



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 83 OF 2013

DANIEL OTIENO MBOLA.....CLAIMANT

-VERSUS-

ROBINSON INVESTMENTS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th March, 2014)

JUDGMENT

The claimant **Daniel Otieno Mbola** filed the memorandum of claim on 12.04.2013 through Orina & Company Advocates. The claimant prayed for payment for:

- a. **Salary for August, 2012 Kshs.9,049.10.**
- b. **Underpayments Kshs.52,177.20.**
- c. **Overtime Kshs.58,596.50.**
- d. **Rest days and off days Kshs.28,528.35.**
- e. **Public holidays Kshs.9,120.00.**
- f. **One annual leave Kshs.7,842.55.**
- g. **Compensation Kshs.108,589.20.**
- h. **Total Kshs.273,903.60.**

The respondent **Robinson Investments Limited** filed the memorandum of Defence on 30.05.2013 through Githiru & Company Advocates. The respondent prayed that the court finds that the claimant's termination from employment was lawful and fair and the claimant's claim be dismissed with costs. The claimant filed the reply to the memorandum of defence on 3.06.2013.

The case was heard on 18.09.2013 and on 24.02.2014. The claimant gave evidence to support his claims. The respondent's witness was Agnes Mokabi Otieno, the respondent's director.

The claimant was employed by the respondent as a night guard on 11.06.2011 and the claimant testified that he was later promoted to a CCTV controller and deployed at the Provincial General Hospital in Nakuru. He was in employment up to 4.09.2012.

The claimant testified that on the evening of 2.09.2012, a person went to him with Kshs.2,000 with a view of bribing him to permit a patient to escape from the hospital. The claimant testified that he rejected the bribe and advised the person to deal with the hospital's management. The following morning, the person came back, tried to get the patient out of the hospital without paying the bills but was apprehended by the security personnel at the hospital's main gate. The claimant admitted in his testimony that the CCTV control room had cameras that enabled him to see patients including the place the patient may have used to escape but he had failed to alert any person about the escaping patient because, the claimant testified

that he thought the patient was going to consult the guards at the gate.

The patient was returned to the hospital. The claimant and the person who was aiding the patient to escape were arrested. However, no criminal charges were preferred against the claimant as he was released from the police station. The claimant after the release reported on duty and met the general manager called William. William advised the claimant to go away to be recalled later to resume work. The claimant was never recalled and the general manager's secretary conveyed to the claimant that the claimant could not speak to the general manager because the claimant had been dismissed.

The issues for determination in this case include:

- a. **Whether the claimant was unfairly dismissed.**
- b. **Whether the claimant is entitled to the remedies as prayed for.**

For the 1st issue, the respondent's witness testified that the respondent decided to terminate the claimant's employment for gross misconduct on account of dishonesty namely, collaborating for a patient with pending bills to escape from the hospital. The court has carefully considered the claimant's evidence and finds that the claimant admitted that he failed to report the initial attempted bribery of Kshs.2,000.00. In his testimony, he also admitted that he saw on the cameras the patient leaving the hospital towards the hospital gate but once again he failed to take action or report the anomalous observation to the relevant authorities. The court finds that by his own conduct and admission, the claimant was guilty of gross misconduct of dishonesty and collaboration in aiding a patient to attempt to escape from the hospital.

In the circumstances of this case, the court finds that the claimant knew the reasons for his termination, he admitted to the misconduct and the poor performance was obvious in the circumstances. The court finds that the claimant's submission that he was not given notice and a hearing was unfounded. The court holds that where an employee admits expressly or by obvious inference from his conduct that he or she is culpable of misconduct or poor performance, then the employee is liable to punishment including dismissal by the employer. The court further holds that the notice and hearing would not be necessary where the culpability on account of poor performance or misconduct has already been established by reason of the employee's express admission or admission obviously inferred from the employee's conduct. In this case, the claimant admitted he observed the anomalous events but failed to report and he expressly testified that he failed to act as expected. The court has therefore found that the dismissal was fair.

The second issue for determination is on the entitlement to the remedies as prayed for and the court makes the following findings:

1. The claimant was paid due underpayments and salary for August, 2012 as per letter by respondent's advocates dated 17.10.2013 exhibit **R6**. Claims for under payment based on engagement as a machine assistant are found not valid. The court finds that the claimant was at all material time employed as a guard and in his last service, he performed the guarding with aid of CCTV cameras. There was no evidence that he worked on the CCTV cameras such as to fix and one way or the other operate them to justify claims of engagement as a machine assistant. Thus, the claim for the underpayments and salary shall fail.
2. The respondent's witness confirmed in her testimony that the claimant reported at 6 am to 6 pm or 6 pm to 6 am depending on the shift. The witness further confirmed that the claimant was not paid. For weekends, rest days or off days and public holidays, the witness confirmed that the claimant worked and was paid but no evidence of the payment was filed. For leave, the respondent's witness testified that she did not know if the claimant took leave and the court finds that on a balance of probabilities, the claimant is entitled to one annual leave as prayed for. On a balance of probability, the court finds that the claimant is entitled to pay for normal overtime, rest days or off duties, public holidays and one annual leave as claimed but calculated at the prevailing statutory pay as a guard.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. **The respondent to pay the claimant normal overtime, rest days or off duties, public holidays and one annual leave as claimed but calculated at the prevailing statutory pay as a guard.**
- b. **The claimant to calculate and to serve the respondent the dues in (a) within 7 days from the date of the judgment for recording the amount in court on a mention date convenient to the parties.**
- c. **The respondent to pay the dues in (a) by 1.05.2013, in default, interest at court rates to be payable from the date of the judgment till full payment.**
- d. **The respondent to pay half costs of the suit.**

Signed, dated and delivered in court at Nakuru this Friday, 14th March, 2014.

BYRAM ONGAYA

JUDGE