



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.966 OF 2014

HEZBORN TONNY MASHAKA.....CLAIMANT

VERSUS

THE WATCHDOG LIMITED.....RESPONDENT

JUDGEMENT

1. The issues in dispute are – wrongful dismissal/termination, failure to pay terminal and salary dues.
2. The Claimant was employed by the Respondent in June 2010 as a Supervisor of security Guards and was terminated in November 2013. That on 8th November 2013 the Claimant proceeded on leave granted by the Respondent for 26 days. On 10th December 2013 when the Claimant reported back to work he was told to wait to be allocated work but no work was assigned to him. The operations manager who was his supervisor told the Claimant that there was a case with the managing director but no details were provided. The Claimant continued reporting to work at 8am to 8pm with no work being allocated to him and all attempts to meet with the managing director were not fruitful.
3. On 26th December 2013, after the Claimant left for the day he was called and told to go and pick a letter which turned out to be his summary dismissal. The letter was left with the security guards at the gate with instructions to hand it over to the claimant.
4. For the period the Claimant was employed he was never served with a warning letter, a notice to show cause or any disciplinary action to show any wrongdoing. The Claimant had been diligent in his duties and was given responsibilities of supervisor. He was allocated various assignments per night covering security of homes in Lavington, Riverside, ADC Place, Westlands and Lakeview Estate – UNEP. The Claimant served with a clean record.
5. The Claimant visited the Respondent for his terminal dues, he made demand but was never paid.
6. The claim is for salary due upon dismissal at kshs.11, 831.00; compensation for unfair termination and costs. The basis is that there was no notice given, no hearing was accorded to the Claimant so as to answer to any accusations or reasons given for the summary dismissal.
7. In support of his claim, the Claimant testified that he was employed by the Respondent in 2009 for one (1) year and then went to a different company and in 2010 the Respondent director called him back for a supervisor position which he held until 27th February 2014 when he was dismissed.
8. The Claimant also testified that on 8th November 2013 he proceeded on leave and when he resumed duty he reported to the office for allocation of work. The office was also the home of the managing

director of the respondent. Mr Stephen wandera told the Claimant that he was not allowed inside the gate. He continued reporting to work until 23rd December 2013 when he was issued with a letter of summary dismissal. That the allegations made against him are not true and he was never called to answer to any such allegations against him. He was never paid his terminal dues. The Respondent also alleged the Claimant was threatening his wife but he was never charged with such criminal acts as alleged.

9. That his November salary was paid through Cooperative Bank account. He saw allegations against him the statement of defence filed in court. He had prior knowledge of changing the time sheets which he kept as a supervisor and all time sheets in his area were signed by all the guards. Wilson Karanja signed his time sheets.

10. The Claimant also called Stephen Baraza as his witness. He testified that he worked with the Claimant at the respondent. He was a supervisor and then promoted as operations manager. His duties were to deploy the guards, supervisors and drivers and was reporting to the managing director and supervised all staff. The Claimant was under him. The Claimant was dismissed after he had taken his leave in November 2013 and when he resumed in December the director instructed him not to be allowed in office or be allocated duties. The director did not give any reasons for such instructions against the claimant.

11. Baraza also testified that the Claimant kept on reporting at the office but the director insisted that he should not allow him at work. Due to the restrictions given, the witness could not deal with the Claimant or make a decision. The director then issued a letter of summary dismissal. There was never a hearing or investigation. There were 5 supervisors including the Claimant who supervised 103 to 105 guards plus drivers.

12. That the Claimant did not abscond duty as he allocated him work and never missed his assignments. There was a schedule to which each guard had to sign upon reporting to work; at midnight; past midnight; and before time off. The Respondent was training all its guards on how to sign the time sheets. No guard was allowed to sign for each other.

13. The Respondent had work in residential areas and if the Claimant was drunk while at work, this should have been noted by the witness, the director or the client.

14. The Claimant was dismissed for the reasons that the Respondent wanted to reduce its staff as some contracts were not renewed. As the operations manager, 39 guards could not be paid due to financial problems. This was not a proper way to terminate the Claimant through a dismissal under the guise of reducing staff. It was a wrong way to go at a redundancy situation.

Defence

15. In defence, the Respondent admit they have employed the Claimant but not as a supervisor or earning kshs.11, 831.00. The Claimant did not serve with a clean record and his termination was no unlawful.

16. The Claimant was employed on a year contract but did not undertake his duties with satisfaction as he was absent from work without valid reason and did so upon committing acts of gross misconduct. The claimant's contract was yearly and was renewed for 2011 and 2012 and then he was placed under a monthly contract. During employment the Respondent received reports off gross misconduct by the claimant, sleeping while on duty, being drunk while at work, falsification or work records and check-up list by allocating guards to sign the guard inspection check list at one go or forging the signatures of guards who failed to sign and misappropriation of Respondent property by suing the vehicle for private purposes.

17. The Claimant did not report to work after his leave and such was without any valid reasons. The reporting hours were between 6pm and 6am not as stated in the claim.

18. The Claimant was not terminated, he was the author of his own gross misconduct by misusing and misappropriation of company property. The Claimant hired out the Respondent vehicle and used it as a

public service vehicle resulting in massive financial losses to the respondent. This were acts of gross misconduct requiring application of section 44(3) and (4) of the Employment Act. In this case, the Claimant should not benefit under section 45 of the Employment Act due to the gross misconduct. There are no dues owing and the failure to report back to work after leave, notice pay should not be granted.

19. The Respondent was correct in dismissing the Claimant and the claim should be dismissed with costs.

20. In evidence, the Respondent called Dudley Stannah the director of the Respondent and testified that he employed the Claimant as a supervisor and was required to visit different sites to support the guards during his night shift running from 6pm to 6am. There were specific locations where each guard had to sign the work sheet 4 times a night. The sheets had spaces to note time and signature of each guard.

21. The witness got information that the Claimant was not doing his work. The Respondent lost a major client and with it, 8 sites were lost. There were incidents that supervisor was poor and clients demanded that Respondent guards be removed. There were also minor incidents at apartments where the Respondent provided security services with clients reporting that they had no contact with the responsible supervisor.

22. That end of September, the Respondent got notice that various contracts would not be renewed. He called the operations manager and informed him that it was clear a third of work was gone and staff would be affected. The Respondent had to release the affected guards and gave one month notice end of October 2013. In November all terminal dues were paid and no guard who was terminated has made any claims.

23. The Claimant was terminated end of December 2013. Due to losses of contracts, the allegations made, the witness commenced investigations to know what went wrong. With the operations manager they went through the records and found guards who were made to sign early for their inspections and later would not see the Claimant as their supervisor. The guards also reported that the Claimant would park the car and go to sleep and at one time when the witness made an impromptu inspection he found the Claimant asleep.

24. That when the Claimant went on leave, the Respondent established that he had been misusing the vehicle assigned to him. He would leave Manyani road and go to Kibera. While the Respondent offices were on Waiyaki Way and sites visited were along Riverside, to go outside these general areas, an approval was required.

25. The Claimant was due back from leave on 8th December 2013 but he did not resume duty. Upon discussion with the operations manager it was agreed that the Claimant should be confronted with the evidence against him but he never reported back. He reported on 23rd December 2013 without giving any reasons for the absence. He was told of allegations against him in the presence of the operations manager and he had no credible answers. All the cases of gross misconduct were brought to the attention of the Claimant but he refused to accept or give a credible explanation.

26. The Claimant actions affected various guard. The Claimant was paid for November 2013 but not for the 7 days he was absent from duty. That the operations manager was also dismissed as he was equally involved with the claimant's gross misconduct. He had full knowledge of the impropriety. The complaints against the Claimant only came to the knowledge of the witness after the Claimant had been dismissed as he took time to investigate the cancellation of contracts and learn what the Claimant had done. He had trusted the operations manager to run the company and never knew at the time that the records had been manipulated.

27. Termination of employment was effected on 23rd December 2013. The operations manager was present.

28. The Respondent also called John Magero as a witness. He testified that he was working for the Respondent from 2007 to date as a security guard. He knew the Claimant as a fellow guard and who became his supervisor. He was a day guard from 5.30am to 6pm. While working with the Respondent he

saw him at *Kamitha* and at *Kawangware* driving the respondent's vehicle which has a logo. The respondent's patrol area is between Manyani/Waiyaki Way – Kabesira/James Gichuru. He saw the Claimant at the village using vehicle number KBJ 909J which was carrying household goods. The first time he saw the Claimant in the evening at 6.30pm and the second time he saw the claimant, he was going to report on duty at 5.30am. At this second time the Claimant was carrying women from the market with vegetables. He reported to the Respondent that he had seen the company vehicle outside the patrol areas and carrying out work that was not part of Respondent nature of work.

29. The third witness for the Respondent was Wilson Karanja who testified that he is a security guard with the Respondent and worked with the Claimant as his supervisor in the night shift. His site was at Manyani Estate. He was required to sign inspection sheet at 6pm; 8pm; 2am and 6am. The inspection sheets from the Claimant the witness is listed but the annexed signature is not his own. Some lists have his valid signature but majority do not have. He later learnt that his signature had been forged by the claimant.

Submissions

30. The Claimant submit that the procedure employed in the termination of the Claimant was unprocedural and in violation of the law. In the case of **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eKLR**; the court held that where an employer violates the provisions of sections 41 and 45 of the Employment act on the minimum procedures that an employee must be taken through, compensation is due.

