



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 248 OF 2013

CHARLES ETYANG .....CLAIMANT

VERSUS

TOTAL SECURITY SURVEILLANCE .....RESPONDENT

### **J U D G M E N T**

The claimant has hereby sued the respondent his former employer for unlawful dismissal for which he seeks to recover accrued employment dues and certificate of service. In total he prays for ksh.184,00/ plus any other relief which the court may deem fit and just to grant.

In response the respondent has denied liability and averred that the dismissal was lawful because the claimant had committed gross misconduct. The case was heard on 12/11/2013 when the claimant testified as CW1 and Patricia Kinyanjui testified for the defence as Rw1.

#### **CLAIMANT'S CASE**

CW1 explained that he was employed by the respondent on 23/7/2004 as a guard based at Bima towers Mombasa. He was later promoted to a supervisor taking charge of KRA premises in December 2004. On 31/3/2005 he was posted to the control room where he worked until April 2012 when he was posted to Mitchell cotts to hold brief for another person as supervisor. He produced letter dated 1/3/2011 as exhibit 1 to confirm that he had been appointed as a Controller.

On 25/6/2012 while on duty, CW1 received a call from Mr. Masika at the control room telling him to direct Mr. John Muringa who had absconded duty for 3 days to go home and report to the office the following day. CW1 executed the instructions but then, no other guard was send to replace the suspended guard forcing him (CW1) to do double job of supervising other guards as well as guarding. He would call a guard to guard his place while he went on checking on other guards.

After 2.30 a.m heavy rain poured and continued for a while. At 5.45 am Mr. Cyrus Majune, a guard noticed a small hole on the rear wall of the premises and reported to CW1. The CW1 went to see the hole after which he reported to the client after he failed to get his bosses. The hole was in the area which was manned by the dog handlers. The matter was reported to the police and CW1 among other guards recorded statements but CW1 was never charged. He continued to work until 2/7/2012 when he was stopped pending service of a dismissal letter which he received on 5/7/2012. The dismissal letter was dated 26/6/2012 and was produced as exhibit 2. It was signed by the RW1.

CW1 was never accorded any disciplinary hearing before the dismissal. The reason for dismissal were

absenting from work and failing to prevent a felony leading to loss of clients property. He was never paid any employment terminal dues even after serving a demand letter through his lawyers.

He on cross examination, denied signing the contract of employment dated 23/7/2011 contending that the contract he signed was bulkier and included details on the uniform and his next of kin.

He admitted that on the night of 25/6/2012, he was in charge of guarding Mitchel Cotts. He further admitted that a theft was discovered just before he left duty in the morning. He did not know what property was stolen but he admitted that no theft could have occurred if there was diligent watching. He denied the reason for dismissal contending that he was on duty on the material night doubling as a guard and a supervisor because there was a shortage of one guard.

He admitted taking 10 days off duty vide letter dated 22/4/2011 but contended that it was an unpaid off. He denied signing any other leave application forms and denied ever going for leave during his service. He however admitted taking 4 days off between 8/9/2010 and 11/9/2010. He contended that the leave forms bore a forged signatures.

He explained that after promotion he was not required to wear uniform and he returned but a monthly uniform deduction of ksh.300 per month was wrongful made from his salary for 18 months and consequently demanded refund of ksh.5400.

### **DEFENCE CASE**

RW1 is the respondent HR Manager based at Nairobi. He contended that the claimant was employed on 23/7/2009 as a guard and thereafter promoted to a supervisor based on annual contract. RW1 produced letter of appointment dated 23/7/2009 and 23/7/2011 as exhibit D1 and D2. She contended that the CW1 was in charge of security operations at Mithcellcotts including identification of security risk and patrolling the allocated areas. The said duties were not contained in the appointment letter but job description document produced as exhibit D11.

On 26/6/2012 a report was made to Nairobi office about theft at Mitchell cotts. The client stated that 25 bags of rice were lost through a hole dug through the wall and demanded ksh.100,000/ compensation. RW1 contended that CW1 never reported the theft until it was recovered in the morning.

RW1 produced document showing leave taken by the CW1 and stated that he was only entitled to 26 leave days per year. She explained that by Exhibit D.3 he took 10 days leave. He further took 16 days, 10 days, 4 days and 15 days, vide exhibit D.4, D.5,D.6 and D.7 respectively. RW1 did not however have the original copies of the exhibits she produced.

She states that the claimant was not entitled to notice before dismissal because the reason was based on gross misconduct. He was also not entitled to service pay because CW1 was a member of NSSF. She however, admitted that claimant was not paid his salary for June 2012.

On cross examination RW1 could not tell who was the manager of the respondent in 2004 and whether CW1 was working for the respondent at that time. She however confirmed knowing a manager called Oera currently based in Eldoret but could not tell whether he once served at the Mombasa branch. because she joined the respondent only in 2009. RW1 stated that uniform clearance is done after termination of service and contended that if CW1 returned his uniform in 2006 there was no record to support that return. She maintained that supervisors were supposed to wear uniform. RW1 concluded by admitting that CW1 was not paid for the days he went for leave.

After the close of the hearing the defence counsel filed written submissions which the court has considered.

## **ANALYSIS AND DETERMINATION**

The issue for determination emerging from the pleadings, evidence and the submissions are:

- 1. whether the dismissal of the claimants' employment was fair.**
- 2. Whether the relief sought ought to issue.**

### **Was the dismissal unfair?**

The evidence on record is that the claimant was summarily dismissed on 2/7/2012 by his Branch boss verbally and then on 5/7/2012 he received the dismissal letter dated 26/6/2012. Without going to the justification of the reason for the dismissal, the court is satisfied with the claimants evidence that the dismissal was done before he was accorded a disciplinary hearing.

Section 41 of the Employment Act requires, in mandatory terms, that an employer must accord to an employee a hearing before dismissal on ground of misconduct under Section 44 of the said Act. The defence did not attempt to disprove the alleged unfair dismissal. Consequently the court finds that the dismissal was unfair within the meaning of Section 41 and 45 of the Employment Act.

On the other hand the reason for the dismissal was not proved against the claimant. The alleged theft was not to blame solely on the claimant. The evidence that the theft was at the area being guarded by the dog handlers was not controverted. It was also not denied that there was heavy rain that night after the claimant made routine patrol at 2.30am. It was also not denied by Mr. Masika that there was shortage of one guard at the scene after the said Mr. Masika directed the claimant to suspend Mr. John Muringa on disciplinary grounds. Lastly, it was not denied by the defence that no criminal charges were ever preferred against the claimant and no disciplinary hearing was ever done that found the claimant guilty of the alleged absence from duty or failure to personally prevent a felony.

In view of the foregoing finding the court finds that the evidence of RW1 was only hearsay because she only testified on information of the alleged misconduct received from people who did not testify and no evidence was tendered by the eye witnesses or at least by the Mombasa branch managers. Consequently the summary dismissal was not justified by the evidence from the defence within the meaning of Section 43 and 45 of the Employment Act which bar an employer from dismissing an employee unless there exists a valid and justifiable reason for the same.

### **The reliefs available**

In view of the findings above the dismissal is declared unlawful as prayed in prayer (a) of the claim. The claimant is awarded ksh.10,000 being one month salary in lieu of notice for the unlawful summary dismissal. The claim for service pay is dismissed for the reason that the claimant was a member and contributor of NSSF. The claimant will get compensation for leave not taken although he pleaded for leave allowance, he clarified in evidence that he meant payment in lieu of leave. Being a lay man the court will excuse that error in his pleadings.

The court will however not excuse the claim for leave outside the 3 years limitation period provided for under Section 90 of the Employment Act. The court grants the claim for accrued leave backdated to 12/8/2010 which 3 years before filing of the suit on 12/8/2013. That period is about 2 years between August 2010 and July 2012 when CW1 was dismissed. The claimant will therefore get 26 leave days per year which translates to 52 leave days. As contended by CW1 and admitted by RW1 the leave or off days taken by the CW1 during his service were without payment salary. Consequently he is awarded ksh.17,333.30 for the accrued leave.

The claimant will also get a refund of ksh.5400 being monthly uniform deductions of ksh.300 erroneously made after the promotion of CW1 to a supervisor where uniform was not needed. That allegation was not contradicted by his immediate branch manager. The court believes the explanation by the claimant, otherwise he would still have been deducted uniform dues until his dismissal.

On the other hand the evidence by the RW1 was not accepted as prove that uniform was still required for the CW1 because she was not working for the respondent during 2006 when CW1 ceased to wear uniform after promotion. She was also not the immediate supervisor of the CW1. The allegation that there was no record of the surrender of uniform by CW1 is neither here nor there. In any case RW1 did not have the original documents in respect of the claimants employment. She did not also verify with the branch manager about the alleged missing records which can only be in the custody of the respondent. The claimant is also awarded his salary for June 2012 being ksh.10,000/ for reasons that RW1 admitted in evidence that the same was not paid. The court also directs the respondent to issue a certificate of service to the claimant for the period between 2004 and 2012 as provided for under Section 51 of the Employment Act.

Lastly, claimant prayed for any other relief that this court may deem fit to grant. The court appreciates the fact that lack of representation by counsel may have caused the failure to pray for compensation for unlawful dismissal and also salary for days worked in July 2012. It has not been disputed that the claimant received the dismissal letter on 5/7/2012. The court therefore awards him salary for 5 days in July 2012 being ksh.1,666.70. In addition and in view of the declaration that the dismissal was unfair the claimant is awarded 12 months gross salary as compensation being ksh.120,000/.

### **DISPOSITION**

Judgment is entered for the claimant against the respondent as follows:

- a. **The dismissal of the claimant from employment is declared unlawful and unfair.**
- b. **The respondent shall pay the claimant ksh.164,400/.**
- c. **Certificate of service to issue.**
- d. **Costs and interest from the date of filing the suit.**

Orders accordingly

**Signed, dated and delivered this 24<sup>th</sup> day of February 2014**

**O. N. Makau**

**Judge**