



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 327 OF 2013

ALFRED ABII OGOMBOCLAIMANT

VERSUS

1. POLYCAP OCHOLLA1ST RESPONDENT

2. WITEROSE GROUP OF COMPANIES 2ND RESPONDENT

3. GUARD FORCE SECURITY[K] LTD3RD RESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has brought this suit against the respondents jointly and severally to recover ksh.321,059.50 being terminal employment benefits plus compensation for unfair termination of employment.

The respondent entered appearance through an advocate but filed no defence. The suit was heard exparte on 26/5/2014 when the claimant testified as CW1.

CLAIMANT'S CASE

CW1 told the court that he was employed by 2nd respondent upto year 2008/2009 when she changed her name to Guard Force Security [K] Ltd (3rd respondent). According to CW1, the 1st respondent was the proprietor and director of both 2nd and 3rd respondent. CW1 produced employment identity cards in respect of his service for the 2nd and 3rd respondent as exhibit 1 and 2. According to CW1, the two companies were the same save for the change of name.

CW1 was never issued with any employment letter and his salary was ksh.4700. He worked until 15//2011 when he was terminated verbally for the reason that he had joined a trade union. On the said day, Rose Rakal Ochola, a director called him to the office and asked him why he had joined the union. When CW1 answered that he wanted better terms and conditions of service, she demanded that he withdraws from the union. However, CW1 refused to withdraw from the union, and she dismissed him. CW1 considers the dismissal to be unfair and wrongful because it was without notice. CW1 produced the union membership card as exhibit 3.

CW1 contended that he never went for leave during his whole period of service. He further contended that he used to work 12 hours per day and no overtime pay was given to him. He also contended that the salary of Ksh.4700 was less than the minimum wage provided by the General Wage Order.

After dismissal he reported to the labour officer but the respondents never responded to the letters from the labour officer. He also served demand letter through his lawyer which was also not responded to hence the present suit.

CW1 prayed for one month salary in lieu of notice, salary for 15 days worked in September 2011, he prayed for the underpayment from may 2010-August 2011, overtime from May 2010-April 2011, service pay for 11 years worked and 12 months salary for unfair termination. He also prayed for certificate of service plus costs and interest. After the hearing of the claimant filed submissions.

ANALYSIS AND DETERMINATION

After carefully perusing the pleadings and considering the evidence and the submissions, the following issues emerged for determination.

1. **whether the dismissal of the claimant was unfair and wrongful.**
2. **Whether the reliefs sought should issue**

Unfair termination

Termination is unfair if the reason for the termination is not valid and fair and if the procedure followed in reaching the termination is in breach of the law.

Section 45 bars any employer from terminating services of his employee except for a valid and fair reason. Section 46(c) provides that an employees membership or proposed membership to a trade union is not a fair reason for dismissal or for the imposition of a disciplinary penalty.

In the present case the claimant was dismissed for joining a trade union to agitate for his terms and conditions of employment. On that ground, the court finds that the termination of his employment was therefore unfair.

Reliefs

In view of the foregoing finding, the court hereby declares that the termination of the claimant from his employment on 15/9/2011 was unfair. Consequently the claimant is entitled to terminal dues and compensation for unfair termination under Section 49 of the Employment Act. The said compensation will be based on the minimum statutory wage at the rate of his dismissal being ksh.9732.50. He is awarded;

- | | |
|--|------------------|
| a. one month salary in lieu of notice | 9,732. 50 |
| b. 15 days worked in September 2011 | 4,866.25 |
| c. 12 months salary for unfair termination..... | 116,790.00 |
| d. underpayment as prayed for 2010-2011..... | 67,547.20 |
| e. leave of 21 days for one year as prayed | <u>13,756.50</u> |

212,692.45

The prayer for overtime is declined because there is no evidence shown to prove that as a security guard he was to work for less than 12 hours. The claimant will also have certificate of service.

DISPOSITION

Judgment is entered for the claimant against the respondent jointly and severally for ksh.212,692.45,

certificate of service plus costs and interest.

Dated, Signed and delivered this 18th July 2014.

O. N. Makau

Judge