



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1006 OF 2010

BETWEEN

SEBASTIAN JUMA WANZALA CLAIMANT

VERSUS

**INTER SECURITY SERVICES LIMITED
RESPONDENT**

Rika J

CC. Mr. Kidemi.

Mr. Makokha instructed by Namada & Company Advocates for the Claimant

Mr. Kibera instructed by Kibera & Associates Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Sebastian Juma Wanzala filed this Claim on 2nd September 2010. The Respondent filed its Statement of Response on 17th January 2012. Sebastian testified, and closed his case on 3rd June 2013. Issack Okwirry, Director of the Respondent Security Firm, testified for the Respondent on 25th September 2013 when the hearing came to a close. The dispute was last mentioned on 12th February 2014, when the Parties confirmed the filing of their Closing Submissions and were advised Award would be delivered on notice.

2. The Claimant states he was employed by the Respondent as a Security Guard, from 2nd February 1997 to 24th May 2010. He was guarding a Construction Site at Hurlingham Nairobi, on 25th May 2010 when the Respondent's Manager asked him to hand over the Work Uniform and leave. He was summarily dismissed on the spot. As at the time of termination, he earned a monthly salary of Kshs. 7,076. No notice or reason was given before termination. He Claims from the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 7,076;
- b. Leave pay for the entire 12 years worked at Kshs. 84,912;
- c. Salary for 24 days worked in May 2010 at Kshs. 6,576;
- d. Service pay at 18 days' salary for 12 years completed in service at Kshs. 50,947; and

- e. Compensation for unfair termination, the equivalent of 12 months' salary at Kshs. 50, 947
Total..... Kshs. 200,458

He prays for a declaration that termination was unfair and unlawful, and for costs, together with interest.

3. He stated that on the material day, he found some people washing cars outside the Site. He had not been asked to stop them from doing this. The son to the Director of the Respondent visited the Site, and demanded to be told by the Claimant, why these people were allowed to wash the cars outside the Site gate. The Claimant told the Director's son that his work was to guard the Site, not other places. He was asked to remove the Uniform and go away. He was not paid for the days worked, and never once went on leave. Cross-examined, he stated he currently works at Construction Sites, doing general labour. He is not formally employed. He was alleged to have allowed strangers to wash cars at the Site, and also allowed Women to make and sell uji and tea. He agreed he did not reveal these accusations in his Statement of Claim, but the same were revealed by the Respondent in the Statement of Response. He clarified upon redirection that the Respondent gave him the 2 reasons for termination at the Site, and he explained to the Respondent, that his role was to Guard, not regulate car washing and hawking. He thought such regulation was in the docket of the then City Council Askaris. The Claimant prays the Court to allow his Claim.

4. The Respondent's position is that Sebastian was its Employee as stated in the Claim. It is also true the Respondent summarily dismissed the Claimant, after he was found to have allowed third Parties to enter the premises the Claimant was guarding, and conduct the business of carwash and cooking. He had been severally warned against such tendency. He acted contrary to the instructions of his Employer. Summary dismissal was in conformity with the Employment Act 2007.

5. Issack Okwirry testified he was called by a Client of the Respondent Company, and informed there were strangers within the Hurlingham Property the Respondent had been entrusted to guard. The Property was under construction. Construction had stalled, and the Property Owner was in the process of getting a new Contractor. Okwirry proceeded to the Site and found people washing cars and others cooking. They were trespassers. He confiscated their tools of trade and replaced the Claimant. Sebastian was summoned to the Office to explain himself. He did not explain why there were trespassers at the Site. He left the Office and did not return. He was not dismissed by the Respondent.

6. Testifying under cross-examination, the Claimant told the Court trespassers were found washing cars and cooking during the day. Work at the Site had stalled, and the Respondent called to secure it. There were no Workers inside. It was a gated Site. It was not the Claimant's responsibility what happened outside the gate. People were cooking inside the premises. The Witness could not say who the food was being sold to, but conceded Construction Sites ordinarily have Women who cook and hawk their food to the Site Workers. Okwirry went to the Site in the company of Simon Oluoch a colleague at work. He confiscated the sufurias and jikos used by the trespassers. Vehicles were being washed at the gate, but outside the premises. Okwirry questioned the Claimant at the Office in the presence of Oluoch. Sebastian did not have a Witness at the questioning. He left employment after the incident. He was not dismissed by the Respondent. Okwirry conceded however that paragraph 7 of the Statement of Response states that the Claimant was summarily dismissed by the Respondent. He confirmed on redirection that cooking was going on inside the premises, and carwash at the entrance, outside the premises. The Respondent prays for dismissal of the Claim.

The Court Finds and Awards:-

7. The Claimant was employed by the Respondent Security Firm on 2nd February 1997, as a Guard. He served up to 25th May 2010. At the time of his exit, he earned Kshs. 7,076 per month.

8. The manner of his exit is contested. The Claimant's position is that he was summarily dismissed. The Respondent's Witness testified the Claimant left of his own volition, while the Respondent in its Statement of Response states the Claimant was summarily dismissed.

9. The two positions by the Respondent cannot both be true. The Court is persuaded the evidence by the Respondent's Witness, that the Claimant left of his own volition, is untruthful. The assertion by the Claimant, and the contents of paragraph 7 of the Statement of Response, that the Claimant left on summary dismissal, is the correct position.

10. Did the Respondent justify its decision as required by Section 43 and 45 of the Employment Act 2007? The Claimant was guarding a Construction Site during the day, at Hurlingham Area in Nairobi. The Respondent alleges trespassers were found to have entered the Site, and engaged in the business of car wash and cooking.

11. Issack Okwirry conceded in cross-examination that the Site had its own gate. The cars were being washed outside the compound, near the gate. The Claimant's duty did not go beyond the compound he was entrusted to guard. The Court sees no reason to disagree with the Claimant on this. It was not his duty to stop third Parties outside the gated Construction Site, from engaging in car wash. The Claimant testified, and the Court believes him, that he explained to the Respondent this was the role of the City Council Askaris.

12. The second accusation was similarly not a valid and sufficient reason to terminate the Employee's contract of employment. It was conceded by Okwirry that ordinarily, there are Women who frequent Construction Sites in Kenya, cooking and supplying the Workmen with food. The particular Site had stalled, and it would not make sense to have Women cooking and selling food from inside the Compound; they would not have any Workman at the Site, to hawk their dishes to. This was not a valid ground to justify summary dismissal.

13. The two grounds raised by the Respondent in substantive justification, were not tested through a disciplinary hearing. Had there been a proper hearing as contemplated under Section 41 of the Employment Act 2007, the Respondent could perhaps, have been able to substantiate its allegations against the Claimant. Instead, the Respondent alleges to have called the Claimant to the Office, where the Claimant remained 'un-cooperative.' The Claimant states he was dismissed on the spot, told to remove his Uniform and go away. On this, the Claimant's evidence appears more persuasive. Okwirry testified he replaced the Claimant at the Site with another Guard on the same day, which in the view of the Court suggests an on the spot summary dismissal decision, shorn of any procedural fairness. Where an Employer opts for on the spot dismissal, the Employer loses the opportunity to show that the reasons for dismissal are valid. In this case, the Respondent gave no valid reasons for its decision, and lost the opportunity for substantiation, by disregarding the Claimant's procedural protections. It is little wonder that in the end, the Respondent was not sure if it should hold the position that the Claimant was summarily dismissed, or deserted employment.

14. The Claimant is therefore entitled to a declaration that termination of his contract was unfair and unlawful. He merits 1 month salary in lieu of notice at Kshs. 7,076 and compensation for unfair termination, which the Court allows at the equivalent of 7 months' salary totaling Kshs. 49,532. There is common evidence that he worked for 24 days in May 2010, and no evidence that his salary for the month was paid, was availed to the Court. Okwirry offered no evidence of payment, saying he did not know if the salary was paid. An Employer should be in a position to say at all times, if an Employee's salary has been paid or not. The Claimant is allowed salary for the 24 days worked in May 2010 at Kshs. 6,531. Okwirry similarly came to Court without any conclusive evidence of the Claimant's annual leave record. He testified he would have to confirm if the Claimant ever went on leave. Confirmation should have been made in Court. The evidence of the Claimant that he never went on annual leave for the 12 years worked, was not contradicted by any records from his former Employer. He is allowed 252 days of annual leave pay at Kshs. 68,582. The pay slips exhibited by the Claimant show the Respondent deducted N.S.S.F contribution in March and May 2010. There were no records of other contributions made. The Regulation of Wages [Protective Security Services] Order justifies the payment of gratuity/service to the Claimant at the rate of 18 days for the completed years of service. The Claimant is granted gratuity/service pay calculated at Kshs 7,076 divided by 26 days worked in a month = Kshs. 272 x 18 = Kshs. 4,898 x12 = Kshs. 58,785. The Parties shall bear their own costs. There shall be no order on interest. *IN SUM:-*

[a] Termination was unfair for validity of reasons and procedural fairness;

[b] The Respondent shall pay to the Claimant 7 months' salary in compensation at Kshs. 49, 532; 1 month salary in lieu of notice at Kshs. 7,076; 24 days' salary at Kshs. 6,531; 252 days of annual leave at Kshs. 68,582; and service/gratuity pay at Kshs. 58,785 – total Kshs. 190,506;

[c] The said amount shall be paid within 30 days of the delivery of this Award; and

[d] No order on the costs and interest.

Dated and delivered at Nairobi this 4th day of April 2014

James Rika

Judge