



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2191 OF 2012

ROBERT NYANGWESO KAIBE CLAIMANT

VERSUS

G4S KENYA LIMITED RESPONDENT

As consolidated with

CAUSE NO. 2010 OF 2012

MESHACK OYOO OTIENO CLAIMANT

VERSUS

G4S LIMITED RESPONDENT

Mr. Mokhoha for the Claimants

Mr. Makori for the Respondent

JUDGMENT

1. The two matters were consolidated by consent of the parties with Industrial Court Cause No. 2191 of 2012 being the Lead file.

2. The Court shall refer to Mr. Robert Nyangweso Kaibe as the 1st Claimant and Mr. Meshack Otiemo Oyoo as the 2nd Claimant hereinafter.

The 1st and 2nd Claimants were employees of the Respondent in the position of security guards.

3. On the material day, being 28th February 2012, both were stationed at Isiolo road, the 1st Claimant was guarding Kenstar premises whereas the 2nd Claimant guarded adjacent premises of Kenya Power and lighting company(KPLC).

Both the 1st and 2nd Claimant were on day shift at the time.

4. 1st Claimant's case

The 1st Claimant was employed on 14th October 2009 as a security guard and earned a monthly salary of Kshs.11,000/=

On 28th February 2012 he was guarding a warehouse for paper owned by Kenstar.

5. At around 5.40 in the evening, he witnessed a food vendor stationed outside the premises argue with another person over scrap copper wire. The vendor rode away and at about 6 p.m., the District Manager **Mr. Moseitu** approached him and conducted a search at his work station.

Staff of Kenstar had left him with a bundle of binding wire and the manager questioned him about it.

6. 1st Claimant testified that it was usual for Kenstar staff to deposit items or luggage with him which they would collect on their way out.

The 1st Claimant was asked to report to the office the following morning and he was asked to record a statement over the incident that he had witnessed outside the day before.

Mr. Moseitu took away his work badge and told him to go home.

7. On the 1st March 2012 he attended a meeting convened by the Human Resource Manager, Area Manager and he was accompanied by a Shop Steward.

He was again questioned about the incident he had witnessed between the Vendor and another person arguing over a copper wire and he explained what he had seen.

He insisted that he was not involved at all in that matter.

He was then dismissed from employment. He filed an appeal which was also dismissed.

8. He was paid salary for days worked up to the 7th March 2012. He did not get any other benefits.

9. He claims:

(i) Compensation;

(ii) One month salary in lieu of notice in the sum of Kshs.11,100/=;

(iii) Service gratuity of Kshs.13,320 and;

(iv) 12 months salary being compensation for the unlawful dismissal.

10. It is his case that there was no valid reason to terminate his employment and the Respondent did not give him a fair hearing before dismissing him.

That he was entitled to service gratuity and notice pay.

11. 2nd Claimant

The 2nd Claimant was guarding the adjacent premises of KPLC. He was dismissed at the same time with the 1st Claimant arising from the same incident.

12. He claims payment of

a) Kshs.14,685/=, being one month's salary in lieu of notice;

b) Service gratuity of Kshs.140,976/=; and

c) 12 months' salary being compensation for the unlawful and unfair dismissal.

13. He told the Court that he had served the Respondent as a security guard until 28th February 2012 when he was dismissed from work by the Area Manager Mr. Moseitu on allegations of theft of copper wire from KPLC.

14. In his testimony under oath, he told the Court he earned Kshs.14,685/= salary per month at the time of the dismissal and was not paid gratuity for the years served and notice pay upon dismissal which he now claims.

On 28th February 2012 he was stationed at KPLC premises along Isiolo road on a day shift. At around 6 p.m. he handed over to the night guard and went home. While he was at home, he received a call from **Mr. Kabonia**, his in-charge who informed him that the area Manager Mr. Moseitu had reported a theft incidence at KPLC and he was asked to report at station immediately.

15. Upon his return to the station, he found the night guards who told him that no incident was reported. He was asked to go back home and report at 6.30 in the morning.

He was summoned by the Area Manager at 7.30 a.m. who told him, himself and the 1st Claimant had helped someone carry an item on a bicycle and should write a statement on the matter. He wrote an exculpatory statement produced in Court but the manager insisted that he was guilty.

16. He asked that CCTV footage be examined to confirm what had transpired.

The Human Resource Officer, **Jeniffer Asmani** was also present and he explained the matter in her presence.

The Area Manager then directed him to return office equipment and go home.

Three days later he received a letter for summary dismissal which was produced before Court.

It was alleged that he had misappropriated KPLC property. He did not receive a show cause letter nor was a disciplinary hearing held before he was dismissed.

17. The alleged theft was reported to the police and he denies that he was involved in such theft at all. He recorded a statement accordingly. He told the Court that he was still jobless and had suffered loss and damage due to the unlawful and unfair dismissal and prays the Court to award him as claimed in the memorandum of claim.

18. He said he had worked for 15 years and was entitled to service gratuity for the period, notice pay and compensation.

KPLC was 100 metres from Kenstar and he denies that he colluded with the 1st Claimant as alleged and was not with him when the alleged incident outside Kenstar took place.

19. **Respondent's case**

The Respondent filed memorandum of reply against the two claims now consolidated.

In the reply, the particulars of employment and the salary earned by the 1st Claimant is admitted.

20. With respect to the 2nd Claimant, the Respondent denies that he earned a monthly salary of

Kshs.11,685 stating that he earned a basic salary of Kshs.8,464 and a house allowance of Kshs.1,268/= making a gross salary of Kshs.9,733/=.

21. Respondent states that 1st and 2nd Claimants were dismissed after a disciplinary hearing where it was established that they were involved in misappropriation of goods belonging to the Respondent's customer.

The 2nd Claimant was alleged to have personally handed over the stolen copper wire, whereas the 1st Claimant stationed at an adjacent station of Kenya Stationery aided and / or abetted the misappropriation of goods belonging to KPLC.

The two Claimants appeared before the Area Manager and the Human Resource Manager and their explanation on the allegation of theft were unsatisfactory hence the dismissal.

22. The Respondent called **Patrick Odongo Bute** (RW1) to testify in support of the case. He told the Court that on 28th February 2012, while on his way to Alfa Motors, his duty station, he saw the 1st and 2nd Claimants passing over copper wire from KPLC to a stranger. He immediately called the Area manager Mr. Moseitu and reported the matter. This was around 5.30 p.m. in the evening.

He recorded a statement to that effect.

23. RW2 was Mr. Mothende Moseitu. He told the Court that he was the Operations Manager for upper and Eastern District in Industrial Area. That he received a report of theft on 28th February 2012 from RW1 who said he saw a colleague putting a roll of copper wire into a crate mounted on the rail of a bicycle. He identified 2nd Claimant as the one who did that. That the person with the bicycle rode away and stopped outside Kenya Stationery and he saw the 1st Claimant bringing a weighing machine to weigh the copper wire. RW1 confronted the two as to where they got the wire and the stranger quickly rode away. RW1 gave chase but the man disappeared in the slum.

24. He reported to the scene of alleged crime and found the 1st Claimant. He searched for the weighing machine but did not get it. He however got a roll of binding wire in a sack at the work station which he also suspected to belong to KPLC.

The two appeared before him, the Human Resource manager in the company of a union representative and were suspended from duty and asked to return their uniform. They were asked to report on 1st March 2012 for a disciplinary hearing.

The two were given a hearing in turns by himself, the Human Resource Manager and in the presence of **Mr. Tom Oloche** employee representative.

Their explanation was not satisfactory and were dismissed for the misconduct. It was established that both were involved in stealing property belonging to a customer.

25 . **Evaluation**

Upon a careful evaluation of the evidence by the 1st and 2nd Claimant vis a vis that of RW1 and RW2 the Court is satisfied that the 1st and 2nd Claimants were involved in theft of copper wire belonging to the Respondent's customer KPLC, in the course of their duty.

The two Claimants violated their contracts of service and could no longer be trusted to perform the work of security guards any more.

The misconduct constituted a serious breach of trust bestowed upon them by the employer and their customers.

26. The summary dismissal of the 1st and 2nd Claimants was in terms of **Section 44(4)(g)** of the **Employment Act 2007**. The dismissal was for a valid reason and was executed in terms of a fair procedure. They are not entitled to payment in lieu of notice nor are they entitled to any compensation as claimed or at all.

However with regard to the claim for service gratuity, **Regulation 17(1)** provides:

“after five years’ service with an employer, the employee shall be entitled to eighteen days pay for every completed year of service by way of gratuity based on the employee’s wage based at the time of termination of service.”

Regulation 17(2) on the other hand provides:

“an employee who is summarily dismissed for lawful cause or who terminates his service for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity.”

27. The 1st and 2nd Claimants were justifiably, summarily dismissed. They were both registered with the National Social Security Fund (NSSF) and thus would get pension from the said statutory scheme. However, they are not entitled to gratuity as provided in these regulations as they were guilty of serious misconduct which warranted summary dismissal.

Accordingly, the claims by the 1st and 2nd Claimants are dismissed with costs.

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

MATHEWS N. NDUMA

PRINCIPAL JUDGE