



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 26 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JALIS AYOTABI AWITI.....CLAIMANT

-Versus-

J.R.S GROUP SECURITY LIMITED.....RESPONDENT

J U D G E M E N T

By his Memorandum of Claim filed in court on 30th January, 2015 the Claimant alleges that he was unlawfully terminated by the Respondent. He seeks the following remedies:-

1) One Month Salary in lieu of Notice

(Basic Salary & House allowance)=10,116 + 1,517.Kshs. 11,633.4/=

2) Leave dues

21 days x years worked + Basic + House allowance/6

days =21 days x 7 years x 11,633/26 days Kshs 65,771/=

3) Severance pay

15 days x years worked x Basic Allowance/30 days Kshs. 35,406/=

15 days x 7 years x 10,116/30 days

4) House allowance

15% of basic x years worked Kshs. 12,746.6/=

1,517.4 x 12 months x 7 years

5) Underpayment of wage

a) Legal notice No.38 of 1st May 2006 to 2009

Basic + House Allowance - Current Pay

5,373 + 805 - 5,000 x 30 months Kshs. 35,340/=

b) Legal notice No.68 of 1st May, 2009 to 2010

Basic + House Allowance - Current Pay

6,340 + 951 - 5,000 x 12 months Kshs. 27,492/=

c) Legal notice No.98 of 1st May, 2010 to 2011

Basic + House Allowance - Current Pay

6,974 + 1,046 - 5,000 x 12 months Kshs. 36,240/=

d) Legal notice No.71 of 1st May 2012

Basic + House Allowance - Current Pay

8,873 + 1,330 - 5,000 x 21 months Kshs. 62,436/=

e) Legal Notice No.64 of 1st May, 2013

Basic + House Allowance - Current Pay

10,116 + 1,517 - 5,000 x 21 months Kshs.139,293/=

f) Legal Notice No.64 of 1st May 2011

Basic + House Allowance - Current Pay

7,846 + 1,176 - 5,000 x 12 months Kshs. 48,274.8/=

TOTAL CLAIM Kshs.589,347.8

The Claimant prays for Judgement against the respondent as follows:-

- a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.
- b) Payment of the sums of money claimed under paragraph 9 above.
- c) Costs and Interests.
- d) Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Memorandum of Defence in which it denies unlawfully terminating the Claimant's employment. The Respondent avers that the Claimant reported to work drunk and thereafter deserted duty after he was called upon to record a statement regarding his drunkenness. The Respondent

further avers that the claimant failed to return his uniform and security book, the property of the Respondent.

The Respondent further denies owing the Claimant the amounts sought in the Memorandum of claim and prays that the claim be dismissed with costs.

At the hearing the Claimant testified on his behalf while the Respondent called one witness Mr. JOHN OJIAMBO WERE.

The Claimant was represented by Mr. Chepkwony instructed by Chepkwony & Company Advocates while the Respondent was represented by Mr. M. M. Omondi instructed by M. M. Omondi & Co. Advocates.

Claimant's Case

The Claimant testified that he was employed by the Respondent on 25th November, 2006, and worked for the Respondent until 9th March, 2014. He was not issued with an appointment letter. His starting salary was Shs.5,500 and his last salary was shs.7,500. He reported for work daily from 6pm to 6am throughout the year including on public holidays. He did not take annual leave and was not given off days.

On 9th March, 2014 he reported to work at his duty station at Cement Centre Obote Road in Kisumu City. At around 9pm a new Manager whose name he could not recall, visited his work station and smelled him then told him he was drunk, but the claimant denied that he was drunk. The Manager directed him to go to the office but he told the Manager that he cannot go to the office at night, but will go in the morning. The claimant went to the office in the morning and presented himself to the Manager who sent him to the classroom where he inducted recruits for 8 days. On the 9th day he requested the Manager to sort out his case or take him to the director but his request was declined. He decided to go home and call the director on phone but when he called the Director abused him. He called again the next day and the director again abused him. It is then that he decided to go for an advocate who tabulated his terminal dues and sent a demand letter to the Respondent.

He prayed for payment of terminal dues as prayed.

Under cross-examination the claimant stated that he was issued with an attendance register which he signed daily. He was supposed to return the register upon termination of employment but had not returned it. He had given the register to his advocate as it contained evidence of his reporting to work. The register was signed by both the employee and the supervisor.

The Claimant further stated under cross examination that he drinks but does not go to work while drunk. The Claimant testified that he had read the Respondents Code of Conduct and understood that he should not go to work while drunk.

The Claimant stated that on 9th March, 2014 two supervisors had visited him at work earlier and signed his register. He denied that he was sleeping while at work.

Respondent's Case

JOHN OJIAMBO WERE the Respondent's witness testified that he was employed as a security guard by the Respondent and had worked there for 15 years. His duties were to plan work for guards and ensure they reported for their duties.

Mr. Were testified that he had known the claimant for about 3 years. That on 8th March, 2014 he was on day shift and one David Mutuko who worked night shift was away so he did the night shift. At around 8.30 pm the supervisor called him on the radio to report that the Claimant was drunk and was unable to work. He went to the Claimant's duty station and asked the Claimant to go home and rest then report to the office the following day. The Claimant left and never went back to work or to report at the following

office. After 7 days the Claimant was treated as a deserter as there was no communication from him to the office.

Mr. Were further testified that the Claimant was aware that he should not go to work while drunk as this was in the Code of Conduct which was issued and explained to all employees during induction training.

Under cross examination Mr. Were stated that he did not know when the claimant was employed or how much salary the claimant was earning. He confirmed that the claimant reported to work at 6pm and left work at 6am. He stated that when he went to relieve the claimant, he was vomiting, walking and falling, but refused to be taken anywhere and insisted he would go home on his own. He reported the incident in the office OB which was recorded by the controller.

Mr. Were stated that he was not aware if the Claimant was issued with a show cause letter. He testified that the claimant was not summoned for a hearing because he did not communicate. He stated he was not aware if the claimant was in the office on 9th March 2014. He was not aware if the claimant was issued with a letter of appointment or a letter of termination.

Submissions

In the written submissions filed on behalf of the claimant it is submitted that he was terminated without regard to section 41 and section 35 of the Employment Act.

For the Respondent it was submitted that the Respondent had proved that the claimant reported to work drunk and then deserted duty. It was further submitted that the claimant failed to prove that he was entitled to any of the prayers sought. The Respondent prayed that the claim be dismissed with costs.

Findings and Determination

The issues for determination herein are whether the Claimant deserted duty or was constructively terminated by the Respondent after being found drunk at work, and whether the claimant is entitled to any of the remedies sought.

The evidence on record for the claimant is that he was accused of drunkenness at his duty station by Mr. Were and directed to report to the office the following day which he did for eight days when he was sent to induct recruits in the classroom. Mr. Were on the other hand alleges that the claimant deserted duty after the date he was found drunk while at work.

Section 10 and 74 of the Employment Act require employers to keep several records including records of warning letters or other evidence of misconduct of an employee and any other particulars required to be kept under any written law.

Section 10(6) also provides for an employer to keep the written particulars for a period of 5 years after termination of employment while section 10(7) provides that where an employer fails to produce the prescribed records the burden of proving an alleged term of employment stipulated in the contract shall shift to the employer.

Further section 47(5) provides that;

(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.

In the present case the burden of proving that the Claimant deserted duty or that the Claimant did not report to the office as he alleges is on the Respondent. No person was called from the office to disprove the claimant's allegation that for 8 days he was instructing recruits at the office. The Manager to whom

the claimant alleges he was reporting was not called to confirm or deny the allegations. The respondent did not even produce the OB in which it is alleged the claimant's drunkenness was recorded or avail the person from control room who is alleged to have recorded the same. As provided in section 47 it is the burden of the employer to justify the grounds of termination which burden the respondent has not justified by either proving that the claimant was drunk while on duty or that he deserted duty. No record of the alleged drunkenness or desertion of duty has been produced by the respondent as provided in section 10 or 74 of the Act.

The Respondent having failed to disprove the allegations by the claimant or to prove that the claimant deserted duty as alleged, the court must find in favour of the Claimant.

I therefore find that the Respondent terminated the employment of the Claimant constructively by unilaterally and without any formal communication withdrawing him from his guarding duties and transferring him to induct recruits without dealing with the issue of drunkenness for which he had been withdrawn from guarding duties.

The **Court of Appeal in Kisumu Civil Appeal No.55 of 2015: The Board of governors, Cardinal Otunga High School Mosochi & 2 others v Elizabeth Kwamboka Khaemba** held that the Appellant's action of unilaterally assigning the Respondent new duties amounted to significant breach that went to the root of employment contract and the Respondent had a right to treat herself as discharged from any further performance of her duties as a cateress. The court further held that she cannot be said to have absconded duty and that her case was a classic case of constructive dismissal. The court quoted with approval the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015]eKLR** in which the Court of Appeal cited **Lord Denning in Western Excavating (ECC) Ltd v Sharp[1978] 1 CR.222** as follows:-

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.

I find that the Respondent constructively dismissed the claimant from employment by unilaterally changing his terms and failing to deal with the issue of drunkenness for which he was withdrawn from guarding duties.

Remedies

The Claimant is entitled to one month's salary in lieu of notice which I award him. The proper salary for a night watchman as at the time of termination of the Claimant's employment was a statutory minimum rate of shs.10,911.70 (basic) and an additional 15% house allowance making a gross of Shs.12,548.50 which I award the claimant as pay in lieu of notice.

The Claimant further prayed for leave dues. The Respondent did not deny that the Claimant never took leave for the entire period he worked for the Respondent. He was entitled to a minimum of 21 days leave per year. For the 7 years he worked he was entitled to 147 days. At a daily rate of shs.609.80 provided for under the General Order for year 2013, he is entitled to (609.8 x 147) Shs.89,640.60 and I award him the same.

The Claimant prayed for severance pay. He is not entitled to the same as he was not declared redundant.

The claimant is entitled to underpayments. The Respondent did not contest the calculations submitted by the claimant for underpayments. This being the case, I award the Claimant the sum of Shs.349,075.80 as claimed on account of underpayments.

The Claimant did not pray for gratuity which is provided for under the **Protective Security Industry Order** at 18 days per year worked for any employee in the Protective Security Industry upon completion of 5 years service. He was also entitled to compensation for unfair termination which he did not pray for.

In summary, I award the Claimant a total sum of shs.451,264.90. The Respondent will pay Claimant's costs for the suit and the decretal sum shall attract interest at court rates from date of judgement.

Dated, Signed and Delivered this 27th day of October, 2016

MAUREEN ONYANGO

JUDGE