



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NO. 2052 OF 2012

JOSEPH M. MIANO.....CLAIMANT

-VERSUS-

INTERSECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Background

This is a case based on unfair termination and non-payment of terminal dues. The case arose from the dismissal of Joseph M. Miano who is the claimant in the matter, herein represented by Mr. Ongicho on 8th November 2012, without due process.

The respondent has denied liability and averred that the claimant was never unlawfully or unfairly terminated, that the claimant absconded from duty and never appeared at the respondent's office even when summoned by the management of the respondent, which amounted to a fundamental breach of his obligation and summarily dismissed.

The respondent also claims that the claimant was not entitled to any notice to vacate office.

The case was heard on 11th March 2014 when the claimant testified as CW1, and there was no attendance on the part of the respondent.

Claimant's Case

CW1 stated that he worked for the respondent from 9th August 2005 as a driver. On 21st August 2012 he went to work and was told to leave the key where it was kept and go home and was not told why he was terminated.

The claimant testified that he was never given any letter of termination, that he was not given a fair hearing and the termination was without notice of termination and the respondent refused to pay his terminal benefits.

He testified that on 12th August 2012 he was assigned to a wedding to guard and drove the security guards.

He was on Monday 14th August 2012 told to record a statement of what had transpired at the wedding and he continued working until the day he was told there is no work by the Managing Director, Bill

Okwiri on 21st August 2012.

The claimant testified that his salary was Kshs 15,206. He denied that he absconded duty. He also denied that he sexually harassed any employee.

He asserted that there is no day he hid from work, that he reported to work every day from the day he was told to return the keys. That he was paid salary up to the day he worked. That he was driving a medium sized Toyota Hilux.

He prays for compensation for unfair termination. He denied ever being absconded duty.

Defence Case

The respondent filed an answer to the Statement of Claim filed on 8th November 2012 in court. The respondent denied the claim and avers that the claimant was never terminated or unfairly terminated.

That he was not entitled to any notice to vacate office, that the claimant absconded duty and never appeared at the respondent's office even after he was summoned by the management of the respondent.

The respondent claims that in the circumstances where the claimant absconded duty without trace, he cannot now claim any terminal dues.

That the claimant engaged in acts that were tantamount to sexual harassment of some of the female staff of the respondent.

It is the respondent assertion that upon realization that a claim had been lodged against him, the claimant disappeared and actually absconded from duty.

Analysis and Determination

The issues arising from the pleadings, evidence and submissions are:-

- i. Whether the claimant was dismissed or absconded duty
- ii. Whether the claimant is entitled to the prayers sought.

Unfair Termination

Termination is unfair under Section 45 of the Employment Act if, the reason for the termination is not justifiable or valid when the procedure followed is not fair. Fair procedure requires that an employee is accorded a disciplinary hearing before summary dismissal on an alleged misconduct in line with Section 41 of Employment Act.

Section 41 of the Act provides that before an employee is dismissed, the employer shall explain the reason for intended dismissal and then invite the employee to make his defence.

During the said hearing, the employee is entitled to be represented by a fellow employee of his choice or a representative of his union who shall also be entitled to make representations.

The said provision does not give the employer any option or discretion. On the other hand, a justifiable reason for dismissal is one that is valid. It must be gross misconduct, poor performance or incapacity.

Section 43 puts the burden of proving the reason for dismissal on the employer. It provides that where the employer fails to prove the reason or reasons for termination, the termination would be deemed to be unfair within the meaning of Section 45 of the Employment Act 2007. Thus the termination of the claimant's contract of employment on grounds of sexual harassment which was not proved was unfair.

The reason cited for summary dismissal was both invalid and unjustifiable. There is no evidence on the respondent's side to show that the claimant absconded duty or that he sexually harassed Immaculate Akinyi Onyango, a fellow employee. The respondent failed to produce any witness or evidence to that extent.

As regards the claimant's rights, the respondent should have given him a one month notice before terminating and dismissing him or pay in lieu thereof.

The foregoing explanation confirms that Section 41 of the Employment Act was not complied with. The claimant was not given a one month notice pending termination and a hearing before termination on grounds of misconduct.

For the reasons above stated, this court is of the considered opinion, and holds that the summary dismissal of the claimant was not in accordance with justice and equity and therefore unfair.

Reliefs available to the claimant

Payment of salary for days worked in August 2012 was admitted in evidence by the claimant. The claimant is awarded one month's salary in lieu of notice.

The claimant prayed for house allowance. His pay slip however shows that he was paid Kshs 1,000/= as house allowance. The claim for house allowance is dismissed. The claimant further prayed for leave allowance. However he testified that he was paid Kshs 7,000/= in lieu of leave. The claim for leave is therefore not proved and is dismissed.

The claimant prayed for service gratuity. According to the Regulation of Wages (Protective Security) Order, the claimant is entitled to 18 days gratuity after completing 5 years in service. Having worked for 7 years. The claimant is entitled to service gratuity.

Judgment is therefore entered in favour of the claimant as follows:-

1. Pay in lieu of notice Kshs 15,007.67
2. Service gratuity $(15,007.67/30 \times 18 \times 7)$ Kshs 63,032.20

TOTAL = KSHS 78,040/=

The claimant's costs shall be paid by the respondent and the decretal sum shall attract interest from date of judgment.

Orders accordingly..

Dated and signed at Kisumu this 16th day of June, 2015

MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 7th day of July , 2015

HELLEN WASILWA

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)