



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2469 OF 2012

STEPHEN NYAMWEYA.....1ST CLAIMANT
BERNARD BARASA NAMUKURU.....2ND CLAIMANT
VS
RILEY SERVICES LIMITED.....RESPONDENT

AWARD

Introduction

1. By a memorandum of claim dated 10th December 2012 and filed in Court on even date, the Claimants have sued the Respondent for unfair termination of employment and failure to pay terminal dues. The Respondent filed a memorandum of response together with a notice of preliminary objection on 12th February 2013. The Court overruled the Respondent's objection on 16th May 2013 and the case was heard on 19th May and 26th May 2014. The Claimants testified on their own behalf and the Respondent called its Human Resource Officer, Anne Wamonje.

The Claimants' Case

2. According to the memorandum of claim, the 1st Claimant, Stephen Nyamweya worked for the Respondent as a security guard from 1st June 2008 until 6th August 2012. His monthly salary at the time he left employment was Kshs. 9,180. The 2nd Claimant, Bernard Barasa Namukuru was also employed by the Respondent as a security guard effective 8th August 2009 until 16th August 2012. His monthly salary at the time of leaving employment stood at Kshs. 8,203. It is the Claimants' case that they were initially on open ended employment and were later made to sign annual contracts.

3. Upon a complaint by the Respondent, the Claimants were arrested on 3rd May 2012 on allegations of theft. They were detained for four days and then set free without any charges. Upon their release, the Claimants were told by the Respondent's Branch Manager to return all company property in their possession and go home to await further communication from the Respondent.

4. The Claimants were eventually served with letters of summary dismissal in August 2012. The Claimants state that prior to their dismissal, they were not given any opportunity to be heard. Further, the Claimants were not paid their terminal dues.

5. The Claimants claim the following:

Stephen Nyamweya (1st Claimant)

- a. One months' salary in lieu of notice.....Kshs. 9,100
- b. Leave pay for 4 years.....Kshs. 36,400
- c. House allowance @ 15% of basic salary.....Kshs. 65,520
- d. 12 months' salary as damages for loss of employment.....Kshs.109,200

Bernard Barasa Namukuru (2nd Claimant)

- a. Salary for 4 days worked.....Kshs. 1,360
- b. Uniform refund.....Kshs. 3,060
- c. One month's salary in lieu of notice.....Kshs. 8,203
- d. Leave pay for 3 years.....Kshs. 24,609
- e. House allowance @ 15% of basic salary.....Kshs. 44,064
- f. 12 months' salary as damages for loss of employmentKshs. 98,436

The Respondent's Case

6. In its memorandum of response filed on 12th February 2013, the Respondent admits having employed the 1st and 2nd Claimants as security guards on one year fixed term contracts from 26th September 2011 to 25th September 2012 and 26th December 2011 to 25th December 2012 respectively. Both contracts were dated 21st April 2012.

7. On the night of 2nd May 2012, the Claimants and their colleague, Joseph Oese were assigned to guard one of the Respondent's clients, the Institute of Advanced Technology (IAT). After the Claimants' shift on the morning of 3rd May 2012, a theft was discovered at the assignment site. The Respondent's client thereby lost eight central processing units and twelve computer monitors.

8. The theft was reported at Kasarani Police Station and the Claimants were arrested for further investigations. Thereafter, the Respondent concluded that the Claimants had violated their employment contracts by willfully neglecting to perform their duties and/or performing their duties carelessly. The Claimants were therefore summarily dismissed.

Findings and Determination

9. The issues for determination in this case are as follows:

- a) Whether the Respondent had a valid reason to terminate the Claimants' employment;
- b) Whether in effecting the termination the Respondent used fair procedure;
- c) Whether the Claimants are entitled to the reliefs sought.

Reason for Termination

10. Section 43 of the Employment Act, 2007 provides as follows:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer

to terminate the services of the employee.

11. The Claimants' letters of summary dismissal dated 6th August and 16th August 2012 stated *inter alia*:

“You will remember that while on duty at Institute of Advanced Technology on the night of 2nd/3rd May, 2012, there was theft in the premises whereby the main Administration block offices were broken into and eight CPUs and twelve monitors were stolen. Thugs were able to access the premises without being detected by yourself and colleagues on duty.

As you are aware, the matter was reported to Kasarani Police station whereby police officers visited the assignment and you were arrested together with your colleagues. You were subsequently locked in at Kasarani Police station and arraigned in court for possible theft or failure to prevent a felony. You were given cash bail of Kshs. 30,000/= and the matter is still pending before court.

You were interrogated as to what may have occurred but could not give a satisfactory answer.

You are hereby dismissed from the company and are instructed to return all company uniforms and equipment issued to you to facilitate computation of your final dues hereunder:

Yours Faithfully,

RILEY SERVICES LIMITED,

Joshua Maluti

MANAGER OPERATIONS & TRAINING”

12. From these letters, the reason advanced by the Respondent for termination of the Claimants employment had to do with a theft at the Claimants' assignment site on the night of 2nd /3rd May, 2012. On their part, the Claimants testified that they were on night duty on 3rd May 2012 and when they handed over to the incoming day guards at 6.00 am on 4th May 2012, everything was intact.

13. The 2nd Claimant, Bernard Barasa Namukuru told the Court that handing over involved going round the assignment facility to confirm if everything was in order. The outgoing team would then sign out and the incoming team would sign in. Any incident would be recorded in the occurrence book and the outgoing team could not leave until the incident was dealt with by their supervisors.

14. Counsel for the Respondent rightly submitted that in determining whether an employer has established a valid reason for termination of employment of an employee, the standard of proof is not beyond reasonable doubt as in criminal cases.

15. In my view, the burden imposed on the employer by Section 43 of the Employment Act, 2007 is to demonstrate a valid reason that would move a reasonable employer to terminate the employment of an employee. The Respondent produced an inter office memo from the Zone Manager-Northern Region, Francis Theuri to the Director-Operations & Administration.

16. From this memo, Theuri drew the following conclusion:

“ our guards thus No. 20303 Stephen Nyamweya (manning the gate) No. 20744 Bernard Barasa (the Dog Handler) and No. 10364 Joseph Oese were presumed to have left the assignments and were sleeping somewhere away from the Administration block where the incident occurred. This is so because they would have intercepted the thugs and this would have prevented the crime from being committed.

Since the investigators did not really establish the authors of crime and the guards on duty on the

material night did not shed light as to what had really happened, nor did they convince the investigators as to why they did not report the incident immediately before reporting off duty, it was found necessary to have them picked by the Police for interrogation.”

17. It is the Claimants' case that when they signed off duty, everything was intact and there was therefore no incident to report. The Respondent's witness Anne Wamonje told the Court that the theft was reported by one of the day guards through a call to the Control Room on 3rd May 2012 at 7.30 am.

18. When the incident occurred, Wamonje was not in the Respondent's employment and Counsel for the Claimants dismissed her evidence as hearsay. I agree with the submission by Counsel for the Respondent that in accordance with Section 20 of the Industrial Court Act, 2011 and Rule 24(3) of the Industrial Court (Procedure) Rules, 2010 this Court is not bound by the strict rules of evidence.

19. One of the key benefits of the flexibility afforded by these provisions is that it allows the Court to receive uncontested documentary evidence even where the makers may not be available. This does not however open the door for a witness to speak authoritatively on events that they did not witness. The Court will therefore evaluate Wamonje's evidence in that light.

20. The Respondent did not advance any evidence to prove when the incident was actually reported. In view of the fact that there was change of guard, the exact time of reporting would be crucial in determining the Claimants' culpability. Further, although Theuri's report and the letters of summary dismissal allude to some criminal charges against the Claimants, there was no evidence that the Claimants were actually charged. In fact, the Claimants told the Court that they did not record any statements at the Police Station and were not charged with any criminal offence. It seems to me therefore that the Respondent's reason for termination of the Claimants' employment was not supported by any verifiable evidence and I find the termination unfair on that score.

Termination Procedure

21. The charges leveled against the Claimants fall within what is commonly known as gross misconduct. Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

22. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

23. The Claimants told the Court that prior to their summary dismissal, they were not given an opportunity to be heard. While admitting that the Claimants were not subjected to a formal disciplinary hearing, the Respondent's witness, Anne Wamonje told the Court that the Operations Manager interviewed the Claimants. She did not however produce any minutes or notes to confirm her assertion in this regard. The charges against the Claimant were serious and the Court was unable to understand why the Respondent took the ultimate disciplinary action of summary dismissal without availing the Claimants an opportunity to defend themselves.

24. The Court also noted that the Claimants were kept away from work without any formal suspension or interdiction from May 2012 when they were arrested to August 2012, when the dismissal letters were issued. Overall, the Court finds that in effecting the termination of the Claimants' employment, the

Respondent failed to follow due process.

Reliefs

25. Having found the termination of the Claimants employment unfair for want of substantive justification and procedural fairness, I award the 1st Claimant three months' salary and the 2nd Claimant six months' salary in compensation for unfair termination of employment. In making this particular award, I have taken into account the period the Claimants were kept away from work without formal suspension as well as their reasonable expectation to serve to the end of their contracts. I further award each Claimant one month's salary in lieu of notice.

26. The Claimants claim that they were not paid house allowance and the Respondent maintains that they were paid consolidated salaries. Section 31(1) and (2) of the Employment Act provides that:

1. ***An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

2. ***This section shall not apply to an employee whose contract of service-***

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

27. Clause 9.1 of the Claimants' contracts of employment does not have any figures for remuneration. The Court therefore resorted to the Claimants' payslips which do not reflect any figures for house allowance. The Court did not therefore find any expressed intention that the salaries paid to the Claimants were inclusive of house allowance. I therefore award the Claimants house allowance at 15% and adopt the resultant figures of Kshs. 10,557 for the 1st Claimant and 9,384 for the 2nd Claimant as the applicable salaries for purposes of this claim. The Claimants are also entitled to prorata leave under their respective contracts up to the date of dismissal.

28. In determining the Claimants' period of service for purposes of this claim, the Court has adopted the dates given in the written contracts of employment produced by the Respondent.

29. In the final analysis, the Court makes an award in favour of the Claimants in the following terms:

Stephen Nyamweya (1st Claimant)

a) 3 months' salary in compensation for unfair

termination.....Kshs. 31,671

b) One month's salary in lieu of notice.....Kshs. 10,557

c) Prorata leave (Kshs. 10,557/30x1.75

x10 months).....Kshs. 6,158

d) House allowance (1,377x10 months).....Kshs. 13,770

Total.....Kshs .62,156

Bernard Barasa Namukuru (2nd Claimant)

- a. 6 months' salary in compensation for unfair termination.....Kshs. 56,304
- b. 1 month's salary in lieu of notice.....Kshs. 9,384
- c. Salary for 4 days worked.....Kshs. 1,251
- d. Prorata leave (Kshs. 9,384/30x1.75x7 months).....Kshs. 3,832
- e. House allowance (Kshs. 1,224x7 months).....Kshs. 8,568
- f. Uniform refund.....Kshs. 2,635

Total.....Kshs. 81,974

30. The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF JULY 2014

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JUDGE

Appearance:

Mr. Namada the Claimants

Mr. Burugu for the Respondent