



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA

AT MOMBASA

CAUSE NO. 325 OF 2014

TOM EMBEGO CLAIMANT

VERSUS

B.M. SECURITY SERVICES LIMITEDRESPONDENT

JUDGMENT

Introduction

1. The Claimant brings this suit claiming accrued employment benefits plus compensation for unfair termination of his employment by the Respondent. It is the Claimant's case that he was suspended from work by the Respondent pending investigations and subsequent charges of theft in court. It is further Claimant's case that he was released on bond while facing prosecution and finally he was acquitted and reported back to work. The Respondent however never received him back prompting this suit.
2. The Respondent has admitted that she had employed the Claimant at a gross salary of Kshs.11665.39 per month until 7th November 2012 when she suspended him and later dismissed him for having committed a criminal offence to her detriment.
3. The suit was heard on 4th December 2014 when the Claimant testified as CW1 while the defence called no witness. Thereafter counsel for both sides filed written submissions.

Claimant's case

4. CW1 was verbally employed by the Respondent from 4th June 2010 but on 11th March 2011 he was given a written contract. His job title was Security Guard and his gross salary was Kshs.10100. The salary was reviewed to Kshs.10498 in February but in March 2011 it was drastically reduced to Kshs.6743 per month. CW1 wrote a protest letter on 3rd April 2011 and the salary was reviewed to Kshs.7600.
5. On 7th November 2012, CW1 was suspended from work following an alleged theft at the premises of a client where CW1 was assigned to guard. CW1 was charged with Criminal Case No. 2018 of 2012 which was eventually withdrawn by the complainant and CW1 acquitted. After the acquittal, CW1 reported back to work but the employer told him to go back and wait until he was called back to work. CW1 was never called back until 11th June 2014 when he wrote a letter to the Respondent which was ignored. CW1 was never served with any dismissal letter or invited to any disciplinary hearing. He however

believes that he was unfairly dismissed because he has not been receiving any salary.

6. CW1 therefore prays for Kshs.440,000 including one month salary in lieu of notice, underpaid salary, underpaid House Allowance, salary arrears from the time he was suspended to December 2013, accrued leave of 42 days for the 2 years served, leave travelling allowance for 2 years, refund of Kshs.350 per month for uniform plus compensation for unfair termination being 12 months' salary. He also prayed for Certificate of Service, costs and interest.

7. On cross examination by the defence counsel, CW1 explained that he started as casual employee from June 2010 to February 2011 when he was given a written contract for 52 weeks. The contract was renewable but under new terms. The contract allowed dismissal of the CW1 in the event of misconduct. His salary was Kshs.6743 as per the written contract but the payslip provided for Kshs.7586. The contract provided for deduction from salary Kshs.350 towards CW1's uniform which was refundable on termination of his services.

8. CW1 maintained that after acquittal from the criminal charges he reported to work on 11th December 2013 and the Branch Manager Mr. Wandai demanded for a copy of the court proceedings. CW1 served the Respondent with the copy of the court proceedings on 13th December 2013 after which, CW1 was told to go home and wait until he was called back. He went back to the office on 22nd December 2013 but he was told that the company had closed down for Christmas holiday for the managers. CW1 returned to the office again on 1st January 2014 but he was told to return after 3 days when he was again told to go home and wait until he was called.

Analysis and Determination

9. After considering the pleadings, evidence and submissions on record, it is a fact CW1 was employed by the Respondent as Security Guard between June 2010 and December 2013. There is also no dispute that CW1 was suspended from work pending investigations and charges of theft connected to the place of his assignment. There is no dispute that CW1 was to remain suspended without pay pending the outcome of the said investigations and theft charges. It is also a fact that CW1 was acquitted of the said charges on 10th December 2013 after the complainant withdrew the charge against CW1. It is also not contested that CW1 reported back to work on 11th December 2013 but the Branch Manager Mr. Wandai refused to allow him back to work even after several attempts by CW1 thereafter to report to work. It is also a fact that CW1 was never paid his salary from the time on 7th November 2011 till now. Lastly there is no dispute that CW1 was dismissed by the Respondent for gross misconduct at his place of assignment. The issues for determination are whether the dismissal of the Claimant was unfair and whether he is entitled to reliefs sought.

Unfair dismissal

10. The Claimant's evidence that he was never served with a dismissal letter, or reason for the dismissal and that he was never afforded any hearing before dismissal has not been contested. The defence never called any witnesses and as such the court believes the testimony of CW1 to make a finding that CW1 was dismissed constructively from 11th December 2013. The said date is when CW1 reported to his employer that he had been acquitted from the criminal charges instituted by the Respondent's client. He had reported back to work in compliance with the suspension letter given to him by the Respondent on 7th November 2011. Failure by the Respondent to accept CW1 back to work was a breach of contract. It was even made worse by the failure to pay CW1 his salary. The dismissal was rendered unfair because CW1 was not afforded a fair hearing as provided for under Section 41, 43 and 45 of the Employment Act. Section 41 requires that before dismissing an employee for misconduct under Section 44 of the Act, the employer must first explain to the employee the reasons for the termination and afford him a chance to defend himself. Such proceedings must be conducted in the presence of an employee of the accused employee's choice and in a language of they understand. In this case, the above process was not followed and that rendered the dismissal unfair and unjustified in the absence of any evidence from the employer to the contrary. Consequently the answer to the first issue for determination is in the affirmative.

Reliefs

11. Under Section 49 of the Employment Act, an unfairly dismissed employee is entitled to payment in lieu of notice, all accrued employment benefits plus compensation for the unfair termination of upto 12 months gross salary. In this case the Claimant is awarded one month salary in lieu of notice as provided for under Section 35 of the Employment Act. According to the payslips produced as exhibits, CW1 was being paid a gross salary of Kshs.14047.86 per month. He is however awarded the same amount pleaded as pay in lieu of notice being Kshs.12073.80. He is also awarded 42 days leave as prayed for the period of 2 years service being Kshs.19,667. CW1 will also get a refund of Uniform Levy at the rate of Kshs.200 per month for the period between June 2010 and October 2012 being Kshs.5800. CW1 is also awarded salary arrears for the period between 7th November 2011 and December 2013 being Kshs.169033, as prayed, instead Kshs.196658 assessed by the court. Lastly CW1 is awarded 6 months gross salary being Kshs.84287.16 as compensation for unfair termination. CW1 is entitled to Certificate of Service under Section 51 of the Employment Act. The rest of the prayers are dismissed save for the order for costs and interest.

Disposition

Judgment is entered for the Claimant in the sum of Kshs.290860.95, Certificate of Service, costs and interest.

Signed, dated and delivered at Mombasa this 27th day of April 2015

Onesmus Makau

Judge