

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1637 OF 2015

STEPHEN MASIA SABATIA.....CLAIMANT

VERSUS

SWAMI GUARDS SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 18th September 2015 seeking to have two issues resolved being the unfair/unlawful dismissal from employment and the non-payment of terminal dues & compensatory damages. He averred that at all material times and more particularly sometime in February 2014, he was employed by the Respondent as a security guard earning Kshs. 8,000/- per month. He further averred that on 8th November 2014 he reported for duty at Diamond Plaza Parklands where he was brutally attacked and beaten by a client who was exiting the facility. He averred that he sustained serious injury and was given 2 months to recuperate. He stated that sometimes in April 2015 he sought permission from Mr. Karim a manager to seek medical care and go on sick leave and that Mr. Karim told the Claimant to leave the premises as leave was not offered by the Respondent. He asserts that sending him away from duty amounted to wrongful dismissal and that the Respondent breached the mandatory provisions of the Employment Act, the principles of natural justice and the constitutional right to fair labour practices. He averred that he had done nothing wrong to warrant the dismissal and the action to dismiss was discriminatory in the circumstances. The Claimant averred that no valid reason was given to him to warrant immediate dismissal from employment. He thus sought the payment of one month's salary in lieu of notice, underpayment for the period February 2014 to April 2015, payment for off days not taken, unpaid/untaken public holidays, house allowance, overtime for 4 hours worked daily, payment in lieu of service pay as well as compensation. He thus sought a declaration that the dismissal was unlawful and unfair and an order for the payment of terminal benefits and compensatory damages, costs of the suit plus interest thereon.
2. The Respondent was served but did not appear and the case was heard in their absence. The Claimant testified on 23rd June 2016 and he stated that he was employed by the Respondent as a guard from 2014 and was dismissed in 2015. He stated that he was earning Kshs. 8,000/- a month and worked from 6.00pm to 6.00am. He testified that on 8th November 2015 he was at Diamond Plaza working as a guard and that on the said date, 3 vehicles came in and the drivers took tickets for entry and parking. He stated that as when is ready to depart they pay for the parking. He said that one of the drivers refused to pay and begun to beat him and after assault he was given a taxi to take him to hospital and obtained a P3 after reporting the incident of assault. He testified that he was treated and he was later dismissed by the Respondent because he was unable to work because of the injury sustained. He urged the Court to grant him his prayers.
3. He sought time to file submissions which were filed on 21st July 2016 and in them he submitted that he was not offered any explanation as required under Section 41 of the Employment Act and that under Section 45, the employer was bound to not only prove the reason for termination was valid and fair, but also that the employment was terminated in accordance with fair procedure. It was submitted that if the employee is not heard *ipso facto* the termination is unfair. He relied on the case of **Donald Odeke v Fidelity Security Limited [2012] eKLR** where Ndolo J. held that an

employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and that if the employee is not heard, the termination is *ipso facto* unfair. It was submitted that this was a typical case of an unfair, unlawful and inhuman dismissal. The Claimant submitted that he had proved his case and thus was entitled to the grant of the orders sought in his claim.

4. The claim was undefended and the Claimant was required to avail documents in support of his claim. The Claimant sought the payment of one month's salary in lieu of notice, payment for the underpayment he had in the period February 2014 to April 2015, payment for off days that were not taken, payment for public holidays not taken or paid for, house allowance, overtime for 4 hours worked daily, service pay as well as compensation. He also sought costs and interest on the sums claimed.

5. Section 47(5) of the Employment Act provides as follows:-

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

6. The Claimant has from the accounts before Court suggested that there was an abrupt end to his termination. He also had an additional burden to discharge in respect of the underpayment, off days not taken, public holidays not taken, house allowance and overtime worked. He attached his NSSF statement but did not attach copy of a payslip in order for the Court to ascertain the amount paid to him each month. There was no proof that he worked from 6.00pm to 6.00am each day. He did not prove that he never went on off or rested on public holidays. He failed to discharge the evidentiary burden and failed to prove his case on a balance of probabilities. The only plausible outcome is that the case is dismissed but because the Respondent did not participate, there will be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of July 2016

Nzioki wa Makau

JUDGE