



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2041 OF 2011

JOHN MUINDE MBURU.....CLAIMANT

VERSUS

INTER SECURITY LTD..... RESPONDENT

M/s Wangari for Claimant

M/s Kimiti for Respondent

JUDGEMENT

Claimants Case

1. The claimant was employed by the respondent on 1st November 2007 as a security guard supervisor. He was placed on three months' probation. He did not get a letter of confirmation upon completion of probation. The claimant earned Kshs 11,421 per month.
2. The claimant's docket included delivering letters and employing security guards. He reported to work at 6 p.m. in the evening upto 6 a.m. in the morning and at 6 a.m. upto 6 p.m. during the day shift. Mr Brain Ngumbe was his supervisor. The claimant worked continuously throughout the week but got off days upon application.
3. The claimant served the respondent for two years and ten months. He was dismissed from work on 7th September 2010. On 6th September 2010, the claimant was in the night shift. He reported to work at 6 pm in the evening. He was instructed by Mr Isaack Okwiri his manager to deploy guards on a motorbike. He was also asked to re-deploy a security guard who was stationed at the Nairobi royal golf Club to S.O.S Yaya Centre. The claimant took the guard Mr Livingstone Kituyi, to S.O.S as per instructions and replaced him with a Mr Kimangau.
4. The following day Mr Isaack Okwiri called the claimant to his office and accused him of not introducing the new guard to the caretaker of S.O.S. The claimant explained that he had deployed Mr Livingstone Kituyi in the evening to S.O.S and he did not know that there was a caretaker living at S.O.S. Mr Okwiri asked the claimant to go home and not come back again. The claimant was not paid terminal benefits nor was he given a certificate of service. He was summarily dismissed. He suffered loss and damage.
5. He went home, sold his cattle and started a bodaboda business to earn an income. He seeks compensation for wrongful and unfair dismissal, one month salary in lieu of notice, unpaid salary for the month of September 2010, overtime for the extra hours worked daily, payment in lieu of leave days not taken and house allowance as set out under paragraph 20 of the amended memorandum of claim dated 16th May 2012 and filed on 17th May 2012.

6. The claimant states that he has failed to secure another job due to the failure by the respondent to give him a certificate of service and seeks provision of the same. Interest on the award and costs.

Response

7. The respondent filed a response to the amended memorandum of claim dated 19th November 2013. The respondent states that the claimant was employed as a casual employee on a temporary employment contract from 1st November 2007 to 1st February 2008. The respondent annexed unsigned 'Temporary Employment Contract' which purports to employ the claimant for a period not exceeding 90 days. The respondent states that the claimant wages were paid at the end of every month.
8. The respondent denies that the claimant was entitled to 21 days annual leave. The respondent avers that the claimant was dismissed from employment due to persistent defiance against his seniors and he had been repeatedly warned due to his continued refusal to take instructions from the operations office and absenteeism from work. The warning letters which do not bear any acknowledgement by the claimant are annexed and are dated 18th December 2009 and 5th July 2010 respectively.
9. The letter of summary dismissal dated 7th September, 2010 gives the reason for the dismissal to be persistent defiance shown to the seniors specifically with respect to the supervision at Air Connection Ltd. That claimant's failure to visit and supervise the guards at Air Connection Ltd led to the respondent's loss of the contract. That the claimant had refused to change his attitude in spite of repeated instructions to do so. The respondent prays that the suit be dismissed with costs.

Determination

10. The issues for determination are as follows;
 - i. Was the summary dismissal of the claimant for a valid reason and in terms of fair procedure?
 - ii. Is the claimant entitled to the reliefs sought?

Issue i

11. From the facts that are not in dispute, the claimant worked continuously for the respondent from 1st November 2007 as a supervisor of security guards until 7th September 2010 when he was summarily dismissed by the respondent. These facts are borne out of the oral testimony of the claimant and RW1 Isaak Okwiri.
12. The claimant and RW1 Isaak Okwiri testified under oath in support of their respective cases. The two reiterated and elaborated the averments in their respective pleadings. The claimant denied the allegations by RW1 whereas RW1 insisted that the claimant deserved summary dismissal because the company lost business due to lack of supervision of guards and absenteeism by the claimant in spite of receiving several warnings to desist from his behavior.
13. It is not in dispute that the claimant received a monthly salary of Kshs 11,421 set out in paragraph 4 of the amended statement of claim and admitted by the respondent under paragraph 6 of the reply to the amended memorandum of claim. These facts are borne out of the pleadings and the testimony of the claimant and RW1. From these facts, the claimant was an employee in terms of section 35(1) (b) of the Employment Act, 2007 and was entitled to at least 28 days' notice to terminate his employment unless there were justifiable reasons to summarily dismiss the employment of the employee in terms of section 44 of the Employment Act 2007.
14. Section 43(1) of the Act provide;

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45”

15. In the present case, the respondent states in the letter of summary dismissal dated 7th September

2010 that the claimant was summarily dismissed for persistent defiance to the seniors. The claimant is said to have refused to supervise guards at Air Connection Ltd leading to the respondent losing the security contract.

16. This allegation is based on a letter of warning dated 5th July 2010 given to the claimant to supervise guards at Air Connection Ltd and give a report, but had deliberately refused to do so. The claimant was warned to resume the supervision failing which he would be dismissed from duty.

17. Section 44(1) (c) allows an employer to summarily dismiss an employee if:-

“An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly;”

18. The claimant has denied that he was defiant and/or failed to supervise guards at Air Connection Ltd as instructed or at all. The claimant in his oral testimony attributes his dismissal to an allegation from RW1 that he had failed on 6th September 2010 to introduce a night guard he had deployed to S.O.S Yaya Centre to the caretaker. The claimant states that he was unaware of the presence of the caretaker when he dropped the guard on a motorbike to the site.

19. The two versions are mutually destructive. Section 41 (2) of the Act provides;

“Notwithstanding any other provision of this part, an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct on poor performance and the person if any chosen by the employee within subsection (1) make”

20. Subsection (1) mandates the employer to allow the employee to bring another employee or a shop floor union representative of his choice to be present and be allowed to make representation when the employee is given opportunity to explain why his employment should not be summarily dismissed or terminated.

21. In the present case the claimant was not presented with a letter or notice to show cause why his employment should not be dismissed. The claimant was not given an opportunity to explain the reason why his employment ought not to be summarily dismissed. He therefore had no opportunity to call a fellow employee to accompany him at such a hearing.

22. Had the respondent provided the claimant with opportunity to show cause whether in writing or at a hearing, the evidence by the parties would not be at cross purpose as is the case. Given the circumstances of the case, the claimant has made a *prima facie* case in terms of section 47 (5) of the Act that a wrongful dismissal took place. The burden was then cast on the employer (the respondent), to justify the reason(s) for the termination.

23. By failing to prefer charges to the claimant and failing to provide the claimant therefore with opportunity to show cause why he ought not to have been summarily dismissed, the respondent lost opportunity to discharge the burden of justification and rebuttal cast on it in terms of section 43 (1) and 47 (5) of the Act.

24. Section 45 (1) of the Act provides;

“No employer shall terminate the employment of an employee unfairly”.

Section 45 (4) provides;

“A termination of employment shall be unfair for the purposes of this part where –

- a. *The termination is for one of the reasons specified in section 46; or*
- b. *It is found out that in all the circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee”.*

25. In determining whether the termination of the employee was unfair and in terms of section 45 (5)

the court shall consider the procedure by the employer in reaching the decision to dismiss the employee and the communication of that decision to the employee, the extent to which the employer has complied with any statutory requirements connected with termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41, *inter alia*.

26. It is the court's considered view and finding that the respondent did not follow the procedure under section 41 in summarily dismissing the claimant. The respondent did not comply with section 51 of the Act by not giving the claimant a certificate of service. The Respondent did not give the claimant any notice or payment in lieu of notice. The salary for days worked was not paid nor payment made in lieu of leave. The respondent in fact testified that the claimant was not entitled to 21 days leave which is a statutory requirement under section 28(1) (a) of the Act.
27. In the final analysis, the summary dismissal was unlawful and unfair within the meaning of section 45(2) (a), (b) and (c) of the Act in that it was not for a valid reason related to the employee's conduct capacity or compatibility and the dismissal was not effected in terms of a fair procedure. And the claimant is entitled to compensation in terms of section 49 (1) (c) as read with section 49 (4) of the Employment Act, 2007.
28. In this regard, the respondent in effecting the summary dismissal made many errors outlined above, including the failure to pay the claimant any terminal benefits, failure to give him certificate of service, failure to give the claimant any notice prior to the dismissal or payment in lieu of notice. The claimant had worked for about three years and in the court's view he did not contribute to the summary dismissal. The court therefore awards him eight (8) months' salary as compensation for the unlawful and unfair summary dismissal in the sum of Kshs 91,368.

Terminal Benefits

29. The respondent did not put up any viable defence to the reliefs sought under paragraph 20 of the amended memorandum of claim. The claimant has proved on a balance of probability that he was entitled to payment of;

- i. One month salary in lieu of notice in the sum of Kshs 11,421
- ii. In lieu of untaken leave in the sum of Kshs 9,224.65
- iii. 7 days salary arrears for the month of September 2010 in the sum of Kshs 3,074.90
- iv. Overtime for 2 years and 10 months at 4 hours per day x 26 days in one month x 12 months in a year x 34/12 in the sum of Kshs 194,038.

30. The claim for house allowance is unsubstantiated and is dismissed.

31. Total terminal benefits payable is Kshs 217,758.55

Total Award is Kshs 309,126.55

32. The final order of the court is that:-

- i. The respondent is ordered to pay the claimant a sum of Kshs 309,126.55**
- ii. The award is payable with interest at court rates from date of filing suit till payment in full.**
- iii. The respondent to provide the claimant with certificate of Service within 30 days from date of judgement.**
- iv. Respondent to pay costs of the suit.**

Dated and delivered at Nairobi this 24th day of June 2016

MATHEWS N. NDUMA

PRINCIPAL JUDGE