



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**

**NAIROBI**

**CAUSE NO.1765 OF 2014**

**MARTIN ADONGO SANGANY ..... CLAIMANT**

**VERSUS**

**VILLA CARE MANAGEMENT LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. Issues in dispute – constructive dismissal, unfair termination, and terminal dues payment.
2. The claimant was employed by the respondent vide letter dated 7<sup>th</sup> May 2012 as a Facility officer at a salary of Kshs.20, 000.00 per month. The claimant diligently performed his duties and his functions increased and the salary reviewed upwards to kshs.30, 9000.00 per month. On 6<sup>th</sup> February 2014 while the claimant was at work at Brooklyn Springs Apartment in Kileleshwa he was called on phone to proceed to head office for work related duties. While at the head office, the property manager, Wambua called in 2 police officers to arrest the claimant. The claimant demanded to know why he was being arrested but Wambua referred him to the Managing Director. His phone was confiscated and placed in custody at Spring Valley Police Station. The claimant remained in custody overnight and was taken to Kibera Law Courts on 7<sup>th</sup> February 2014 and charged with the offence of attempted to extort by threats contrary to section 300(1) of the Penal Code. The claimant remained in custody for 2 weeks when he was able to deposit bail. While in custody he was terminated from his employment.
3. The claim is also that the claimant did not extort money from Surinder Kaur Bizar as alleged and he never used his cell phone number to send text messages to extort from the person. Extracts from Airtel on his phone line revealed that he had not sent such messages. The termination of employment on this basis was therefore not justified as there was no notice or hearing. The respondent refused to allow the claimant back to work or take him through disciplinary hearing. The claimant was greatly aggrieved by the termination of his employment as there were no valid or justifiable reasons.
4. The claim is that there was constructive dismissal on the basis of false allegations. He did not violate any of the respondent policies or commit any gross misconduct as required under section 44 of the Employment Act. He was not given notice or paid in lieu thereof. That due to the nature of his job, the claimant was made to work full time without break or payment of allowance. He worked for 88 Sundays and 88 Saturdays without being paid for it. The respondent also deducted statutory dues from the claimant's salary but never remitted as required and thus service pay is due. No housing was provided and the claimant was not offered accommodation as required by law and should be paid. As a result of the respondent's failure to issue the claimant with a Certificate of Service, he has suffered loss and damage and claim that punitive measures be taken against the respondent.

5. The claimant also testified in support of his case. He confirmed that on 1<sup>st</sup> march 2014 he received his letter of termination of employment

6. The claim is for;

*a. A declaration that the dismissal was unprocedural, unfair and unlawful.*

*b. Compensation of 12 months.*

*c. Notice pay.*

*d. Unpaid salary*

*e. Accrued leave of 37 days*

*f. Unpaid allowance on public holidays*

*g. Service pay*

*h. Punitive damages*

*i. Compensation for constitutional violations*

*j. Certificate of service*

*k. A fine of kshs.100,000.00 against the respondent for violating section 51(3) of the Employment Act*

*l. Costs of the suit*

## **Defence**

7. In defence, the respondent case is that they employed the claimant and he had a contract of employment. On 6<sup>th</sup> February 2014 the respondent received communication from the police that they were looking for the claimant in connection with an ongoing criminal investigation and being the employer, the respondent was obliged to comply. The managing director was told that the claimant had been arrested for extortion from one Surinder Kaur Bizar by way of threats. The respondent played no part in the arrest of the claimant and there was no collusion with the police.

8. The defence is also that the claimant did not report to work for 2 months and 2 weeks. They run a real estate business which requires constant attention and after his arrest, the claimant did not attend work. This affected the respondent business and was entitled to terminate his employment. Employment was not tenable due to prolonged incarceration. The respondent issued the claimant with a Certificate of Service and there is evidence of payment of kshs.53, 140.00 in final dues.

9. There is no case of unfair termination and the same was lawful as notice of termination was issued. The claimant did not work overtime as alleged and no pay is due. The claim should be dismissed with costs.

10. The respondent did not offer any evidence in support of their case. They remained absent on the date allocated in court for defence hearing. Both parties filed their written submissions.

## **Determination**

11. The claimant was terminated from his employment by letter dated 1<sup>st</sup> march 2014. The termination was on the grounds of imprisonment which had taken more than 14 days. Indeed, section 44(40) of the

Employment Act allow an employer to summarily dismiss an employee on the grounds of arrest and imprisonment and is not released within 14 days or released on bail.