31. The Claimant should be paid notice, unpaid salary for November 2013 and December 2013 together with compensation.

32. The Respondent submit that the Claimant did not proof that his termination was unfair based on his gross misconduct as held in **Joseph Kaitano Ikobwa versus Khetia Garment Ltd, Cause No.189 of 2015**. Where there are substantive reasons for termination, the employer is justified to dismiss an employee. The Respondent had valid and justifiable reasons for terminating the Claimant when by his conduct he had fundamentally breached his employment contract when he engaged in cases of gross misconduct and the 3 witnesses testified to. The evidence against the Claimant was brought to his attention that he had misused the Respondent vehicle to undertake duties outside his mandate; he forged inspection records and when he went on leave, he failed to report back to work. Dismissal was the only option availed to the Respondent against the claimant's conduct as held in **Shankar Saklani versus DHL Global Forwarding (K) Ltd [2012] eKLR**.

33. The Respondent also submit that they followed due process in effecting the dismissal of the claimant. When the Claimant reported back to work on 23rd December 2013, he was told of instances of his gross misconduct in the presence of the operations manager and he refused to accept the allegations. This was followed by the issuance of the letter of dismissal.

34. The Claimant is not entitled to the remedies set out. He was the one who should have issued notice before absconding duty.

Determination

35. Section 44 of the Employment Act allow summary dismissal in instances set out under subsection (4) of the same. in instances of being drunk while at work, misuse of the employer property, negligent performance of duties, failure to take lawful orders or directions and fundamentally, where an employee, through his conduct has fundamentally breached the employment contract as set out under section 44(3) of the employment Act.

36. In such instances, the employer is allowed in law to terminate the employment of such an employee without notice or with less notice. The Respondent submitted a work record and schedule or work records noting that the Claimant proceeded on leave and was due back on 8th December 2013. There is no record

of such reporting back. However the Claimant has called the former operations manager of the Respondent Mr Baraza who testified that when the Claimant reported back, he was given instructions not to allow him back to the Respondent premises and not to allocate him duties.

37. It is noteworthy that Mr Barraza has since left the employment of the Respondent and was said to have worked in collusion with the Claimant to falsify records. I did not find any credible challenge to this evidence of collusion and manipulation of records by the Claimant and the Baraza. They have both left the Respondent since, following these series of misconduct.

38. What is also crucial to note is the letter by the Respondent dated 20th February 2014 which states;

You continually come to our premises requesting your dues. You seem to have forgotten that you were asked to leave as you allowed the driver to leave the car as early as ten o'clock to go and do another job as a taxi driver leaving you with no driver and hence you slept and did no supervision.

...

39. The Claimant attached his letter of dismissal dated 23rd December 2013. This letter is part of the claimant's documents filed with the memorandum of claim. The evidence that the Claimant kept on reporting to work until his termination, based on the challenge to the same, I find merit in the defence made in this regard.

40. In cases of summary dismissal, where an employer has a valid reason to effect the same, the same guard on an employee is section 41(2) of the Employment Act;

(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.

41. My reading of section 41(2) together with section 44 of the Employment Act is that on the one hand, before an employer can terminate an employee for gross misconduct, such an employee must be given a hearing. On the other hand, where an employee commits acts set out under section 44 that warrant summary dismissal, the employer can dismiss without notice or with less notice. It is therefore upon the employer to demonstrate to the court the circumstances that led to the summary dismissal without notice or with less notice based on the circumstances of each case. Where the employer is able to give the employee a hearing that is a good practice as with it, the safeguards under section 41(2) of the Act are secured.

41. In **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** the court held that internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. This position was given emphasis in the case of **John Onyango Asare versus Brookside Dairies Limited, Cause No.1204 of 2014** that the shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.

42. I find the respondent's evidence credible to the fact that the Claimant was called on 23rd December 2013 and told of his misconduct and this was done in the presence of the operations manager Mr Baraza who he called in court as his witness. For obvious conflict of interests, such witness only gave evidence supportive of the claimant's case as they had a common employer and adversary in this proceedings.

43. I also find the evidence by Mr Magero and Karanja credible. These witnesses were not challenged by the Claimant in any material way. They confirmed the defence that the Claimant acted in a manner that was gross and contrary to his employment contract when he engaged in the use of Respondent vehicles to undertake duties outside his work and that he forged work and inspection records. Such are acts that warrant summary dismissal.

Remedies

44. On the above findings, the termination having been effected on 23rd December 2013, the Claimant is entitled to his pay until such date. On a monthly salary of Kshs.11, 840.00, the dues for 23 days amounts to Kshs.7, 890.00.

45. No notice pay is due in a case of summary dismissal that is justified. Such is declined.

46. Each party shall bear their own costs.

Delivered in open Court at Nairobi this 14th day of September 2016.

M. MBARU

JUDGE

In the presence of

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