

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 838 OF 2010

EZEKIEL OMBASO TAGITI.....CLAIMANT

VERSUS

K.K. SECURITY.....RESPONDENT

JUDGMENT

1. The Claimant herein Ezekiel Ombaso Tagiti filed this suit in this Court on 23rd July 2010 claiming 3 months pay as final retirement notice, gratuity for 8 years worked at 30 days per year worked, leave payment of 1 month and general damages equivalent to 6 months all totaling to Kshs. 143,766/=. He amended his claim on 3rd December 2010 to increase his pay per month to 16,024.95/=.
2. The Respondent denied the claim and filed a Reply to the Memorandum of Claim on 15th September 2010 and an Amended Reply to the Memorandum of Claim on 8th December 2010. In the defence the Respondent averred that the Claimant was dismissed for gross misconduct due to unprofessional and dishonest activities detrimental to the Respondent's operations and image contrary to the terms of the contract of service and his legal obligations as an employee under the Employment Act 2007.
3. The Claimant testified that he was employed by the Respondent in May 2000 and was summarily dismissed on 5th October 2008. He stated that he had given his bank instructions to pay but the bank did not effect payment and he notified his colleague Nahashon and paid him the sum of 3,800/= which was paid by the Respondent. He testified that he was earning 16,024/= and worked with commitment and even got a certificate of appreciation, commendation by clients and he was taken for training as well. He thus sought payment of the sums sought in his claim as he was not agreeable to the dismissal as there was not justice. He denied using the company vehicle for personal work. He claimed the day he went to the bank he and his colleague were both on duty.
4. He was recalled for cross-examination and stated that he worked for 9 years and left the Respondent in position of Crew Commander. He acknowledged that he knew Nahashon Ratemo and stated that he went to Kiambu on 20th September 2008 with Nahashon Ratemo at 9.00 a.m. He testified that it was during working hours and they went to Equity Bank Kiambu. He had requested the persons at the office who had an Equity account to guarantee him on a personal loan of 10,000/= and Nahashon Ratemo agreed to guarantee. He testified that Ratemo was interviewed by the bank officials alone and he agreed to guarantee the loan. He stated that the deduction made to Ratemo's pay was after the Claimant had left KK the Respondent. He refunded the money to Ratemo. He testified that he thought the loan had been deferred and so he withdrew the money. He denied coercing Ratemo to guarantee him on the loan.
5. In re-examination he testified that he requested Nahashon and he agreed. He denied that he coerced Ratemo to guarantee him. He confirmed that it was a request as evidenced by the statement of Nahashon B. Ratemo who stated that he was requested by Ezekiel Tagiti a Crew Commander Zulu 26 to go and be a guarantor and that they proceeded with a night guard Nahashon Bugundu by matatu to Kiambu and back. He resumed his duties after the exercise.

6. The Respondent called Nahashon Bagwasi Ratemo who still was in the employ of the Respondent. He stated that he knew Ezekiel Ombaso Tagiti the Claimant herein who was his supervisor in 2008. He testified that he had declined earlier but he agreed to go out of fear because the Claimant was his supervisor. He produced a bank statement which showed that a sum of Ksh. 3,484/= was deducted from his pay. He reported the matter to the office as he suffered pecuniary embarrassment due to the deduction.
7. In cross-examination he testified that he knew the Claimant for 4 months and that he agreed to guarantee the Claimant. He admitted that he wrote the hand written statement in which he states that he agreed to guarantee the Claimant. He testified that he was not forced to write the statement. He testified that at the time he wrote the statement the Claimant was Crew Commander. He admitted that he was given the money deducted and had no claim against the Claimant.
8. The Claimant filed submissions on 29th July 2013 and reiterated his case and stated that the summary dismissal was not lawful since the Claimant did not abscond from duty. In the submission the Claimant denies having sought a colleague to escort him to the bank.
9. As at the time of writing the judgment, the Respondent has not filed any submissions. The case of the Claimant is that he was unlawfully dismissed by the Respondent. The Respondent avers the dismissal was for just cause. The Claimant avers that the witness for the defence willingly guaranteed him for the loan taken. The Respondent's witness testified on oath and stated that he was coerced. However, in his statement recorded a short while after the incident on 23rd October 2008 clearly does not suggest coercion. It does not support the Respondent's claim that there was a company vehicle used.
10. It is clear that the dismissal was prompted by the report made by Mr. Nahashon Ratemo after he found a sum of money deducted from his pay. The Respondent made inquiries to the point statements were recorded. The Claimant was asked to explain and he did. He stated that the bank deducted the loan sum from his guarantors and the incident was not intentional. He was therefore summarily dismissed after a process that permitted him to give his version of events. The recommendation was disciplinary action. It is not disputed that final dues were paid inclusive of day worked, overtime pay, service and pay for public holidays. The calculation was based on the basic salary as is expected. The upshot of the foregoing, is that the Claimant was paid his dues and no notice was payable to the Claimant as his termination was under summary procedure. The Claimant is thus not entitled to recover from the Respondent. I hereby dismiss the claim by the Claimant but order that each party bears their own costs.

Orders accordingly.

Dated and Delivered at Nairobi this 24th day of March 2013

NZIOKI WA MAKAU

JUDGE