



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT MOMBASA**  
**CAUSE NO. 517 OF 2014**  
**BARASA PAUL ISAAC.....CLAIMANT**  
**VERSUS**  
**XFOR SECURITY SOLUTIONS (KE) L.T.D.....RESPONDENT**  
**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for unfair termination and non payment of terminal and contractual benefits. It is the Claimant's case that he was unfairly summarily dismissed from employment by the respondent on 18.8.2014 for unfounded reasons and without according him any hearing.
2. The Respondent has denied liability for unfair dismissal and payment of any dues and averred that the dismissal of the Claimant from employment was for good reason. It is the Respondent's case that the Claimant being a security guard neglected his duty by sleeping while on duty despite having been served with two warning letters. It is further defence case that the Claimant was dismissed procedurally after being warned twice and being given a chance to improve.
3. The suit was heard on 24/2/2015 when the Claimant testified as Cw1 and respondent called Linus Mwakio as Rw1. Thereafter both parties filed written submissions.

**CLAIMANT'S CASE**

4. Cw1 was employed by the Respondent on 23.12.2012 as a security guard. His salary was kshs.12,000 per month. His written employment contract was retained by the Respondent. He worked until 18/8/2014 when he was dismissed on allegation that he was found sleeping while on duty on the night of 17/8/2014. Cw1 denied that allegation and contended that on the said night the Operation Managers Mr. Durant and Dan passed at Cw1's place of assignment, Shiva Carriers, at around 5.00 am. Cw1 saw the duo while at the road and they called him and asked him for a pen and his force number and then left.
5. On 18/8/2014 Cw1 reported work at 6.00 pm. but at 7.30 pm the Head guard at Shiva Mr.Dishon Onkoba came and told him that he was send to replace him that night. He further told Cw1 to go home immediately and report to the office the following day together with all the company property. Cw1 complied and on 19.8.2014 he went to the office where he met Mr. Mwakio, the Human Resource Manager who served him with termination letter dated 18/8/2014 (Exh.1). The reason for dismissal was sleeping while on duty. Cw1 contended that in his dismissal was unfair

because the Human Resource Manager never gave him any hearing. He prayed for kshs.20,000 for 30 leave days earned in the 20 months served, kshs.12,000 being one month salary in lieu of notice, overtime for working 12 hours per day plus kshs.144,000 being 12 months salary for unfair termination.

6. On cross examination by Rw1, Cw1 denied that he slept while on duty. He denied that he was photographed while sleeping. He maintained that he was awake through out the night when the Operations Managers came to his work station 3 times. He admitted that he was previous served with a warning letter. He admitted that he was employed to work for 12 hours per day. He denied that his image is the one in the photograph allegedly taken while asleep. He clarified that the warning letter given to him was not for sleeping while on duty but for late reporting of which he maintained that he had given notice to his Supervisor.

### **DEFENCE CASE**

7. Rw1 is the Human Resource manager for the Respondent. He confirmed that Cw1 was employed by the Respondent as a security guard on 18/12/2012. He also confirmed that Cw1 was receiving kshs.12,000 gross salary per month. On 17/8/2014, Cw1 was found sleeping while on duty by the Operations Managers of the Respondent and was dismissed by them on 18/8/2014 but Cw1 never went to the office for his dismissal letter until 29.8.2014 when he went for clearance and was issued with Certificate of Service.
8. According to Rw1, Cw1 had started to perform his work poorly and had been warned for later reporting and absentism. Rw1 maintained that sleeping while on duty for guard attracted summary dismissal and as such Cw1 was dismissed for a good reason. Rw1 contended that Cw's pay was inclusive of leave and long hours of service. He further contended Rw1 maintained that the dismissal was fair because Cw1 committed the offence only 5 days after receiving a warning. According to Rw1, the warning letter satisfied the requirements of section 41 of the Employment Act which require that the employee be explained the reason for the intended dismissal. Rw1 contended that Cw1's pay was inclusive of leave and long hours of service. He further contended that the Respondent remitted all NSSF contributions for Cw1 and as such Cw1 is not entitled to any service pay.
9. On Cross examination by the Claimant's counsel, Rw1 did not produce the contract of employment for Cw1. He however admitted that he did not accord Cw1 a hearing before dismissing him. He stated that Cw1 was dismissed by the Operations Manager.

### **ANALYSIS AND DETERMINATION**

10. There is no dispute that Cw1 was employed by the Respondent as a Security Guard from December 2012 to 18/8/2014 when he was summarily dismissed for gross misconduct. The issues for determination are whether the dismissal of the Claimant from his employment was unfair and whether the reliefs sought should issue.

### **UNFAIR TERMINATION**

11. Termination of employment of an employee is unfari unless the employer proves that the same was founded on a valid and fair reason and that it was reached after following a fair procedure. The Claimant has contended that the dismissal was unfair because he never slept while on duty and that he was not accorded a hearing to defend himself before dismissal. On the other hand Rw1 has denied that he is the one who dismissed the Claimant and maintained that Cw1 was dismissed by the Operations Manager. Rw1 further admitted that he never gave Cw1 any hearing in the presence of a fellow employee or at all. The said Operations Manager who allegedly found Cw1 sleeping and photographed him never testified in this case. The court is therefore left with the hearsay evidence from Rw1 and a photograph which Cw1 denied being his image. Rw1 is not the one who took and processed the said photograph. He cannot therefore competently testify on it.

Consequently the court is of the view that the employer has not discharged his liability under section 45 and 47 of the Employment Act.

12. Under section 43 and 45 of the said Act, the employer is burdened to prove that he had a valid and fair reason for dismissing the employee in any legal proceedings where the employee alleges unfair termination like the present suit. He is therefore supposed to call all the relevant witnesses and produce all the relevant documents to prove that he had justifiable reason for dismissing the employee. The employer is also supposed to call evidence to prove that the employee was accorded a fair hearing and allowed to defend himself in the presence of a shop floor union representative or a workmate of the employees choice. In this case the respondent has miserably failed to prove the reason for the dismissal and to prove that the Claimant was accorded a fair hearing before the dismissal.
13. The allegation by Rw1 that the warning letters given to the Claimant were tantamount to hearing within the meaning of section 41 of the Employment Act is laughable and it is dismissed for being neither here or there. Such evidence from Rw1 corroborates the Claimant's evidence that he was dismissed unfairly without any hearing. In addition, the court has noted that the dismissal letter dated 18/8/2014 was indeed signed by Rw1 even before meeting Cw1. The said letter never mentioned that the Claimant had been dismissed by the Operations Officer before Rw1 wrote the letter. The said letter therefore sharply contradicts with the testimony given by Rw1 which leaves the court with the inference that Rw1 lied in his testimony. On a balance of probability therefore the court finds and holds that the termination of the Claimant's employment by Rw1 *vide* letter dated 18/8/2014 was unfair and unjustified within the meaning of section 45 of the Employment Act.

### **RELIEFS**

14. In view of the foregoing finding, the court declares that the dismissal of the Claimant from employment by the Respondent on 18/8/2014 was unfair. Under Section 49(3) of the Employment Act an unfairly dismissed employee is entitled to reinstatement subject to among other considerations, his wishes as provided under Section 49(4) of the Act. In this case the Claimant prayed for payment of damages and the court will grant that wish. The purpose of the court is to do justice and as such failure by the employee to pray for reinstatement should as a matter of Cause be treated as his wish not to be reinstated in which case the court should award damages under section 49(1) of the Employment Act. In assessing the damages to be awarded the court must consider whether the employee contributed to his dismissal, whether damages were, or could have been mitigated and any payments that the employer paid to the employee after the termination.
15. After considering the facts of this case, the court awards the Claimant one month January in lieu of notice being kshs.12,000 and kshs.12,000 being pay in lieu of 30 leave days as prayed. In the court's view, the leave earned in the 20 months served by Claimant was more than the 30 days claimed. In addition to the foregoing reliefs the Claimant is awarded kshs.36,000 being 3 months salary as compensation for unfair termination. The reason for not awarding the maximum compensation is that losses were mitigated when the Claimant shortly secured another employment within the same industry. The prayer for overtime is dismissed because no basis was made upon which to assess the overtime prayed.

### **DISPOSITION**

16. For the reasons stated above Judgment is entered for the claimant declaring his dismissal from employment unfair and awarding him kshs.60,000 plus costs and interest.

**Dated, signed and delivered this 19<sup>th</sup> day of June 2015.**

**O. N. Makau**

## Judge