



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 91 OF 2014

MWANDOGO MWASOTO.....CLAIMANT

VERSUS

READY CONSULTANCY CO. LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for ksh.444285 being accrued employment benefits plus compensation for unfair termination of employment by the respondent on 2/9/2013. According to the claimant, his dismissal was done without any prior notice or due process.
2. The respondent has denied liability for the alleged unfair and wrongful dismissal and put claimant to strict proof.
3. The suit was heard on 16/10/14 and 4/11/2014 when the claimant testified as CW1 and Ali Muhammed Mgomba testified for the defence as RW1. After the close of the hearing both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 was employed by the respondent on 7/8/2009 as a day watchman attached to Mombasa Maize Millers and later transferred to Milly Branch of the same company as a night watchman. He produced contract letters dated 7/8/2009 as Exhibit 1. He worked continuously until 23/9/2013. On 24/9/2013 he was off duty while on 25/9/2013 he had leave of absence. When he reported back to work on 26/9/2013, he was told to see his supervisor (RW1) first. The supervisor told CW1 that a theft had occurred at Milly branch while CW1 was on his off duty and that the guards on duty had been arrested. RW1 then told CW1 to go back home and wait until RW1 spoke with Mr. Suleiman Nangela alias Lucky. CW1 complied with RW1's directions and went home from where he kept calling RW1 to enquire about his job. When CW1 waited enough, he called Suleiman himself who told CW1 that he was not wanted at the work station because his colleagues failed to prevent theft.

5. consequently, CW1 lodged a complaint with the labour office and the respondent was summoned to the labour office. He explained that his daily pay was ksh.529 which added up to 15870 per month. He contended that the employer used to deduct ksh.200 for NSSF from his salary but it was never remitted to the fund. He prayed for ksh.15870 being one month' salary in lieu of notice, accrued leave for 3 years, house allowance arrears, service pay plus compensation for unfair termination totalling to ksh.444 285.

He denied ever doing anything wrong. According to him he was not told the reasons why he was dismissed.

6. On cross examination by the defence counsel, CW1 admitted that the contract letter produced as exhibit 1 was for probation and the salary was ksh.6520 plus house allowance of Ksh.1151 per month. He denied that when salary changed to ksh.529 per day the same included house allowance. He explained that Suleiman Nagela was the overall security officer Mombasa Maize Millers where CW1 was attached and once he (Nagela) rejected a guard there was no otherwise.

DEFENCE CASE

7. RW1 is the supervisor of the respondents guards at the Mombasa Maize Millers. He confirmed that CW1 was employed by the respondents as guard attached at the Mombasa Maize Millers for a long time. RW1, however denied that CW1 was dismissed from employment by the respondent. According to RW1, a theft took place at CW1's work place while CW1 was off duty and when he returned to work he was asked to go to Makupa Police Station to record a statement. Instead of going to record the statement, CW1 disappeared and refused to resume work even after RW1 and madam Gloria called him back. When CW1 returned thereafter, he was serving a letter from the labour office. RW1 therefore maintained that it is CW1 who deserted work. He however did not know whether Suleiman had told CW1 to go away.

ANALYSIS AND DETERMINATION

8. After carefully considering the pleadings, evidence and the submissions made by the two sides, it is not disputed that CW1 was employed by the respondent as a night watchman as at September 2013. There is also no dispute that the claimant was earning ksh.529 per day which totalled ksh.15870 per month. The burden of disproving the alleged salary was upon the respondent under Section 10 and 74 of the Employment Act. She however did not discharge the burden by producing the relevant written contracts of employment among other relevant documents. There is also no dispute that the contract of employment between the parties herein ended on 26/9/2013 when either CW1 was told to go home by RW1 or after CW1 was asked to go to the police station to record statement about a theft which occurred while he was on an official off duty. The main issue for determination is whether CW1 deserted work or he was unfairly and wrongfully dismissed by the respondent. The other issue is whether the reliefs sought in the suit should be granted.

Desertion or dismissal

9. The burden of proving unfair termination lies with the employee who alleges unfair termination under Section 47(5) of the Employment Act while the burden of justifying the termination lies with the employer. It is claimants case that RW1 told him to stay at home while RW1 sorted matters with Suleiman on behalf of Mombasa Maize Millers following a theft incidence while CW1 was off duty. That was not a disciplinary action against CW1 because no one accused him of any wrong doing.

10. It is further claimant case that after calling RW1 severally to enquire about his job, he called Suleiman directly and the latter told him that he was not wanted back at Mombasa Maize Millers. According to CW1, that meant that he was dismissed. He however did not go back to the respondent who was his employer to confirm whether indeed he had been dismissed. Instead he rushed to report to labour office that he had been dismissed. Whereas the circumstances could have led CW1 to make an inference that he was dismissed, the court is of the view that such an inference was unreasonable without first consulting with the employer.

11. Having considered all the matters raised, the court finds that CW1 did not discharge his burden of proving that he was unfairly dismissed. Likewise the court finds that the defence did not prove that CW1 deserted work. RW1 did not produce any tangible evidence to prove that he told CW1 to go to the police to record statement. He also did not prove that he called CW1 to resume duty either at Mombasa Malize millers or at all. Consequently the court finds that the contract was terminated by the respondent through construction when RW1 failed to allocate duty to the CW1 elsewhere after Suleiman rejected guards from

the respondent following an alleged theft. The said termination of CW1's employment was without notice and therefore in breach of Section 35 and 36 of the Employment Act.

RELIEFS

12. Under Section 36 of the said Act, an employee who is unjustifiably dismissed without notice is entitled to salary equal to the gross earnings for the notice period. In this case he is awarded ksh.15870 being once month salary in lieu of notice. He will also get service pay because the respondent never remitted NSSF deductions except for the period between October 2009 and December 2010. The period when NSSF was not remitted between February 2008 and September 2013 is 52 months which is equal to over 4 complete years of service. The service pay for the said 4 years is assessed at ksh.31740 based on 15 days pay per years of service. In addition, CW1 is awarded leave for the years between 2011 and September 2013 only due to the limitation period as per Section 90 of the Employment Act. The said provision limits the period of suing under employment contract to 3 years. This suit was filed on 14/3/2014 meaning that any claim for leave earned should not extend beyond March 2011. The court awards pay in lieu of 52.5 leave days being ksh.27,772.50.

13. The claim for compensation for unfair termination is however dismissed for the reasons that CW1 was only wrongly dismissed without notice and through unfair process. This court has severally held that termination of services through breach of contract by an employer does not necessary amount to an unfair termination especially where the termination is not through redundancy or disciplinary process on account of incapacity or poor performance. In this case, the termination of the CW1's services was due to failure to assign duties in an alternative station after client rejected guards from the respondent including the claimant herein. The court also declines to award the prayer for house allowance arrears as prayed because the court treats the ksh.529 daily wage (ksh.15870 monthly salary) to have been a consolidated pay. The said pay for a security guard not in accordance with the minimum statutory pay for watchman if not higher going by the Wage Orders published between 2008 and 2013.

DISPOSITION

For the reasons stated above judgment is entered for the claimant in the sum of ksh.75,382.50 plus costs and interest.

Dated, signed and delivered this 27th February 2015.

O. N. Makau

Judge