



REPUBLIC OF KENYA



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**Dancun v Xfor Security Solutions Kenya Limited (Cause 443 of 2015)  
[2016] KEELRC 1869 (KLR) (9 December 2016) (Judgment)**

*Mwangi Odhiambo Dancun v Xfor Security Solutions Kenya Ltd [2016] eKLR*

Neutral citation: [2016] KEELRC 1869 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 443 OF 2015  
ON MAKAU, J  
DECEMBER 9, 2016**

**BETWEEN**

**MWANGI ODHIAMBO DANCUN ..... CLAIMANT**

**AND**

**XFOR SECURITY SOLUTIONS KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues and compensation for alleged unfair termination of the claimants employment contract by the respondent on 6.2.2015. The respondent however denies that the dismissal of the claimant was unfair and avers that it was done on ground of a valid reason and after following a fair procedure.
2. The suit was heard on 4.2.2016, 9.6.2016, and 16.6.2016 when the claimant testified as Cw1 and the respondent called her Supervisor M/s Caroline Odaga and her HR Manager Mr. Lenus Mwakio as Rw1 and 2 respectively. Thereafter the parties filed written submissions.

**Claimant's case**

3. Cw1 was employed by the respondent on 1.7.2014 as Night Security Guard. That he worked at various points of assignment during his term of service. That although he signed written contract with the respondent on 8.7.2014, the respondent retained it. That his salary was kshs.12,000 but it was increased to ksh.15,000 in August 2014 when he was appointed to a Dog Handler. That like in the first contract the employer also retained the second contract of employment.
4. On 6.2.2015 he reported to work at 5.30pm but Rw1 told him to surrender all the company property and go home. That when he demanded for a letter to that effect and also for reason for the termination,



she referred him to the Head office Mombasa. That when he went to the office on 10.2.2015 he was served with a summary dismissal letter dated 6.2.2015 citing the reason for the dismissal as sleeping while on duty but without stating the date and the place of the offence or the name of the person who witnessed the offence.

5. Cw1 denied the offence of sleeping on the job and averred that he was not given any hearing before the summary dismissal. He therefore contended that the dismissal was unfair and prayed for compensation, salary in lieu of notice plus terminal dues. He maintained that his termination was a form of victimization after he lodged a complaint to the Labour office on 25.1.2015 about delayed payment of his salary by the respondent.

### **Defence case**

6. Rw1 stated that he caught the claimant asleep while on duty on 5.2.2015 and woke him up. That when he returned after few minutes, she found the claimant again asleep and took 2 photographs using his Samsung Galaxy phone. Thereafter she woke him up and brought another guard to keep him company. That the claimant had been warned on 2.1.2015 for sleeping on the job. However Rw1 admitted that she did not have any certificate to prove that she took the photographs of the claimant while sleeping on the job. She further admitted that after taking the photos, she forwarded the same to the Rw2 who then dismissed the claimant.
7. Rw2 stated that the claimant slept while on duty on or about 5.2.2015. That he accorded the claimant a chance to explain why he fell asleep while on duty but his explanation was not satisfactory and he was therefore dismissed on 6.2.2015. He however admitted that the dismissal letter did not state that the claimant slept on the job on 5.2.2015. That on 2.1.2015 Cw1 had committed the same offence and was served with a warning letter. He denied that the claimant had previously lodged a complaint at the Labour office.
8. Rw2 contended that the claimant was invited to the office for hearing with a witness but he chose to come alone. He confirmed that during the hearing he sat with Mr. Daniel Odera, a commander but the minutes of the hearing were not reduced into writing. He maintained that he served the dismissal letter on the claimant on 6.2.2015.

### **Analysis and Determination**

9. There is no dispute that the claimant was employed by the respondent until 6.2.2015 when he was dismissed for gross misconduct. The issues for determination are that:
  - (a) Whether the termination of the claimant's services was unfair.
  - (b) Whether the reliefs sought should be granted.

### **Unfair termination**

10. Under section 45 (2), termination of employment of employee's employment contract is unfair if the employer fails to prove that it was founded on valid and fair reason and that it was done after following a fair procedure.

### **Reason for termination**

11. In this case the reason for summarily dismissing the claimant is that he was found by the Rw1 asleep while on duty as a night guard on 5.2.2015. That she took photographs of the claimant while asleep using her phone and send them to the Rw2. She then woke the claimant up and called another guard



to assist him. Cw1 has denied that Rw1 found him asleep while on duty on 5.2.2015. He denied that the images on the photographs produced by the defence was his. He maintained that the only time Rw1 came to his place of assignment was on 6.2.2015 after 5.30pm when she told him to surrender company property and go home. That when he demanded to know the reason for the said orders, Rw1 referred him to the Head office Mombasa.

12. After considering the photograph produced as exhibit d.2(a) and (b) I find that they are not clear for purposes of ascertaining both the identity of the person in them and the activity he was engaging in. I will therefore not decide this cases through guess work. The standard of prove remain balance of probability based on the evidence adduced. In my view the evidence adduced by the respondent in the form of photographs is therefore not able to discharge the burden of proving that the claimant was found by Rw1 while sleeping on the job. In addition to the photos being blurred, the respondents witnesses have failed to prove that the photos produces were taken and processed by them or under their supervision. They also did not produce any evidence to prove and certify that there was no error or manipulations done on the data after it was captured by the phone and during the processing.
13. Rw1 is the one who dismissed the claimant on basis of the photographs which were send to him by the Rw1. That evidence has already been rejected herein above and therefore I find that the reason cited by Rw2 in the dismissal letter dated 6.2.2015 was not supported by evidence, and it was therefore an invalid reason.

#### **Procedure followed**

14. The claimant's case is that on 5.2.2015, he reported to work at 5.30pm and left on 6.2.2015 at 6am. That when he reported to work on 6.2.2015 at 5.30pm for night duties, Rw1 told him to surrender company property and go home and further referred him to the Head office at Mombasa for any queries about her decision. That when he reported to the office on 10.2.2015 he was just served with a dismissal letter dated 6.2.2015. Rw2 alleged in his testimony that the claimant was invited to a disciplinary hearing on 6.2.2015 with his witnesses but he came alone. That after the hearing, Cw1 was allegedly served with the dismissal letter dated 6.2.2015 on the same day.
15. I have carefully considered the evidence by the two sides and I agree with the claimant that he was dismissed by the Rw2 before first being given a fair hearing on the reason cited for his dismissal. No minutes of the hearing were produced as exhibits. Likewise no visitors register or book was produced to prove that Cw1 indeed visited the respondent's office on 6.2.2015 for the hearing. In addition, the respondent did not prove that the dismissal letter was served on the claimant on 6.2.2015 at the office as alleged by the Rw2. Consequently, and in view of the foregoing observations, I find that the respondent has not proved on a balance of probability that she gave to the claimant a fair hearing before summarily dismissing him.
16. Under section 41 of the *Employment Act*, fair hearing involves the employer explaining to the employee in the presence of another employee or Shop floor union representative the reason for the intended dismissal and thereafter invite him and his companion to air their defence for consideration before the dismissal is decided.
17. Having found herein above that the respondent failed to prove that the claimant was found sleeping while on duty, and that he was dismissed after being given any hearing, it is my considered view that the termination of the claimant's services by the respondent on 6.2.2015 was unfair within the meaning of section 45 (2) of the *Employment Act*.



## **Reliefs**

18. In consideration of the foregoing finding, I make declaration that the termination of the claimant's employment was unlawful and unfair as prayed.

## **Notice and Compensation**

19. Under section 49 of the Act, an unfairly dismissed employee is entitled to salary in lieu of notice plus compensation at the discretion of the court. I grant the prayer for one month salary in lieu of notice plus 3 months salary as compensation for unfair termination. In awarding the said compensation I have considered the fact that the claimant worked for the respondent for just 8 months. The award will be based on the salary of kshs.12,000 because the claimant did not prove by bank statements that he was receiving kshs.15,000 salary per month. The respondent has produced letter of appointment signed by the claimant reflecting a salary of kshs.12,000.

## **Salary from January and February 2015**

20. There is no dispute that the claimant worked in January 2015 and February upto 6.2.2015 morning. The respondent did not produce evidence of payment of the salary to the claimant and therefore, I award to him kshs.12000 and kshs.2400 as salary for January and February 2015 respectively.

## **Gratuity**

21. There is no legal or contractual basis shown to prove that the claimant was entitled to gratuity as prayed. That claim is therefore dismissed.

## **Public holidays**

22. The claimant admitted during cross examination that he worked for only 4 public holidays between July 2014 and 6.2.2015. The four days attract double pay, hence the claimant will get  $4 \times 2 \times 12000 = 3200$

## **Leave**

23. The claimant worked for 8 months and I award the claimant  $1.75 \times 8/26 \times 12000 = 6461.55$  for leave on prorated basis.

## **Webtime**

24. The claimant never pleaded any particular of the claim for 224 days webtime and not evidence was adduced to substantiate the same. I therefore dismiss that claim.

## **House Allowance**

25. This claim also is dismissed for want of particulars and evidence.

## **NSSF**

26. No evidence was adduced to prove the claim for kshs.2400 for NSSF and it is also dismissed.

## **Disposition**

27. For the reasons stated above, I enter judgment for the claimant declaring his dismissal unfair and awarding him kshs.72,061.55 plus costs and interests.



**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF DECEMBER 2016.**

**O.N. MAKAU**

**JUDGE**

