



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 576 OF 2010

PATSON MUSEMBI KITOLO.....CLAIMANT

VERSUS

MR. KIN JIN LEE.....1ST RESPONDENT

LEE SECURITY SERVICES.....2ND RESPONDENT

JUDGMENT

1. The claimant in this suit avers that he was working for the respondent as a night guard for 8 years and 9 months. His earnings were Kshs.5,126 per month.
2. He claimed that he worked for the respondent until 29th April, 2009 when he was summarily dismissed over allegations that he instructed guards to take off, that he instructed night guards to follow his own timetable leading to clients being served by less guards and that he was rude to the Respondent's Managing Director.
3. He further averred that upon termination he was never explained to, the reasons why his dismissal was being considered and that the respondent's Managing Director just served him with the letter and took off.
4. The claimant therefore seeks the judgment of this Court for his salary for the period he has been kept out of employment, payment of all his benefits including notice pay, leave on pro rata, underpayments, overtime and severance pay.
5. The respondent on its part denied it employed the claimant and at the salary claimed. On the other hand the respondent stated that the claimant's services were terminated due to gross misconduct in total violation of the terms of service.
6. According to the respondent, the claimant initially started as a casual labourer but was subsequently hired on permanent basis before subsequently being made an in-charge.
7. Concerning leave, the respondent averred that the claimant took annual leave for all the years he worked.
8. According to the respondent, it got necessary information from the claimant and fellow guards after due consideration and found it prudent to dismiss the claimant on grounds of

misconduct.

9. At the trial, the claimant testified that on the date of his dismissal he was at Kasarani on duty. He was called to the office by the 1st respondent and issued with a dismissal letter. He stated that he was accused of giving guards unauthorized offs yet he was not a supervisor. Before dismissal he stated that he was not given chance to defend himself. In cross-examination he stated that some of his colleagues did not turn up for work. He further stated that he was the one who prepared the duty rota. He denied accommodating a stranger at the Guard Premises. He stated that the so called stranger was one of the drivers to the respondent's clients.

10. The respondents on its part called two witnesses and adduced evidence by way of affidavit.

11. The respondent's first witness Mr. Mbako testified that the claimant was his in-charge. He stated that on 20th December 2008 he was at work at Safari Park when the 1st respondent came on patrol and found the claimant missing yet in the OB he had signed he was at work. According to Mr. Mbako, this was not the first time the claimant had absented himself. He further stated that the claimant used to release them on off without approval of the Head Office and that the claimant used to record them as present yet they were on off.

12. The second respondent's witness Mr. Nyandira testified that on 20th December 2014 he was not at work as he had been granted off-duty by the claimant through the local arrangement. Regarding reporting to work he stated that they were supposed to report by 6 p.m. and that the claimant was the one in-charge and arranged reporting times and recorded work attendances.

13. The 1st respondent in his evidence by way of affidavit deponed that the claimants through his years of service took leave and signed for it. He annexed copies of leave forms signed by the claimant. Regarding terminal dues, he deponed that these were quantified and paid to the claimant upon dismissal from service.

14. The 1st respondent further deponed that the claimant facilitated fraud by signing the attendance book for absent employees. He further stated that when he visited Safari Park Estate on 20th December, 2008, the claimant being overall in charge did not give sufficient explanation why he allowed fellow employees to absent themselves from work yet he signed them in as present.

15. Counsel for the claimant in his closing submissions stated that his client was not an in-charge as alleged since his payslip which was produced as an exhibit merely described him as a guard.

16. Concerning letter of appointment, Counsel submitted that the same was dated 1st August, 2005 yet indicated to have been executed by the claimant on 6th July, 2007. This document according to Counsel, does not elaborate the period the claimant was employed. He therefore submitted that the claimant was employed in 2002.

17. Regarding termination from employment Counsel submitted that this occurred on 29th December, 2009 yet the events that led to the termination took place on 20th December, 2008. During the entire period the claimant was never issued with a show cause letter as required by the Employment Act.

18. Regarding process, Counsel submitted that both the respondent's witnesses were not present when he was terminated hence incapable of knowing if procedural fairness was undertaken prior to the claimant's termination. Counsel further submitted that there was no record of investigations conducted by the respondent into the alleged offence. Further there was no record of whether the claimant was given an opportunity to defend himself from any allegations that may have been levied against him.

19. Regarding house allowance and underpayment, Counsel submitted that the minimum wage ruling then was Kshs.6,839 as per the Wages Order No. 70 of 2009, yet his client was paid Kshs.5,126. Counsel therefore submitted that the Court should award Kshs.154,170 and 15% of the basic pay i.e. Kshs.6,839 as house allowance.

20. The respondent on its part submitted that the claimant was employed on 1st August, 2005 and it is the period from which he should raise any claim if justified. Counsel submitted that the law then did not cap the length of time one could be hired as a casual employee like it is currently under the Employment Act, 2007. According to Counsel, the claimant was then paid in accordance with the terms and conditions of service of casual employees that existed then and that the current law cannot apply retrospectively.

21. Regarding the dismissal, Counsel submitted that the dismissal was justified since the claimant allowed his colleagues to be absent for duty without prior approval of the respondent thereby exposing its clients to danger.

22. The Court has thus far reviewed the pleadings, supporting documents, oral testimony by witnesses and submission by counsel on the issue in dispute. The issues for determination therefore can be discerned as four, namely:-

- (a) When was the claimant hired?
- (b) Was he underpaid
- (c) Was his dismissal justified
- (d) Is he entitled to the prayers sought in the memo of claim?

23. Concerning when the claimant was employed, both parties seem to agree that the claimant was initially hired in 2002 as a casual worker. A casual worker by the very nature of engagement is not entitled to a letter of appointment. It is therefore explicable why the claimant did not initially have a letter of appointment but was issued with one in 2005. Further, as correctly submitted by Counsel for the respondent, the former Employment Act (Cap 226) did not limit the length of time one could serve as a casual employee and the present Act cannot apply retrospectively. Any claim arising out of the claimant's contract of employment can only therefore be reckoned from 1st August, 2005 when he was formally hired.

24. The letter of appointment provided that the claimant would be paid Kshs.7,046 per month made up of basic pay of Kshs.4,836, overtime of Kshs.1460, house allowance of Kshs.750. The letter further provided that the claimant would be entitled to 26 days leave after 12 months of continuous service.

25. The claimant has alleged that he was underpaid, however the Wages Order allegedly relied on to show the extent and nature of such underpayment was never produced in Court. The Court therefore finds this allegation not proved to the required standards. Regarding house allowance, the claimant's letter of appointment provided that he was entitled to Kshs.750 as house allowance which is approximately 15% of the claimant's salary of Kshs.4,836/=. To this extent, the claim for house allowance is not sustainable and is therefore disallowed.

26. On the issue of fairness or otherwise of the dismissal, the claimant was summarily dismissed for gross misconduct. The dismissal letter dated 29th April listed reasons for the claimant's dismissal which included that on 20th December, 2008 he as in-charge allowed guards to proceed on off without authorization of the respondent, he allowed guards to follow a time table he had

drawn himself leading to provision of less guards to clients and that on 29th April, 2009 he was rude to the respondents Managing Director. The letter did not inform the claimant that the management was considering terminating his services and call upon him to make any representations over the grounds for which termination of his services was being considered as required by section 41(2) of the Employment Act. The letter simply informed him that his services had been terminated summarily for reasons stated therein and called upon him to liaise with the accounts department for settlement of his dues.

27. Summary dismissal is dismissal with no notice or less notice than provided either in the contract of employment or the Act. It usually arises out of fundamental breach of a contract of employment which does not permit the giving of the requisite notice. The Employment Act enumerates some of the reasons or circumstances that can justify summary dismissal, however their enumeration does not prevent an employer from summarily dismissing an employee for a justifiable cause not enumerated therein.

28. The events for which the claimants was dismissed spread from 20th December, 2008 to 29th April, 2009. A span of approximately 5 months. Absence from work without lawful excuse and rudeness are some of the reasons an employee can be summarily dismissed. Failure by the respondent to dismiss the claimant on 20th December, 2008 when he allegedly authorized guards to be off duty without prior approval can only be interpreted to mean that the respondent did not consider it serious enough to warrant summary dismissal. To use it as a reason to dismiss the claimant some five months later was unreasonable and unfair. The Court therefore finds that the claimant's services were unfairly terminated and awards 6 month's salary as compensation for unfair dismissal. The Court further awards the claimant one month's salary in lieu of notice.

29. Concerning leave the Court is not sufficiently persuaded that the claimant did not take leave. The claimant simply claimed leave without alleging that he applied for the same but was denied. In his evidence in Court he stated that he took leave for 2007 to 2009 but not for 2006. It is difficult to understand why subsequent leave was taken in priority over previous outstanding leave. Besides refusal to go on leave when due is a continuing injury which must be brought within 12 months next following the cessation thereof (section 90 Employment Act. To this extent the claim for leave accrued in 2006 is statute barred and cannot be awarded.

30. In conclusion the Court finds that termination of the claimant's services was wrongful and unfair and awards him as follows

- (i) One month's salary in lieu of notice.....5,126.00
- (ii) Six months' salary for unfair termination.....30,756.00
- 35,882.00
- (iii) Certificate of service
- (iv) Costs of the suit

31. It is so ordered.

Dated at Nairobi this 10th day of July 2015

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge