



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1204 OF 2010

ATANUS TETE NDOLI CLAIMANT

VERSUS

INTER SECURITY SERVICES LIMITED RESPONDENT

M/S Kwengu for the Claimant

Okulo for the Respondent

JUDGMENT

1. By a memorandum of claim dated 19th September 2010 and filed on 7th October 2010, the Claimant seeks payment of terminal benefits and compensation for wrongful and unfair dismissal from employment.
2. The Claimant avers that he was employed as a Guard in October 1987 and worked continuously until 15th September 2005 when he was summarily dismissed on allegations of having committed gross misconduct which allegations the Claimant denies in toto.
3. That the termination was unlawful and unfair contrary to the provisions of Employment Act, Cap 226 of the Laws of Kenya (now repealed) as read with the provisions of Trade Disputes Act (now repealed) operational then.

The letter of termination dated 14th September 2005 reads:

“It is now over one month since you showed up at the control base where you were supposed to be reporting regularly while on standby.

It is mandatory by law that you must seek permission to be away from duty. That you chose to stay away without the office knowing your whereabouts for such long periods manifests your scant regard for the laid down employment guidelines rules and regulations, which are well known to you.

You have thus forfeited your employment position in the company on account of desertion effective from the date of this letter.

You are expected to hand over to the control all company equipment in your possession to enable

accounts work out your dues which you may collect at the end of the month.”

4. It is the Claimant’s case that he did not desert work as alleged or at all and seeks the Court to find that the termination was unlawful and unfair taking all the circumstances of the case into account.

The Claimant prays for terminal benefits to wit;

- i. unpaid leave days and off days not tabulated in the statement of claim;
- ii. other terminal benefits not enumerated in the statement of claim;
- iii. 12 months compensation for wrongful loss of employment.
- iv. costs of the suit.

5. The Respondent filed a statement of Response dated 11th November 2010 on the same date. The Respondent admits that the Claimant was employed in October 1987 as a guard and worked continuously until 14th September 2005 when his employment was lawfully terminate for gross insubordination and all his terminal dues were duly paid to him. The letter of termination however shows that the Claimant’s employment was terminated for being away on duty while he was on standby.

Neither the Claimant nor the respondent called any witness in support of their respective cases.

6. The statement of claim does not disclose particulars of the unlawful conduct by the Respondent to assist the Court evaluate whether or not the termination was wrongful.

7. The Claimant did not also plead in specific terms the terminal benefits claimed nor did he adduce any evidence to substantiate the bald statements contained in the memorandum of claim.

8. It is trite that he who alleges must proof. The Respondent bears evidential burden of rebuttal once a *prima facie* case has been established.

Whereas the Respondent states that it paid the Claimant full terminal benefits upon termination, no reply was filed by the Claimant to join issues in this regard.

9. In the absence of any testimony or documentary evidence from the Claimant, this case remains largely unproven and the Court has no alternative but to dismiss the suit in its entirety.

10. Although, the costs follow the outcome of the case, the Court is not inclined to award costs in this matter.

In any event the Claimant had served the Respondent for a long period of time and it is equitable and just for each party to bear their own costs of the case.

Dated and Delivered at Nairobi this 25th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE