



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1248 OF 2011

JOHN JONAI KHASINDU.....CLAIMANT

VS

JONADA SERVICES LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim filed in Court on 26th June 2011, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Defence on 10th December 2013 but did not call any witness. The Claimant testified on his own behalf.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent as a security guard from October 2000. He worked as such until 30th August 2010 when he was dismissed on allegations of theft of a carpet from the residence of the Respondent's Managing Director where he was deployed. The Claimant states that his dismissal was unjustifiable and unfair as there was no valid reason for the dismissal and he was not given an opportunity to be heard. Further, he was not paid his terminal dues.

3. He claims the following:

- a. A declaration that the termination of his employment was unlawful
- b. One month's salary in lieu of notice.....Kshs.3,800.00
- c. Leave pay for 10 years.....Kshs.38,000.00
- d. Service gratuity @ 18 days salary for each completed year of service.....Kshs.22,800.00
- e. 12 months' salary in compensation for unfair termination.....Kshs.45,600.00
- f. Costs plus interest

The Respondent's Defence

4. In its Statement of Defence dated 9th December and filed in Court on 10th December 2013, the Respondent admits having employed the Claimant effective 1st February 2008.

5. The Respondent however denies the Claimant's claim for unlawful dismissal stating that after completion of investigations, the Claimant deserted duty warranting summary dismissal. It is the

Respondent's case that since the Claimant was summarily dismissed, he is not entitled to any dues.

Findings and Determination

6. The issues for determination in this case are as follows:
 - a. Whether the Respondent had a valid reason for summarily dismissing the Claimant;
 - b. Whether in effecting the dismissal the Respondent observed due procedure;
 - c. Whether the Claimant is entitled to the remedies sought.

The Dismissal

7. The Claimant testified that from 2002, he was deployed to work at the home of the Respondent's Managing Director. On 28th August 2010, a carpet went missing from the home upon which the Claimant alongside the maid and the driver were arrested and booked at Muthangari Police Station. The Claimant and his colleagues were released without any charge. Thereafter, the Claimant was asked to return his uniform and go home.

8. On its part, the Respondent states that the Claimant deserted duty soon after completion of investigations into the theft.

9. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

10. The burden placed on the employer under Section 43 is to demonstrate a valid reason that would cause a reasonable employer to terminate the employment of an employee. From the Respondent's Statement of Defence it would appear that the final decision to dismiss the Claimant was triggered by desertion of duty by the Claimant. The Claimant however denied the allegation of desertion.

11. As held by **Abuodha J** in ***Geoffrey Muringi Mwangi v Rwaken Investments Limited (Cause No. 1658 of 2012)***, an assertion by an employer that an employee has deserted duty must be evidenced by a notice to show cause why employment should not be terminated on this ground. No such evidence was rendered on behalf of the Respondent in this regard and the allegation of desertion against the Claimant was not proved. Moreover, there was no evidence even on a balance of probability that the Claimant was involved in any way in the theft of the carpet in issue.

12. For the foregoing reasons, the Court finds that the Respondent failed to show a valid reason for the Claimant's dismissal and the termination was therefore substantively unfair.

Dismissal Procedure

13. With regard to the termination procedure, Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative.

14. From the record, there was no evidence of the Claimant being subjected to any disciplinary process and the Court therefore finds that the termination of his employment was procedurally unfair as well.

Remedies

15. Before discussing the remedies available to the Claimant, I need to establish the Claimant's rightful salary. In his final submissions, the Claimant raises the issue of salary underpayment which was however neither pleaded nor canvassed at the hearing. Nevertheless, this is a Court of justice and in my view salary underpayment is a matter on which the Court ought to take judicial notice.

16. Additionally, Section 48 of the Labour Instructions Act, 2007 protects the minimum wage for all employees. The Claimant produced a letter dated 28th January 2011 from the District Labour Officer, Nairobi by which the Claimant's rightful salary was established as Kshs. 7,754. I find no reason to disagree with the salary figure as tabulated by the Labour Office and proceed to adopt it as the Claimant's salary for purposes of this claim. I further adopt the figure of Kshs. 32,400 as salary underpayment for period between September 2009 and April 2010 as well as the figure of Kshs. 17,016 as salary underpayment for period between May 2010 and August 2010.

17. With regard to the claim for unlawful and unfair termination, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

18. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay which therefore succeeds and is allowed. From the Claimant's National Social Security Fund (NSSF) statement availed to the Court it appears that the Respondent remitted the Claimant's NSSF dues for the year 1999 and part of 2010 only. Service gratuity for the rest of the period is therefore due and payable to the Claimant.

19. Cumulatively I make an award in favour of the Claimant in the following terms:

- a) 12 months' salary compensation for unfair termination.....Kshs.93,048.00
- b) 1 month's salary in lieu of notice.....Kshs.7,754.00
- c) Salary underpayment (September 2009-April 2010).....Kshs.32,400.00
- d) Salary underpayment (May 2010-August 2010)....Kshs.17,016.00
- e) Leave pay for 63 days (7,754/30x63).....Kshs.16,283.00
- f) Service gratuity for 9 years (7,754/30x18x9).....Kshs.41,872.00
- Total.....Kshs.208,373.00**

20. I award the costs of this case to the Claimant. The award amount shall attract interest at court rates from the date of the award until payment in full.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF
JUNE 2015**

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JUDGE

Appearance:

Mr. Mulanya for the Claimant

Mr. Sato for the Respondent