*f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty;*

12. In the context of the above provisions, the law also dictate that whatever the reasons for dismissal, an employee must be given a hearing as set out under section 41.of the Employment Act and even in very serious cases of gross misconduct, and section 44 of the Act apply, such must comply with the provisions of section 41(2) of the Act thus;

*(2) 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 or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

13. The employer is therefore required to comply with the above provisions, hear and consider the representatives of the employee. Where the employer is not practically able to hear the employee in their defence, the duty is upon the employer to demonstrate the circumstances and the fact as otherwise, the law is set out in mandatory terms. The respondent opted not to call any evidence. However my reading of the statement of defence is that; *The respondent states that on 6<sup>th</sup> February 2014 it received communication from the police that they were looking for the claimant in connection with an ongoing criminal investigations. Being his employer the respondent was obligated to hand him over.*

14. The respondent therefore was aware of the claimants' circumstances. That he had been arrested as they handed him over to the police on allegation of extortion. Was this related to his employment? Was there notice to the claimant to show cause why he should not be dismissed for being absent from work? I find, without any evidence from the respondent, the filed statement in response is left bare. I however recognise that upon arrest of the claimant, he had made effort to exonerate himself, such arrest has not been linked to his employment and the respondent having been aware of his whereabouts upon handing him over to the police for arrest, he was not able to discharge his duties under his employment contract. The resulting violations upon his arrest and inability to undertake his duties as an employee of the respondent cannot be visited upon the employer. The duty placed upon an employment is ensure compliance with the law and where there is a legal agency such as the police carrying out their mandate to arrest and the employer is requested to abide, such dictates compliance. Such cannot be visited upon an employer. The charge sheet attached to the memorandum of claim show **Criminal Case no.481 of 2012 (Kibera) was Republic Versus Martin Adongo Sangany.**

15. This is however no sufficient reason for the respondent to fail to pay the claimant his terminal due owing and entitled to him as at the time of termination of employment due to incarceration for periods over 14 days. Such are due to him as an employee.

16. The respondent is however without blame. Upon the filing of the claim, the matters set out, this called for the filing of employment records to show compliance with hours of work as required under section 27 of the Employment Act; leave and rests days taken pursuant to sections 28 and 27(2) of the Act respectively; provision of housing or allowance thereof pursuant to section 31 of the Act; and compliance with statutory dues deduction dn remittances as appropriate. Such is required with regard to any matter filed before this court as the duty to keep work and employment records is upon the employer. Where contested, the employer whether he/she be the claimant or respondent, the duty does not change. Such records are required for the court to assess each claim and award as appropriate.

17. Without any call of evidence, the failure to submit any employment record with regard to the claimant, I take it that such records do not exist and where they exist, the same are not in favour of the defence case. Such cannot negate the claimant's right to enjoy his minimum work hours, take his rest days and enjoy annual leave or housing as these are legal rights. equally where there statutory dues are

deducted and not remitted, that essentially affect the service gratuity of an employee and section 35(5) and (6) come to the protection of the employee such as the claimant as service pay is payable.

## **Remedies**

18. The claimant testified that his last salary was kshs.30, 000.00. Where termination is effected without notice as required under the contract of employment or as under section 35 of the Employment Act sets out, payment in lieu is awarded. On the above findings, the claimant is awarded one (1) months' pay in lieu of notice at kshs.30, 000.00.

19. Clause 6 of the contract of employment stipulate the work hours from Monday to Friday, 8am to 5pm and 8.am to 2.30pm on Saturdays. The claimant is seeking 88 days overtime for Sunday and Saturday. Without work records and on the basis of the employment contract, where the claimant was at work on Saturdays until 5pm, he only worked 3 ½ overtime for the 88 Saturdays. Overtime is payable at a higher rate of 1.5 for each hour and on a salary of 30,000 per month for the 88 Sunday and 88 Saturday's worked overtime, he worked a total of 1012 hours overtime all computed at kshs.189,750,

20. Service pay is due to the claimant where statutory dues were deducted and not remitted as required. The obligation to remit such dues is upon the employer and where a claim is lodged, the respondent must submit evidence of compliance. The claimant was employed on 7<sup>th</sup> May 2012 and terminated on 1<sup>st</sup> March 2014. He served for less than 2 years and section 35 allow for service pay at 15 days salary for each full year served. Service pay is awarded at kshs.15, 000.00.

21. House allowance is due where lawfully not contracted as inclusive in the contract amount and housing is not provided. Clause one (1) of the employment contact has provision for a base pay. No benefits are included. House allowance is due as there is no record that this was paid to the claimant. For the 21 months the claimant was employed by the respondent, house allowance provision at 15% of base pay is kshs.94, 500.00. The claimant is awarded.

22. There is no challenge to the claim with regard to pay for work done on public holidays. Such is awarded at kshs.16, 000.00.

23. A Certificate of Service is due under the provisions of section 51 of the Employment Act. Such a certificate should issue together with the termination letter. Where not issued and this affects the employer ability of an employee, such evidence must be set out for the court to assess the damage and award as appropriate. I find no such evidence in this case. Punitive damages apply where an employer fails to abide by legal requirements. The labour Officer should in essence move the court in this regard. However for the claimant and for purposes of his case, he will be awarded costs of the suit.

24. The claimant admitted that he has since been paid for his leave days and days worked. Work terminated on 1<sup>st</sup> march 2014 and I find the pay made generous. Such will not be disturbed.

**Judgement is hereby entered for the claimant against the respondent in the following terms;**

- a. Notice pay kshs.30,000.00;**
- b. Overtime pay kshs.189,750.00;**
- c. Service pay kshs.15,000.00;**
- d. House allowance kshs.94,500.00;**
- e. Work during public holidays kshs.16,000.00; and**
- f. Costs.**

**Orders accordingly.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 3<sup>RD</sup> DAY OF JUNE 2016.

**M. MBARU**

**JUDGE**

In the presence of

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