



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 104 OF 2015

RAYMOND MBEVI MUTISOCLAIMANT

VERSUS

XPOR SECURITY SOLUTIONSRESPONDENT

J U D G M E N T

Introduction

1 This a claim for terminal benefits and compensation accruing as a result of alleged unfair termination of the claimant's employment by the respondent on 3.5.2013. According to the claimant the termination was unfair because it was without prior notice, no just cause and done without following fair procedure.

2 The respondent has denied liability to pay any damages for the alleged unfair dismissal. According to her, the claimant was dismissed for material breach of his contract of employment as guard, by sleeping while on duty. It is further defence case that the claimant was afforded a fair hearing before the dismissal but failed to tender any defence.

3 The suit was heard on 26.3.2015 when the claimant testified as Cw1 and the respondent called Lenus Mwakio as the Rw1. Thereafter the parties filed written submissions.

Analysis and Determination.

4 There is no dispute that the claimant was employed by the respondent from 8.6.2012 to 3.5.2013 as a security guard, and for a monthly salary of Ksh 12,000. There is no dispute that on the night of 2.5.2013 Cw1 was no duty as a security guard at the Sai Rock Hotel in Mombasa with other guards. There is also no dispute that the Cw1 was summarily dismissed from employment by Rw1 vide letter dated 3.5.2013 for the reason that he was found sleeping while on duty, and which Rw1 termed as negligence. The issues for determination are whether the termination of the claimant's employment was unfair and whether the reliefs sought ought to be granted.

Unfair Termination.

5 Cw 1 believes that he was unfairly dismissed because he never slept while on duty as alleged by the defence. According to him he was alert the whole night from 6 pm on 2.5.2013 to 6 am 3.5.2013. He described himself as the team leader who assigned the other guards where to guard and kept on rotating them after every one hour. He admitted that the supervisor Mr. Isaac visited him at 10 pm on 2.5.2013 and left shortly thereafter only to return on 3.5.2013 in the morning and told him (Cw1) that he found him sleeping at 1.00am. He then told him to report to the office at Nyali and when Cw1 went to the office he

met the operations manager Mr. Mbori who told him that he was found sleeping. Despite his denial of the accusation, Mr. Mbori directed him to hand over company property on 4.5.2013 for reassignment to another station. That on after handing over on 4.5.2013, Cw1 was given a dismissal letter dated 3.5.2013 by the Rw1. He produced a copy of occurrence book (O B) to prove that he was alert throughout the night. He maintained that he was denied hearing on allegation that he had been photographed while asleep. That he reported the matter to the labour officer but again the labour officer relied on the said photographs to find that the claimant was sleeping while on duty.

6 Rw1 has contended that the dismissal was fair because the claimant was found sleeping while on duty and photographed from behind and front by Mr. Durant and Mr. Mbori while on patrols. That such conduct amounted to breach of his employment of contract which entitled the respondent to dismiss the claimant summarily. He produced copy of contract of employment dated 8.6.2012 (exhibit D1) and photographs (Exhibit D 2a&b) to support his contention that there was a valid reason for the dismissal. In addition, Rw1 contended that Cw 1 was given a fair hearing before his dismissal. That the hearing was conducted by Mr. Mbori and Rw1 according to the respondent's disciplinary hand book but Cw1 never responded when asked by Mr. Mbori why he was sleeping while on duty after being shown his photographs. That he was then given a dismissal letter and directed to clear with the company but he disappeared and went to report to the labor office demanding salary for April 2013 and salary in lieu of notice.

7 After considering contentions by the Rw1 and Cw1 the court finds on a balance of probability that the claimant was unfairly dismissed. The reason for dismissal was not proved before this court just like fair process. Under Section 45 of the Employment Act (E A), termination of employment is unfair if the employer fails to prove that there existed a valid and fair reason for termination and that a fair procedure was followed before arriving at the termination.

8 In this case the only evidence produced to prove that the claimant was found sleeping while on duty are photographs of the claimant allegedly taken by a Mr. Durant and Mr Mbori. The photographs were produced by Rw1 and not the maker of the photographs. The photographs are in black and white photocopies and Cw1 denied that they represented his image. The court has carefully examined the said photographs (Exhibit 2a & b) and finds it hard to identify the image as that of the claimant. The same were produced by a stranger who did not explain the circumstances under which they were taken and processed. The author of the photographs never testified in this case and as such the court has made a considered opinion that the respondent did not discharge her burden of proving a valid and fair reason to warrant the dismissal of the claimant within the meaning of Section 43, 45 and 47 (g) of the Employment Act. In any event the respondent did not prove that the alleged negligence was deliberate or an error of judgment by Cw1.

9 Likewise the court finds that the respondent failed to prove that she complied with Section 41 of the Employment Act before dismissing Cw1. According to Rw1, Cw1 appeared before him and Mr Mbori and was showed photographs and asked why he was sleeping while on duty. That when he failed to reply, he was given a dismissal letter and directed to clear with the company. In this court's view, that exercise did not amount to a fair hearing within the meaning of Section 41 of the E A.

10 Section 41 of the EA provides in mandatory terms that, before terminating an employee's employment contract on ground of misconduct, like in this case, he shall explain to the employee, the reason for the contemplated termination in a language the employee understands. That the employee shall be accompanied by a fellow employee of his choice or a shop floor union representative. That the employee and his companion shall be accorded a chance to air their defence before the decision to dismiss him is reached. Consequently the court answers the first issue for determination on the affirmative.

Reliefs

11 In view of the foregoing matters, the court makes a declaration that the termination of the claimant's employment by the respondent was unfair and wrongful. He is therefore awarded 3 months' salary for unfair termination being Ksh 36,000. The reason for not awarding the maximum compensation

is because the claimant had only worked for the respondent for only one year. Secondly, the court has considered the fact that a security guard could secure another employment within 3 months with some due diligence.

12 He will also get Ksh 8,400 as pay in lieu of 21 days annual leave for the one year served. He will also get Ksh 12,000 being one month salary in lieu of notice. As regards over time, Cw1 testified that he was employed as a day guard working for 8 hours per day but when he was transferred to Sai Rock hotel on night shift he was made to work for 12 hours with no additional pay. He therefore prayed for overtime pay for the extra 4 hours worked every day. He worked as such for 8 months.

13 In response Rw1 stated that the Ksh 12,000 salary included the pay for overtime. He contended that a guard can lawfully work for 8 to 10 hours per day. The court is of the view that working for 12 hours at night should attract a high pay than working for 8 hours during the day time. Rw1 never denied that Cw1 started as a day guard working for 8 hours per day before being transferred to a new station to work in the night shift. Consequently the claimant is awarded over time for 4 hours worked per day for 8 months. His daily pay was Ksh 400 which is equal to Ksh 50 per hour. He will therefore get Ksh 200 overtime pay per day x 26 days per month x 8 months = 41,600. The claimant will also get a certificate of service as prayed.

Disposition

14 For the reasons stated above judgment is entered for the claimant declaring his dismissal unfair and wrongful and awarding him

Ksh 98,000, certificate of service, costs and interest.

DATED and DELIVERED at MOMBASA this 2nd day of October 2015.

ONESMUS MAKAU

JUDGE

2.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE