



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1119 OF 2011
JACKTON OIGARA OMAE.....CLAIMANT
VERSUS
G4S SECURITY SERVICES LIMITED..... RESPONDENT
JUDGMENT

1. The claimant in this suit averred that he was initially employed as a casual on 25th August, 2000 at a salary of Kshs.189.20 per day. He was subsequently hired on permanent employment on 27th September, 2002 at a salary of Kshs.4675 inclusive of house allowance.
2. The claimant served the respondent until 15th February, 2010 when the respondent terminated his services for gross misconduct. He complained that prior to receiving his dismissal letter, he was never given a chance to explain or defend himself. He denied knowledge of any misconduct as no particulars were made known to him.
3. Consequently he seeks the order of the Court declaring the dismissal unlawful and unfair with the consequence that he either gets reinstated with no loss of salary and benefits or gets compensated for wrongful and unfair dismissal at a sum he quantified at Kshs.169,050/=.
4. The respondent on the other hand refuted the claimant's averments stating that he did not perform his duties under the contract of employment as required.
5. The respondent averred that the claimant was assigned duties at one of the respondent's customer's residence in Nairobi. His duty then was to ensure that the respondent customer and his property were safe and that there was no loss of destruction of property. The claimant was required to be alert at all times in order to detect and take necessary action including raising of an alarm in the event of any unauthorized entry into the residence.
6. According to the respondent, on the night of 15th/16th January 2010, whilst on duty together with a dog handler, thugs gained access into the respondent's customer's property, ambushed the claimant and his colleague, tied them and stole the customer's property.
7. As a result of the claimant's failure to discharge his duties, the respondent's customer suffered substantial loss for which he held the respondent liable. According to the respondent, the failure to discharge his duties was gross negligence on the part of the claimant as his failure to act could have led to loss of life including his own. The claimant's inaction was a fundamental

breach of his contract of service and the respondent was therefore entitled, and did terminate the contract with the claimant.

8. The respondent further averred that before being dismissed, all the procedures of summary dismissal were followed. The claimant was given an opportunity where he was heard regarding the incident during a meeting held on 3rd February, 2010. He did not give any satisfactory explanation and sought instead to blame the alarm system which he alleged was faulty.

9. The respondent averred that upon the dismissal of the claimant he was entitled to final dues in the amount of Kshs.6,286 which amount was applied to set off any claim made by the customer.

10. At the trial, the claimant reiterated most of the averments in his statement of claim. Concerning the robbery incident he stated that he pressed the panic button but it was not working. The button was later tested and found not to be working. It was his evidence that after the incident, he was arrested and charged but the charges were later dismissed for lack of evidence. According to him, his colleague was reinstated while he was dismissed and was told his case was different. He denied being asleep while on duty.

11. In cross-examination he conceded that Kshs.14,029/= included overtime. He further stated that after the incident he and his colleague met Mr. Mwaura (DW1) together with the shop steward and talked about how it was to be carried out and he was informed that he could not be reinstated in view of how the offence was committed. It was his evidence that he could not blow the whistle because it could have endangered his life.

12. The respondent called one witness, Mr. Mark Mwaura who stated he was the Branch Manager for the respondent. He stated that he investigated the incident and found out that thugs gained entry by cutting the K-apple fence and that the point of intrusion was about 20 metres from the Security box where the claimant was. It was his evidence that from observations made, the thugs had been there for some time. He admitted that the claimant pressed the panic button and it was not working and that the Manager confirmed it was not working.

13. Mr. Mwaura informed the Court that after investigations, the respondent became of the view that the claimant was negligent and decided to dismiss him.

14. In his closing submissions Counsel for the claimant submitted that his client was dismissed without being given a chance to explain or defend himself which was a fundamental breach of principles of natural justice.

15. According to Counsel, the claimant was used as a scapegoat for the unfortunate incident. He could not be entirely be blamed for what happened as he tried to take reasonable step to avert the situation by raising an alarm which was not working something that was the responsibility of the respondent to ensure that it was working at all times.

16. Regarding procedure for dismissal, Counsel submitted that the claimant was called to a meeting where he was interviewed and a decision taken to dismiss him without benefits. The claimant was given a punitive warning letter prior to dismissal. This according to counsel amounted to two punishments for the same offence which makes the dismissal unfair and unlawful.

17. Counsel for the respondent on the other hand submitted that the respondent demonstrated that there was both valid and fair reason for the dismissal and that all the processes were followed. According to Counsel, the claimant was guilty of gross negligence which led to loss of property from the residence he had been assigned to guard. He was given an opportunity where he was heard regarding the incident during a meeting held on 3rd February, 2010. The claimant failed to give any satisfactory explanation and a decision was made to dismiss him. Counsel therefore

submitted that the termination was in accordance with the law and his contract of employment.

18. Concerning allegations of discrimination, Counsel submitted that these were without basis. The claimant's contract of service with the respondent was personal. When he was alleged to have performed his duties negligently and in breach of his contract, he was called upon to show cause as an individual.

19. Regarding absence of an investigation report in Court, Counsel submitted that its absence did not justify the allegation that there was no valid reason for termination. According to Counsel, the claimant admitted that he was made aware of the charges he was facing and on which the respondent was considering terminating his contract of employment. He attended a disciplinary hearing on 3rd February, 2010 with a shop steward and made his representation on the allegations facing him.

20. Termination of employment contract is usually considered at two levels namely in terms of reasons for termination and the process followed in carrying out the termination.

21. Under section 45 of the Employment Act, the reason for termination must be valid and fair related to the employees conduct, capacity of compatibility. Once this first limit is met, the termination has to be carried out in accordance with a fair procedure.

22. The claimant was accused of negligence in the performance of his work which led to robbery at respondent's clients premises. It was alleged that the point of intrusion was were the security box where the claimants was supposed to sit hence he ought to have heard the attempt to intrude the premises early enough and raise an alarm.

23. The claimant was supposed to have a whistle and panic button to call for response in the event of an intrusion.

24. According to the claimant, he gave out his whistle to a colleague on the material day and that the panic button was not working. The latter was confirmed by the respondent. The claimant further stated that he could not blow the whistle as that could have endangered his life. Nothing much was said about the guard dog and whether it barked or not.

25. The claimant further alleged that his colleague with whom they were guarding was reinstated after the criminal charges preferred against them was dismissed for lack of evidence. The respondent did not refute this and merely responded that the claimant was treated as an individual and in accordance with his contract of employment.

26. One of the mechanisms for raising an alarm in the event of intrusion was not working. That is the panic button. The claimant had no whistle on the material night. An alarm response would have triggered a more elaborate response including armed policemen than the whistle. But the alarm system as conceded by the respondent was not working. In the circumstance the Court takes the view that the accidental failure of the alarm system at the material time cannot be solely blamed on the claimant to justify his dismissal and more so when his colleague with whom they ought to have been equally culpable was reinstated back to service.

27. Section 45(5) of the Act guides the Court in deciding whether it was just and equitable for an employer to terminate the services of an employee. One of the considerations is the previous practice of the employer in dealing with the type of circumstances which led to the termination.

28. The respondent did not produce in Court evidence that attributed more blame on the claimant than his colleague who was reinstated back to service after the dismissal of criminal charges.

29. To this extent, it is the finding of the Court that reasons for terminating the claimant's services were not fair reasons relating to the claimant's circumstances at the time the intrusion

occurred. The Court having found, will not delve into the question of fairness or otherwise of the procedure for terminating the claimant's services.

30. The Court therefore awards the claimant as follows:-

Kshs.

- (a) One month's salary in lieu of notice.....6,839.00
- (b) 10 months' salary as compensation for
Unfair dismissal.....68,390.00
- (c) Salary for 15 days worked upto to 15/2/2010.....3,664.00
- (d) 3 days leave accrued as at 15/2/2010.....733.00
- (e) 20.04 hours overtime.....914.00
- (f) 15 days house allowance.....550.00
- (g) One way travelling allowance.....425.00

81,515.00

- (h) Costs of the suit

31. The claim for service pay is disallowed since the claimant was registered with NSSF. The respondent shall issue the claimant with certificate of service if not issued already.

32. Further the award shall be subject to statutory deductions and any payments or loans the claimant may have received from the respondent.

33. It is so ordered.

Dated at Nairobi this 26th day of June 2015

Abuodha J. N.

Judge

Delivered this 26th day of June 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge