LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant averred that he was initially employed by the respondent as a security guard in April, 2003 and rose up the ranks to the position of operations manager.
2. He worked until 22nd February, 2014 when the respondent's director, Mr. Stannah issued him with a summary dismissal letter dated the same date. The reason for his dismissal as stated in the letter was misuse of company's property, extortion and being a traitor.
3. According to the claimant he disputed the accusations and reported the matter to the County Labour Office for conciliation but the respondent refused to cooperate. The claimant therefore sought an order for compensation as set out in his memorandum of claim.
4. The respondent denied the claimant's assertion and averred in the main that the claimant had been issued with two warning letters during the period of service and further that the respondent gave the claimant several opportunities to explain and show cause but the claimant's reasons were found to be insufficient.
5. According to the respondent, during the period of employment, the respondent received reports of the claimant's extortion, nepotism and misuse of the company's resources amounting to gross misconduct while on duty. This according to the respondent warranted dismissal under section 44(3) and (4) of the Employment Act.
6. Regarding the reliefs sought by the claimant, the respondent averred that the company's policy did not allow employees to work on their leave days. The claimant was however allowed to take collective leave at the end of the year.
7. Concerning bonus, the respondent stated that the contract between them did not entitle the claimant to any bonus. The claimant was only entitled to a consolidated salary each month. The respondent further denied the claimant was entitled to service pay and overtime pay.
8. In his oral evidence in Court the claimant stated that on 22nd February, 2014, the

respondent's director called him and handed him the dismissal letter. According to him, the director accused him of being responsible for loss of business as he did not supervise work properly leading to theft at customers' sites. He denied using the respondent's vehicles as taxis and denied driving himself in the company's vehicles. It was his evidence that he always used the company's drivers whenever he wanted to move around. He denied ever extorting money from people seeking jobs from the respondents.

9. In cross-examination he stated that in 2004, March he received a warning letter. He also received another one in 2006. He denied knowledge of any information about investigations about the performance of some supervisors. He however conceded that as the overall supervisor he took responsibility over other supervisors. He further admitted that before being issued with the termination letter, the director told him there were complaints about him and his performance. He also stated that he was accused of starting up a rival company. He admitted he was registered with National Social Security Fund and that the salary he was paid was a consolidated salary.

10. The respondent's witness Mr. Dudely Michel Stannah informed the Court that the claimant was essentially running the company on his behalf and was allocated more responsibility because he was thought competent. According to the witness, in 2012 he started receiving allegations from guards that the claimant was extorting money from employees prior to them being hired.

11. According to him, the claimant was responsible for paying employees and used to do so in cash. This he later changed and started paying them through Co-operative Bank. He further testified that in 2013 one client which had seven assignments complained about breakages and felt that the respondent was not supervising guards properly. According to him, the claimant was responsible for patrolling to ensure work was going on well. In September, 2013 the same client complained again and wanted the respondent to move out.

12. The client terminated the contract prompting the respondent to reduce the number of guards. It was his testimony that while paying the guards most of them complained of not going on leave or off and wanted to be paid. The records however did not show they were entitled to leave. It was his evidence that the claimant extorted money from guards who wanted to go on leave. The claimant was subsequently removed from overall supervision and assigned to a specific client in Lavington.

13. Mr. Stannah further stated that by and by he lost confidence in the claimant when he saw no change and after speaking to him about the concerns severally.

14. In cross-examination he stated that payslips were never produced but if one wanted they could be given. He stated that he used to deal with the claimant more like a colleague than an employee. None of the complaints against the claimant were documented. He used to receive calls from supervisors and guards about the claimant.

15. In cross-examination he stated that the company was small and he run the same at personal level with the claimant. They used to taLk things out with the claimant.

16. The respondent's second witness Mr. George Wanjala informed the Court that he was bereaved in 2013 but the claimant informed him that he could not be given leave because he was recently employed unless he gave "**kitu kidogo**". The claimant asked for Kshs.3000/=. According to him he gave the claimant the money. The money was given cash. He further stated that the claimant used to call him to his office and demand "**haki yake**". He reported the matter to the respondent's director.

17. The respondent's 3rd and last witness was Mr. Martin Melesi. He stated that he verbally asked the claimant for leave and was told by him that he would get back to him. Eleven days passed and the claimant still never gave him leave. The claimant later told him "**wewe hutaki kuangalia wazee**".

18. Section 35 of the employment Act makes provision for notice of termination of employment under normal circumstances. Section 36 provides for payment in lieu of notice for termination.

19. The claimant herein was summarily dismissed. Under section 44(1) summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than one which the employee is entitled by any statutory provision or contractual term. Summary dismissal usually takes place as a result of the employee being found guilty of gross misconduct. Section 44(4) of the Act enumerates incidents which are regarded as gross misconduct warranting summary dismissal. The Act however places a rider that the enumeration of such incidents does not preclude dismissal for any other incident deemed by the employer to warrant summary dismissal. The Act under section 43(1) places the onus of proof of reasons for dismissal on the employer.

20. By a letter dated 22nd February, 2014 the respondent summarily dismissed the claimant. The dismissal letter set out in detail the accusations against the claimant which included misuse of the respondents' vehicles, extorting money from guards in return for jobs and leave or offs and insubordination. The claimant does not deny receiving this letter. He however refutes the accusations both in his memorandum of claim and oral testimony in Court. The respondent on its part stood its ground on the accusations and even called RW2 and 3 to vouch for accusations against the claimant over extortion.

21. The Court however noted that there was no averment in the memorandum of response or oral evidence in Court that the claimant was given an opportunity to respond to the accusations against him.

22. In deciding whether termination was unfair or not the Court looks at two things. One, the validity of reasons for dismissal or termination and second the fairness of procedure adopted in the process.

23. The Court is not concerned about the absolute proof of reasons for dismissal. They must however be reasons for which a reasonable employer would dismiss or terminate the contract of employment. Second the Court does not insist that every minute detail of a formal hearing akin to a Court trial must be conducted before a dismissal or termination is undertaken. If an employee is informed of the charges/accusations against him whether orally or in writing and given a reasonable opportunity to react to the accusations, that would suffice. The Court requires to be satisfied on the evidence before it that a reasonable opportunity was availed to the employee to answer to the charges/accusations. This can be proved through oral and or documentary evidence.

24. In the case before me, the accusations against the claimant were serious enough to justify his summary dismissal. He did not deny being informed of these accusations however there was no evidence either in the letter of dismissal itself or oral evidence in Court that he was called upon to respond to the accusations prior to his dismissal. This omission renders the dismissal unfair in terms of procedure followed.

25. The Court therefore awards the claimant as follows:-

- a. Four months salary as compensation for unfair termination of services.
- b. Salary for the month of February, 2014.

26. Since the Court is of the view that the reasons could, save for the fact that the claimant was not afforded an opportunity to respond, to warrant dismissal there will be no order on salary in lieu of notice. The claimant's claim for bonus, service and overtime were either not proved or insufficiently proved hence are hereby dismissed with costs.

27. It is so ordered.

Dated at Nairobi this 13th day of May 2016

Abuodha Jorum Nelson

Judge

Delivered this 13th day of May 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge