



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1066 OF 2012

KIPKEMOI ARAP RUGUT 1ST CLAIMANT

MICHAEL OLWENY 2ND CLAIMANT

VERSUS

NAIROBI ACADEMY (H) LIMITED RESPONDENT

Claimants in person

M/S Nyamwea for Respondent

JUDGMENT

1. The 1st and 2nd Claimants were employed as security guards at the Respondent School compound. The school is situated on a twenty acre plot. The 1st Claimant was stationed at the School Bus Park whereas the 2nd Claimant was stationed pre-prep School cum squash area.

2. The 1st and 2nd Claimants were employed on 1/2/1996 and worked continuously for the school until 29th September 2009.

This followed a break-in and theft in the administration block. About 10 doors were broken into and money and property was stolen.

The school had at the material time about twelve (12) guards stationed at different places during the night shift.

3. According to the Director of the school, **Mr. Francis Mwangi Kirugo**. The Bus Park and the pre-school were about 150 meters apart. The Administration Block where the theft took place was about equal distance from the Bus Park and the pre-school.

4. The guards were allocated duties and station by the care taker. There were guards stationed at the Administration Block. Following the theft, five (5) guards were arrested by the police and charged with the offences of office breaking and committing a felony contrary to **Section 306** of the Penal Code. In the alternative the guards were charged with the offence of neglect to prevent a felony contrary to **Section 392** of the penal Code.

5. On the 1st October 2009, whilst the 1st and 2nd Claimants were in custody, the Director of the school, suspended the two Claimants from employment **“until such time that the police will finish their investigation, the case heard in Court and decided.”**

The letters of suspension of the same date were produced as evidence before Court.

The first Claimant Kipkemoi Arap Rugut was in custody for about one year and one month whereas the 2nd Claimant came out on bond after 25 days in custody.

6. According to the 1st and 2nd Claimants they did not know about the break-in until it was over. They only realised what had happened when a colleague informed them much later. The colleague stationed at the Administration Block where the break-in took place had been tied up and were lying down. They realized what had happened about dawn.

7. At 6.30 a.m., the caretaker took them to Hardy Police Station to record statements and they were put in custody.

The two told the Court that they had honestly and diligently served the Respondent for 14 years and denied any wrongdoing whatsoever.

8. They state that the suspension from work and failure by the Respondent to recall them back to work was an unfair dismissal in that it amounted to collective punishment for an offence they did not commit.

9. The two produced the Judgment of the Chief Magistrate in **Criminal Case No. 4332 of 2009** and the Court has scrutinized it carefully. The learned Magistrate on page 4 found the following;

“At close of the defence case I find that each accused had been assigned a place to guard. They were working in pairs. The 2nd and 4th accused were at the Administration Block and that is where the break-in and theft took place. The 3rd and 6th accused persons were at the Bus Park and nothing was stolen from there.

Similarly the 1st and 5th accused persons were at the pre-prep school cum squash area and again nothing was stolen from there.”

The magistrate found that 1st, 3rd, 5th and 6th accused persons could not have heard the break-in from where they were stationed which was approximately one hundred (100) metres away gave them the benefit of doubt and acquitted them.

The 1st and 2nd Claimants were the 1st and 3rd accused persons respectively and their testimony before Court tallies with the findings of the Chief Magistrate.

10. Though the burden of proof is much lighter in a civil matter, I find that the Claimants have on a balance of probability established that they were not involved at all in the break-in and theft that took place on the material night.

They have accordingly discharged their burden in terms of Section 47(5) of the Employment Act that a wrongful dismissal took place and the Respondent has not been able to rebut that evidence and has failed to show that the dismissal was for a valid reason.

11. In terms of the procedure followed by the Respondent in the matter, it is common cause that the Claimants were suspended pending the investigation and conclusion of the Criminal Case.

12. What is in dispute is whether or not the Claimant’s effort to return to work was thwarted by the respondent by failing to open the gate for them as they allege, or they did not return at all to work until, they came looking for certificates of service as the Respondent alleges.

13. It is common cause that the two Claimants were acquitted of any wrong doing by the Magistrate Court. It was incumbent on the Respondent in terms of its letter of suspension dated 1st October 2009, to recall the Claimants in writing and either reinstate them back to their employment and /or institute disciplinary proceedings against them prior to terminating their services.

14. The Respondent having stated the terms of suspension clearly cannot now be heard to deviate from the same especially because no documentary evidence was produced according to the Claimants of desertion upon acquittal for the claim of desertion to be valid.

15. The Court finds that indeed, the Respondent did not follow its own terms, to recall the Claimants upon being acquitted by the Magistrate's Court and or did not conduct any disciplinary hearing against them.

16. Accordingly, the Court finds that the respondent summarily dismissed the Claimants from their employment and did not pay their terminal benefits as claimed in this suit.

The dismissal violated **Section 43** as read with **Section 45(1)** and **(2)** of the employment Act in that the reason for the termination was not valid and the same was not in terms of a fair procedure.

17. **Remedy**

The 1st and 2nd Claimants earned Kshs.8,360/= a month at the time of dismissal.

They were not paid a salary during the period of their suspension pending the determination of their Criminal Case.

Since the terms of the suspension were by the Respondent, it was expected that in the event the Claimants were exonerated of any wrong doing in the least the salary for the entire period of suspension should have been paid. However, the Claimants did not claim payment of the salary during this period of suspension but have instead claimed:

- a. one (1) month's salary in lieu of notice;
- b. twelve (12) months' compensation for the unlawful and unfair termination and;
- c. unpaid leave for 2009 equivalent to 21 days salary.

18. The Court is satisfied that the Claimants are entitled to one month salary in lieu of notice in the sum of Kshs.8,360/= accordingly.

The court is also satisfied that the Claimants did not go on leave in the year 2009 and awards them Kshs.5,852 each for the leave.

It is unfortunate that the Claimants did not claim payment of gratuity for the 14 years served in terms of the wage regulations for the security sector to which they are entitled. The Court cannot delve on this issue as it was not part of pleadings.

19. **Compensation**

The two Claimants had served well for 14 years and did not have a record of misconduct. The circumstances of this case are unfortunate in that, the Claimants suffered false imprisonment on charges they were eventually acquitted of. They were taken to the police by the Respondent itself and therefore, the respondent had a hand in their incarceration.

20. The Court is satisfied that acquittal of the claimants was on merits, and not a mere technicality. They did not participate in the break-in and theft and this Court has found so in deciding that the reason

for the dismissal was not valid.

Having lost their gratuity for 14 years and also did not claim more than a years salary for the period they were on suspension, the Court finds this an appropriate case to award each of the Claimants twelve (12) months' salary as compensation for the unfair dismissal.

21. In the final analysis the Court awards;

Kipkemoi arap Rugut;

- a. Kshs.8,360/= in lieu of notice;
- b. Kshs.5,852/= in lieu of leave;
- c. Kshs.100,320/= being compensation for the unlawful and unfair termination.

Total is Kshs.124,438/=.

Michael Olweny:

- a. Kshs.8,360/= in lieu of notice;
- b. Kshs.5,852/= in lieu of leave;
- c. Kshs.100,320/= being compensation for the unlawful dismissal.

Total Kshs.124,438/=

22. The counter claim by the Respondent for property stolen on 30/9/2010 in the sum of Kshs.430,995/= is without basis since the Claimants were exonerated from the theft by the Chief Magistrate as aforesaid. This Court has also on a preponderance of evidence found that the claimants were not involved at all in the break-in and theft. In any event some of their colleagues who were stationed where the theft took place were found guilty of the offences charged and should be the ones in an appropriate case to shoulder that burden and not the claimants herein.

The counterclaim dismissed.

The Respondent is also to pay the costs of the suit to the two Claimants.

Dated and Delivered at Nairobi this 9th day of May, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE