



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT NYERI

CAUSE NO. 148 OF 2015

ALLOISIUS MUKUNYA MUTUA.....CLAIMANT

VERSUS

EAGLE WATCH COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 22nd July, 2016)

JUDGMENT

The claimant filed the suit on 04.09.2015 through his union's secretary general one Boniface M. Kavuvi of the Kenya Union of Commercial, Food and Allied Workers. The claimant prayed for judgment against the respondent for one month pay in lieu of the termination notice, gratuity for 3 years, leave accrued for 3 years, underpayment of wages throughout his service, and 12 months' salaries as compensation for the dismissal.

The respondent filed the memorandum of defence on 11.12.2015 through Lorraine Oyombe Advocate for the Federation of Kenya Employers. The respondent prayed that the suit be dismissed for lack of merits with costs awarded to the respondent.

The undisputed facts are that the claimant was employed on temporary terms by the respondent as a day security guard effective 06.07.2010. The claimant was emplaced on permanent terms of service effective June 2011 till the termination of his employment on 11.03.2013.

The **1st issue** for determination is whether the claimant was terminated from employment and if yes, if the termination was unfair. The claimant's testimony was that he had a personal problem and he verbally asked for permission to be on off on 11.03.2013. The manager called David Mutua denied him the permission unless the claimant provided a person to stand in for him before he took the off as requested. The claimant testified he got a co-worker to stand in for him and he left with his supervisor's agreement. The supervisor was one Peter Njau. He allowed the claimant to attend to his pressing personal issues about a land dispute for 7 days.

On 18.03.2013 the claimant testified that he reported back on duty but he was not allowed back as he was told he had surrendered his job. The manager called David told the claimant he had lost his job. Conciliation with the union's intervention failed to yield amicable solution and the claimant filed the suit. His last monthly pay was Kshs. 4, 600.00.

The respondent's case and testimony was that the claimant left job of his own volition. RW1 testified that

on 11.03.2013 the claimant was on duty and on 12.03. 2013 he failed to report on duty. The claimant's supervisor Peter Njau was assigned to trace the claimant and Njau reported on 03.03.2013 that the claimant had taken up a job elsewhere at Murang'a General Hospital or around that hospital. Claimant was summoned to explain his circumstances to RW1 but he failed to show up. Subsequently RW1 was summoned to labour office and told about claimant's grievance for payment of terminal dues. RW1 stated the claimant had complained about pay when RW1 increased the pay from Kshs. 4,000.00 to Kshs. 4, 600.00. The claimant had failed to return the respondent's uniforms and had failed to give termination notice.

The respondent says the claimant was not dismissed verbally because in the union's letter dated 20.05.2013 the claim was for underpayment. The court has revaluated the evidence. There is no doubt that the claimant had raised the issue of underpayment and the union's letter, in the court's findings, was not misleading in any manner. If the claimant abandoned duty, the respondent has not explained why it did not initiate disciplinary process for his removal on account of the desertion in circumstances whereby in the respondent's case, the claimant had not given a termination notice and had not returned the uniform. The court finds that the claimant was verbally terminated as was testified on his part. While making that finding the court upholds its opinion against the principle of soft landing in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

The court returns that the claimant was terminated verbally from his employment. It is obvious that there was no due process in the termination as envisaged in section 41 of the Employment Act, 2007 requiring a notice and a hearing. Further, the court finds that there was no valid reason for the termination as envisaged in section 43 of the Act. The court returns that the termination was unfair. While making that finding the court has considered the respondent's submission that the claimant pleaded that he had been dismissed on 11.03.2013 for seeking salary increment and the evidence was at variance with that pleading. The court finds otherwise. The court finds that the evidence on record is that the claimant had complained about underpayment and his further evidence is that when he came from the leave that had been granted verbally, he was verbally told he had surrendered the job. The court considers that the issues ran into each other; the claimant was dismissed verbally and as pleaded, there being no any reason at the verbal termination, the reason must have been that he asked for pay rise.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The court finds that the claimant worked within Murang'a Municipality and is awarded **Kshs.105, 055.00** as computed in the respondent's paragraph 25 of the submissions. While adopting the respondent's computation the court has noted that the claimant's computation in the submissions runs from April 2010 when the claimant was not in employment.
2. The court finds that the claimant was not a member of the NSSF and under section 35(5) of the Employment Act, 2007 the court considers that for the 32 months of service the claimant's

reasonable service pay or gratuity would be **Kshs. 12, 800.00** at Kshs.400.00 that would have been deducted and contributed for the claimant at NSSF. While making that award the court has considered the underpayment throughout the service that go to support the claimant's contribution in that regard as the underpayment has been allowed without interest from the due date it was to be paid.

3. The claimant is entitled to one month pay in lieu of the termination notice under section 35 (1) (c) of the Act being **Kshs. 9,013.00**.
4. As submitted for the claimant he is awarded **Kshs. 14, 776.40** being pay in lieu of annual leave for the entire period served.
5. The court considers that the claimant had served for only 32 months, he wished to continue in employment and he had been mistreated by the respondent in view of the underpayments. In all the circumstances the court considers that 6 months' salaries would meet ends of justice in the case making **Kshs.54, 078.00**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.195, 722.00** by 01.09.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 22nd July, 2016**.

BYRAM ONGAYA

JUDGE