



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 249 OF 2014

PETER ONYANGO NYABONGO CLAIMANT

V

CITADELLE SECURITY LIMITED RESPONDENT

JUDGMENT

1. Peter Onyango Nyabongo (Claimant) was dismissed from his employment as a guard with Citadelle Security Ltd (Respondent) through a letter dated 21 February 2013.
2. The Claimant was aggrieved and on 26 June 2014, he filed a Memorandum of Claim in Court stating the issue in dispute as *unfair termination* and seeking *wages for day worked up to dismissal, one month pay in lieu of notice, pro rata leave, service gratuity, compensation for unfair termination, refund of National Social Security Fund deductions, refund of uniform deposit and overtime*.
3. The Respondent filed a Response on 14 August 2014 and on 2 October 2014, the Claimant filed a Reply to Response.
4. The Cause was heard on 2 February 2015, and the Respondent filed its submissions on 11 March 2015 (the Claimant filed his submissions on 16 March 2015, and sent a letter through the Deputy Registrar attempting to explain the late filing).
5. After considering the pleadings, documents produced, testimonies by witnesses and the submissions, the Court has identified the issues for determination as, *whether the Claimant was employed by the Respondent and from when, whether the dismissal of the Claimant was unfair and appropriate remedies*.

Whether Claimant was employed by Respondent and from when

6. The Respondent in its pleadings denied that the Claimant was its employee.
7. The Claimant had contended that he had been employed by the Respondent as a security guard in August 2010.
8. The Respondent's Operations Manager admitted during testimony that the Claimant was an employee of the Respondent at its Nakuru branch but asserted that the relationship commenced in September 2010.
9. The Respondent had also issued *a to whom it may concern letter* to the Claimant indicating that he was its employee.
10. Under section 10 of the Employment Act, 2007, the employer should issue to an employee a written contract with certain prescribed particulars including the date of commencement of employment.
11. The Respondent did not comply with the law in this regard. Considering the failure, the Court accepts the Claimant's contention that he was employed with effect from August 2010 as a guard.
12. The Court wishes to observe that parties should not just plead and or deny facts for the sake of it.

Such practice will only increase the time used to hear cases and costs.

Whether dismissal was unfair

Procedural fairness

13. A hearing should precede a decision to terminate the contract of employment. That is the import of section 41 of the Employment Act, 2007.
14. The Claimant was dismissed through a letter dated 21 February 2013. His case is that he was not accorded a fair hearing.
15. In examination in chief, he stated that on 28 February 2013, he was on duty at Erek Plaza when a Manager called Chesebe who was accompanied by an instructor Ochola and a Mbugua came calling.
16. The 3 gentlemen went to an adjacent office and after sometime called him and gave him a letter dated 21 February 2013 to sign. It was a dismissal letter.
17. The Claimant stated that he was not given any show cause letter or notice prior to dismissal.
18. For the Respondent, who has the statutory duty to show it complied with the procedural fairness requirements of section 41 of the Employment Act, 2007, the Operations Manager stated that the Claimant had many complaints against him and that he (witness) raised the concerns with him on the phone.
19. He also stated that he travelled to Nakuru around November/December 2012 and he had discussions with the Claimant after which the Claimant was summoned to Respondent's office in Nairobi and he met with the General Manager and Training Officer.
20. The Claimant was asked to give a written explanation on issues raised but declined.
21. The Claimant was again summoned to appear before the Respondent's Administrator after some guardettes started complaining but he failed to turn up and was ultimately dismissed.
22. He further stated that after the dismissal, the Claimant wrote a letter dated 7 March 2013 to the Respondent seeking for forgiveness and asking to be given another chance.
23. The witness acknowledged that the Claimant was not given notice of termination of services.
24. It is now widely accepted that the hearing contemplated by section 41 of the Employment Act, 2007 can be conducted through correspondence or verbally. The process does not require an employer to hold a mini-court.
25. But a prudent employer with many employees is well advised to reduce into writing what transpired (employers with over 50 employees must have a written disciplinary policy).
26. Where the hearing is conducted verbally, the employer should at least answer the *What, Who, When* and *How* questions to demonstrate it complied.
27. The *What* question relates to the particulars of charges brought to the attention of the employee. The *Who* part of the equation relates to who heard the representations made by the employee, in short, who was present. The *When* question will address where and the date when the hearing took place.
28. When an employer grants a hearing to an employee, it is a fact which should be easy to prove. The evidence in that respect should be precise and concise.
29. The Respondent in the present case did not place before Court a coherent story as to show how and that it complied with the procedural fairness dictates of the law.
30. In its submissions it cited *Muthuri v National Industrial Credit Bank Ltd*(2003) KLR 145 by Ringera J (as was then), that a master could terminate the services of an employee at any time and for any reason or none, but submitted nevertheless that the Claimant was afforded a hearing.
31. This decision does not present the correct legal position since the coming into force of the Employment Act, 2007.
32. The Respondent also submitted that the apology letter written by the Claimant demonstrated he was afforded a hearing.
33. The Court therefore finds that the dismissal was procedurally unfair. Because of the conclusion reached, it is not necessary to examine whether the Respondent had valid and fair reasons to dismiss the Claimant.

Appropriate relief

Salary for January/February 2013

34. The Claimant sought Kshs 20,000/- being wages for these 2 months. His testimony that he was not paid wages for January and February 2013 was not controverted.
35. The Claimant therefore succeeds on this head of claim.

One month pay in lieu of Notice

36. With the conclusion reached that the dismissal was unfair, the Claimant is entitled to one month pay in lieu of notice pursuant to sections 35(1)(c) and 36 of the Employment Act, 2007.

Pro rata leave

37. The Claimant sought Kshs 27,005/- on account of leave. In testimony, he stated that for 2 years and 7 months he was not granted leave.
38. Considering the testimony, and section 10(3) of the Employment Act, 2007 the Claimant succeeds on this head of claim as well.

Service gratuity

39. The Claimant did not lay an evidential, contractual or statutory foundation for this claim. In any case he was a contributor to the National Social Security Fund and therefore would not be eligible for service pay (if it is the same as service gratuity).

Compensation

40. The Claimant has succeeded in his unfair termination claim.
41. He served the Respondent for about 3 years. Considering the length of service, the Court awards him the equivalent of 4 months gross wages of Kshs 40,000/- as compensation.

National Social Security Fund deductions

42. The National Social Security Fund Act has very robust provisions for dealing with cases where an employer deducts and fails to remit such deductions to the National Social Security Fund.
43. The Claimant should make use of that avenue by making an appropriate report to the Fund.

Uniform deductions

44. The Claimant sought Kshs 6,200/- being refund of monies deducted on account of uniform.
45. He is contractually entitled to the same on return of the uniforms he was issued with.

Rest and Off days

46. The Claimant, under this head sought Kshs 41,329/20. Pursuant to section 10(3) of the Employment Act, 2007, the Court allows this relief.

Severance pay

47. The Claimant was not declared redundant. Severance pay is therefore inapplicable.
48. Before concluding a few words on relief in employment disputes. The Respondent in its submissions made reference to certain entitlements which the Claimant did not pray for (days worked, pro rata leave, rest days etc).
49. The authority of *Central Bank of Kenya v David Kivieko Muteti* (2009) eKLR was cited. I can only draw the attention of the Respondent to the provisions of sections 10(3) & (7), 49(1)(b) and 74 of the Employment Act, 2007.

Conclusion and Orders

50.The Court finds and holds that the dismissal of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

a. January/February 2013 wages	Kshs 20,000/-
b. One month pay in lieu of Notice	Kshs 10,000/-
c. Accrued leave	Kshs 27,005/-
d. 4 months wages compensation	Kshs 40,000/-
e. Uniform refund	Kshs 6,200/-
f. Rest/off days	Kshs 41,329/20

TOTAL **Kshs 144,534/20**

51.The claims for National Social Security Fund refunds and service gratuity are dismissed.

52.Claimant to have costs.

Delivered, dated and signed in Nakuru on this 20th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Gatonye instructed by Mirugi Kariuki & Co. Advocates