



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1231 OF 2013

ENOCK M. GICHANACLAIMANT

VERSUS

BRINKS SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit seeking resolution of a dispute he framed as wrongful dismissal and termination of employment and refusal to pay terminal dues and other monies owed to the Claimant. He averred that he was employed by the Respondent on 1st May 2006 as a guard. He averred that he was not issued with a letter of contract and that he served with diligence until 28th March 2011 when he was arrested and charged before the criminal courts. He pleaded that his suspension was to be in place until the conclusion of the criminal trial and that he was acquitted by the court before he was placed on his defence. He averred that on return to the Respondent for deployment the Respondent refused to have the Claimant resume his employment duties. He sought reinstatement through his advocate and the Respondent never responded to the letter. The Claimant thus sought one month in lieu of salary, salary arrears from May 2010, house allowance from May 2006 to March 2011, gratuity, 12 months salary compensation, leave allowance for 6 years, certificate of service and costs of the suit.
2. The Respondent filed a Response to Statement of Claim on 18th November 2014. In it the Respondent denied the claims by the Claimant and stated that it was a stranger to the contents of the claim. The Respondent averred that the amount claimed by the Claimant was unwarranted and unmerited as it was without basis. The averments in the claim were denied as if they had been set out forth and traversed seriatim.
3. The Claimant filed an amended Statement of Claim on 7th January 2015 pursuant to leave granted. The Claimant averred that when he was released on bond and resumed duties he was informed that he had been placed on suspension till finalization of the case. He averred that he worked for the Respondent for a total of 73 months and was not informed of the reasons for his termination and neither was he given audience before termination.
4. The Claimant testified on 5th March 2015. He testified that he was employed by the Respondent on 1st May 2006 as a guard and was assigned duties to guard at Development House Nairobi. He earned Kshs. 4,500/- and was not given a letter of appointment. He testified that he was issued with payslips and at the time of dismissal was earning Kshs. 5,300/- and the pay was without any house allowance. He stated that on the material night he was on duty and the next day a theft took

place and he was taken to Central Police Station and charged in a criminal case No. 459 of 2011. The case ended on 22nd June 2012 and the outcome was a dismissal. The Claimant testified that he was not put on his defence. He stated that he was not paid his dues by the Respondent and that he had gone to the office upon release on bond and was advised to wait till the case was concluded. He would be paid and reinstated to his job. He testified that when the case was dismissed he went back to his employer but was not reinstated to his job or paid his dues. He was not given any notice nor was he given an opportunity to defend himself. He thus sought the pay for the time he was in court and the maximum 12 months compensation as well as payment of one month salary in lieu of notice. He testified that he never went on leave and thus sought leave pay and gratuity that was unpaid.

5. In cross-examination the Claimant testified that he was paid Kshs. 5,300 by the time he filed suit and that there were some months when NSSF dues were unpaid. He conceded that the payslips showed that there was payment of NSSF dues. On the payslips there was no indication of payment of house allowance. He testified that he was presently a gardener but had been jobless for a long while when the case was ongoing. He would do odd jobs to earn his keep. He stated that what he sought was pay from May 2011 not May 2010. He testified that he did not assist the thieves and that he had not heard of the incidences of collusion with thieves by security staff. He insisted that he went back to work.
6. In re-examination he testified that he did not have a letter accusing him of desertion. He testified that he was engaged in jua kali and as a shamba boy when the Respondent failed to re-engage him. He sought the 15 months pay from the date of his arrest till the day the case ended.
7. The Respondent called Florence Mwendu the Human Resource Manager at the Respondent from April 2012. She testified that there were other employees arrested alongside the Claimant. She sought to refresh herself and stated that these were Joseph Mwangi and Kennedy Wasike. She stated the two are still in the employ of the Respondent. She could not tell when they reported back to the Respondent.
8. In cross-examination the witness testified that the 2 employees were still the employees of the Respondent. She testified that the payslip for the Claimant did not have any pay for house allowance. She admitted that she did not have a letter showing the Claimant deserted duty. She confirmed that the Claimant did not receive pay for the 15 months according to their records. She could not confirm whether the Claimant worked from 6.00am to 6.00pm or not. She testified that the guards are not provided accommodation. She could not confirm whether the Respondent paid NSSF dues for the 15 months the Claimant underwent trial. She could not tell if there was a session with the Claimant before his termination.
9. In re-examination she testified that the Claimant was not terminated and there was no other payment apart from that shown on the payslip.
10. The Claimant filed submissions on 20th March 2015. In the submissions the Claimant submitted that he was charged alongside other guards in criminal case No. 459 of 2011 and was acquitted of all charges after a lengthy trial. He was not reinstated after the acquittal as had been indicated and was informed that he was terminated. No letter was given nor was he given notice of the termination. The Claimant submitted that he was dismissed without cause and without notice. He relied on the case of **Mutune Musau v Design Wear Limited Cause No. 116 of 2012** where the Court awarded the maximum compensation for wrongful dismissal.
11. The Respondent filed submissions on 11th March 2015. In the submission the Respondent submitted that the Claimant had not proved that the Respondent had terminated his employment. The Claimant had testified that the Respondent had failed to take him back when he was acquitted of the theft while it was the Respondent's case that the Claimant failed to return to work unlike the co-workers with whom he had been charged. The Respondent submitted that the Claimant had thus deserted his employment. The Respondent submitted that the Claimant earned more during

