REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT MOMBASA

CAUSE NUMBER 362 OF 2015

BETWEEN

JOHN INGOSI AGALA…….....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED……..…….RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Federation of Kenya Employers [FKE] for the Respondent

JUDGMENT

1. The Claimant states he was employed by the Respondent Company as a Security Guard, on 17th March 2008, earning a gross salary of Kshs. 12,549 per month. His contract was terminated by the Respondent on the 24th April 2014 on allegations of desertion of duty and poor performance. He feels termination was unfair and unlawful and prays for the following orders against the Respondent:-

a) 1 month salary in lieu of notice at Kshs. 12,549.

b) Annual leave for 2013/ 2014 at Kshs. 12,549.

c) 24 days worked in April 2014.

d) Gratuity calculated at 126 days x 482 daily wage, at Kshs. 60,732.

e) 12 months' salary in compensation for unfair termination at Kshs. 150,588

Total…….. Kshs. 248,967

f) A declaration that termination was unfair and unjust.

g) Certificate of Service to issue.

h) Costs and Interest.

i) Any other relief the Court may deem just and fit to grant.

2. The Respondent filed its Statement of Response, on the 23rd July 2015. It is agreed the Claimant was employed by the Respondent, as indicated in the Statement of Claim. He was assigned guard duties at Mombasa Apparels. He was while at the assigned place of work, captured by one of the Supervisors, trying to sneak out some timber from the site. He was suspended, and asked to avail himself for a disciplinary hearing on the 24th April 2014. He was heard and admitted he was found with the timber, but denied he stole the timber. He was summarily dismissed. He appealed and his summary dismissal was commuted to normal termination. He took annual leave in 2009, 2011, 2012 and 2013. He was offered terminal dues computed at Kshs. 38,235.95. The Respondent prays the Court to dismiss the Claim.

3. The Parties agreed in Court, on the 23rd June 2016, to have the dispute considered and determined, on the strength of the Pleadings, Documents and Submissions on record. They confirmed filing of Submissions on the 29th July 2016, and the decision of the Court reserved for 18th November 2016.

4. ***The Claimant submits*** he recorded a statement with the Respondent, where he explained that one Edgar gave to him several pieces of broken timber. Edgar was in charge. Edgar was not at the disciplinary hearing. The letter from the Respondent dated 12th August 2014 indicates Claimant was dismissed for desertion. There was no evidence presented by the Respondent showing the Claimant was charged and heard for deserting. It was not made clear by the Respondent if termination was on the ground of desertion, poor performance or stealing.

5. The Claimant submits there is no proper record of the initial disciplinary hearing, and the subsequent appeal. Relying on decision in Industrial Court at Nairobi Cause involving ***Peter Kamau Chege v. Telkom [K] Limited [2013] e-KLR,*** the Claimant urges the Court to find disciplinary processes are not mere formalities to be placed on the table for Employers' endorsement. Hearing must be handled fairly.

6. Mr. Agala submits the Respondent offered to pay to him Kshs. 38,755 as detailed in appendix 9 of the Statement of Response. What the Employer has offered to an Employee should never be take away, the Claimant submits.

7. He submits he merits 1 month gross salary of Kshs. 12,549, as notice pay. The offer of Kshs. 10,912 in notice pay made by the Respondent has no basis. Annual leave for 2013/2014 similarly should be Kshs. 12,549 based on the gross salary, not Kshs. 10,912 as offered. The Claimant worked for 6 years. He merits gratuity, at 18 days' salary for every year completed in service, adding up to Kshs. 52,056, under Regulation 17 [i] of the Regulation of Wages [Protective Security Services] Order 1988. The Respondent seems not to know why it sacked the Claimant. Compensation for unfair termination is merited at 12 months' salary, totaling Kshs. 150,588.

8. The Claimant submits he worked for 24 days in April 2014, and deserves his salary of Kshs. 12,549, not Kshs. 8,366 as offered by the Respondent. Although the Claimant did not include a prayer for overtime, the Respondent made an offer of Kshs. 7,532 in overtime pay. He submits this should be granted. Public holidays pay and traveling allowance have similarly been included in the Respondent's offer, and should not be taken away.

9. ***The Respondent submits*** the Claimant accepts he was caught trying to sneak out from Mombasa Apparel factory some timber, without authorization. This is a valid ground for termination under Section 43 of the Employment Act 2007. He was issued letter to show cause dated 22nd April 2014. He replied on the same date. He attended a disciplinary hearing on the 24th April 2014. He was heard. He was

summarily dismissed. He appealed. Summary dismissal was reduced to normal termination. The Respondent offered, and is willing to pay to the Claimant Kshs. 38,235.95 as terminal benefits, detailed in Respondent's annexure 9. Gratuity is not payable as the Claimant was a Member of the N.S.S.F. The Respondent submits termination was fair and the Claim should be thrown out.

<u>The Court Finds</u>:-

10. The Claimant was employed by the Respondent as a Security Guard, on the 17th March 2008, earning a gross monthly salary of Kshs. 12,549. His contract was terminated by the Respondent, on the 24th April 2014. He was alleged to have attempted to sneak 7 pieces of timber out of Mombasa Apparels factory. He had been assigned guard duties at the factory. The Respondent characterized this act, in the letter of summary dismissal, as 'poor duty performance.'

11. He was taken through a primary disciplinary hearing which culminated in a decision to summarily dismiss him. He appealed, with the result that summary dismissal was reduced to regular termination. He was offered terminal benefits under annexure 9 of the Respondent's bundle of documents, which he did not accept.

12. He does not seek to be reinstated. He seeks compensation for unfair termination and terminal dues. Comparing what was offered by the Respondent against what the Claimant seeks in terminal dues, the Court is of the view there is a very narrow gap, and proposes therefore to start by making an attempt at reconciling the Parties' positions on terminal benefits, before looking into the question of unfair termination.

13. The Claimant asks for 1 month salary in lieu of notice, at Kshs. 12,549. He was offered 1 month salary in lieu of notice at Kshs. 10,912 based on the basic, rather than the gross salary. Section 36 of the Employment Act 2007 refers to notice pay as 'remuneration which would have been earned…'' The term ''remuneration' means under Section 2 of the same Act, ''the total value of all payments in money or kind…'' Notice pay should therefore be based on the gross, rather than the basic pay. ***The Claimant is allowed the prayer for notice pay at Kshs. 12,549***.

14. He was offered annual leave based on 11 months, at Kshs. 10,002. He prays for annual leave pay the equivalent of 30 days' salary at Kshs. 12,549. The Respondent did not explain to the Court why annual leave pay was offered at Kshs. 10,002. The Claimant demanded for 21 days of annual leave in his letter of demand. He did not explain to the Court why this changed to 30 days. ***He is granted 21 days of annual leave at Kshs. 10,135.*** The Respondent offered him leave traveling allowance at Kshs 779. ***The Respondent shall pay leave traveling allowance of Kshs. 779 as offered.***

15. ***Public Holidays' pay offered at Kshs. 1,163; and overtime pay offered at Kshs. 7,532, are granted to the Claimant***.

16. Salary for days worked in April 2014, is claimed at Kshs. 12,549. The Respondent offered to pay salary for 20 days worked in April 2014 at Kshs. 8,366. It was not told to the Court why 20 days, yet, summary dismissal was on 24th April 2014. The relationship ended on this date. The Claimant did not complete the maximal 26 working days and based on the daily rate he relies in computing his annual leave pay above, salary for 24 days worked should be Kshs. 11,583. ***He is allowed salary for 24 days worked, at Kshs. 11,583.***

17. The Claimant invokes Regulation 17 of the Regulation of Wages [Protective Security Services] Order as allowing him gratuity. The Respondent objects to this item, submitting that the Claimant was subscribed to the N.S.S.F and not entitled to gratuity. The Respondent relies on Section 35 of the Employment Act. The Court upholds the objection. The law does not intend that Employees are paid this social security benefit under multiple legal regimes. If Parties have contracted for payment under different regimes, such benefit would be enforceable as the law only lays down the minimum standards. Section 35 would not be a bar, where the Parties have agreed gratuity/service pay is made under different regimes. It is not intended that the benefit is paid however, under different legal regimes, such as the Wage Orders

and the Employment Act 2007. The Claimant's years of service have been recognized and rewarded under the N.S.S.F Social Security Plan. He should not seek recognition and reward under another legal regime. The prayer for gratuity is declined.

18. The balance of the dispute is on unfair termination. This requires the Court to examine under Sections 41, 43, and 45 of the Employment Act, if there was valid reason justifying termination, and if the decision was arrived at fairly.

19. The procedure met the threshold of fairness under Section 41 of the Employment Act 2007. The Claimant was given an initial hearing; a decision was made to summarily dismiss him; he was allowed to appeal; the Appeal was heard; and a different sanction of normal termination imposed. There were no significant flaws in the procedure.

20. The Respondent failed the test on substantive justification. There were 3 grounds stated at separate times by the Respondent, in justifying its decision. These were- poor performance, attempted theft of a Client's timber, and desertion of duty. Summary dismissal was based on poor performance as well as theft. While there were specific accusations with respect to theft, there was no substance to the accusation regarding poor performance. On appeal, substantive justification became muddier. The letter dated 12th August 2014 from the Respondent to the Claimant communicating the appeal decision, states the Claimant had been dismissed on the ground of desertion. This was a completely new ground. The Respondent pivoted. In the end, there was no substantive justification. Termination was unfair for want of substantive justification.

21. ***The Claimant is granted the equivalent of 6 months' salary in compensation for unfair termination at Kshs. 75,294***.

22. Certificate of Service to issue.

23. No order on the costs and interest.

IN SUM, IT IS ORDERED:-

a) It is declared termination was procedurally fair, but substantively unfair.

b) The Respondent shall pay to the Claimant 1 month gross salary in notice pay at Kshs. 12,549; annual leave pay at Kshs.10,135; leave traveling allowance at Kshs. 779; overtime at Kshs.7,532; 24 days' salary at Kshs.11,583; and 6 months' gross salary in compensation for unfair termination at Kshs. 75,294- total 117,872.

c) Certificate of Service to issue.

d) No order on the costs and interest.

Dated and delivered at Mombasa this 18th day of November, 2016

James Rika

Judge