the period when he was on trial and an inference could be drawn that the Claimant had no incentive to resume work with the Respondent. It was submitted that the Claimant's suit was an attempt at unjust enrichment at the expense of the Respondent. The Respondent relied on the case of **Lilian Atieno Ondigo v Ultimate Spa & Beauty Parlour [2014] eKLR** where the court dismissed the case in which the claimant was seeking damages for unfair dismissal. The Respondent submitted that in the alternative, if the Court found in favour of the Claimant then the award would only comprise of one months notice Kshs. 5,300/- leave allowance Kshs. 26,500, salary arrears Kshs. 71,550/- and Kshs. 21,200/- as compensation based on the ratio in the case of **Kenya Petroleum Oil Workers Union v Petro Oil Kenya Limited [2014] eKLR** and a certificate of service.

12. The Claimant's case is that he was unlawfully dismissed. He was employed by the Respondent as a guard and on 28th March 2011 while on duty the premises he was guarding were broken into and a theft executed. He was charged alongside other guards from the Respondent and two others from a company also guarding the premises. He was later acquitted and it was uncontested that the other 2 employees were reinstated. The Claimant was not. He sought therefore the damages as set out in his claim. The Respondent's position was that the Claimant was not dismissed but that he deserted the employ of the Respondent. It is clear from the evidence adduced that the Claimant did not resume duties as was expected after his acquittal. He asserts the employment was terminated at instance of the Respondent when the Respondent declined to reinstate him. The Respondent asserts desertion. There was no proof that the Claimant deserted. The least the employer would have done is make a record of that. Nothing was availed to show there was desertion. The Claimant asserts he sought to be reinstated and was denied the opportunity. I would therefore find that there was constructive dismissal in the failure to reengage after the trial. No reasons were ascribed for this and I would thus find the dismissal unfair in the circumstances. He thus was entitled to notice pay of Kshs. 6,095/-. On the quantum of damages I would be guided by the provisions of Section 49 of the Employment Act. The case of **Kenya Petroleum Oil Workers Union v Petro Oil Kenya Limited** is persuasive that the maximum recompense is not available in each case. I would award 4 months compensation Kshs. 24,380/-. The payslip the Claimant had indicated that he received Kshs. 5,300/-. There is no indication that house allowance was paid. Under the Employment Act section 31 house allowance is payable at the rate of 15% of basic pay. The Claimant would be entitled to some recompense for this. He was thus underpaid by Kshs. 795/- each month. In terms of Section 90, he was not competent to obtain redress beyond the 3 year limit. I would thus award him Kshs. 28,620/- as unpaid house allowance. He would be entitled to the unpaid arrears calculated as Kshs. 71,550/- by the Respondent. He did not prove he was entitled to payment of gratuity or severance pay. He is also entitled to a certificate of service.

13. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 6,095/- being one month notice,
- b. Kshs. 71,550/- being salary arrears,
- c. Kshs. 28,620/- being unpaid house allowance
- d. 4 months compensation Kshs. 24,380/-
- e. Certificate of service
- f. Costs of the suit
- g. The sums in a), b), c) and d) are subject to statutory deductions. The NSSF, NHIF, and PAYE must be remitted as required in law.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of **June** 2015

Nzioki wa Makau

JUDGE