



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1779 OF 2011

PATRICK MUSIKOYO OJWANG.....CLAIMANT

VERSUS

SECURITY GROUP KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant **Patrick Musikoyo Ojwang** instituted this Claim against the Respondent through a Memorandum of Claim dated 14th October 2011 and filed in court on 18th October 2011. He alleges unlawful termination /dismissed and non-payment of terminal dues and compensatory damages. He prays for the following orders:-

- a. A declaration that the Respondent's dismissal or termination of the Claimant's employment was arbitrary, unfair, unlawful and inhumane and the Claimant is entitled to payment of his due terminal benefits and compensatory damages.
- b. An order for the Respondent to pay the Claimant his terminal dues and compensatory damages amounting to Kshs. 329,326/-.
- c. Costs of this case plus interest thereon.
- d. An order for the Respondent to issue a certificate of service to the Claimant.

The Respondent **Security Group Kenya Limited** filed a Defence on 19th December 2011. The Defence is dated 13th December 2011. In the Defence the Respondent denies the allegations in the claim and avers that the Claimant was lawfully terminated for driving motor vehicle registration number KAQ 038Q without authority and causing an accident resulting in injury of his colleague. That the colleague was later retired on medical grounds.

The case was heard on 21st February, 27th March and 1st July 2013. The parties thereafter filed written submissions.

The Claimant was represented by Ms. Akhaabi and Mr. Makokha instructed by Namada & Company Advocates while the Respondent was represented by Mr. Mbabu and Mr. Kariba instructed by T.K Kariba Mbabu & Co. Advocates. The Claimant testified on his behalf while the Respondent called **ERIC LUKAYE DIANGA**, its Operations Manager. The parties thereafter filed written submissions.

The Claimant testified that he was employed by the Respondent as a security guard on 1st May 1997. At

the time the Respondent was known as KK Security before it changed its name to security Group. He was promoted to crew and in 2009, to crew commander. As a crew commander he was in charge of a response vehicle with a driver and two crew with the communication equipment. The crew was responsible for attending to calls from clients and to escorting clients. The vehicle was stationed at International School of Kenya.

On 28th October 2010 while at work at about 1.00 am a client by the name Mr. Kioko asked to be escorted. The Claimant called the Respondent's control room and was given permission to escort the client. The driver of the vehicle was not in the car and the Claimant decided to drive the car. While escorting the client one of the crew members fell out of the car and was injured in the head. The vehicle was open on the sides and the crew member was asleep. The accident was reported to the office then to Parklands Police Station. The Claimant was called to the office on 2nd October 2010 and given the letter of summary dismissal. The grounds for dismissal in the letter was that he was driving carelessly and that he had no permission to drive. The Claimant wrote an apology letter on 4th October 2010. The Claimant testified that he was never given an opportunity to defend himself and that his dismissal was unfair. He prayed for notice, service gratuity and compensation for unfair dismissal.

The Respondent called ERICK DIANG'A Operations Manager (herein after referred to as RW1) who testified that the Respondent's offices are situated along Mombasa road and his duties are to oversee the operation of response services to customers based in Nairobi and its environments. The Respondent has a control room manned 24 hours by controllers. Within Nairobi the Respondent has response vehicles based in different locations. Whenever there is an emergency the controllers alert the nearest response vehicle to attend to the emergency. The Response vehicles have a crew commander who is in charge of a driver and 2 crew members. The work of the crew commander is to be in charge of the vehicle personnel under his control and communication equipment installed in the vehicle. The crew Commander also receives all communication from control room and communicates back on feedback from the ground.

The Claimant was a crew commander of a response vehicle based in International School of Kenya near Gachie. On 28th October 2010 a customer by the name Kioko requested the Claimant's response vehicle for escort to his residence about 2 km from the school. The Claimant obtained permission from the control room to escort the customer. The Claimant however decided to drive the vehicle himself as he did not know where his driver had gone. In the process one crew member fell out of the vehicle and got injured. The incident was reported to the control room. The Claimant was not authorized or trained to drive the vehicle. It was also the Claimant's duty to know where all his crew and the driver were and to ensure his team is alert.

RW1 further testified that before the Claimant was dismissed he was summoned by the then General Manager and the Human Resources Manager and asked why he drove the vehicle without authority. He was unable to explain prompting the Respondent to dismiss him. The proceedings of the disciplinary hearing was not recorded. After the dismissal the Claimant appealed but his appeal was not successful.

According to RW1 the dismissal was in accordance with the law and fair procedure was followed. He further testified that the Claimant apologized for the misconduct, which is an admission.

I have considered the pleadings and the evidence adduced in court, the written submissions and the relevant law.

For dismissal to be valid the employer must comply with the provisions of Section 41 of the Employment Act on procedure and Section 43 for validity of reason.

In the present case the Respondent had valid reasons to take disciplinary action against the Claimant as disclosed by the evidence of both the Claimant and RW1. However, there is no evidence that Section 41 was complied with. There is no letter or other evidence that the Claimant was informed of the reasons for which the Respondent intended to terminate the Claimant's employment. There is also no evidence that the charges preferred against the Claimant were explained to him. There is further no evidence that the Claimant was informed of his right to have either a fellow employee or a union official present during the

disciplinary hearing and whether any hearing took place at all.

Failure to comply with fair procedure makes the summary dismissal of the Claimant unfair in terms of Section 45 of the Employment Act. I therefore find that the summary dismissal of the Claimant was unfair.

Having found the summary dismissal unfair, the next issue for determination is whether the Claimant is entitled to his prayers. I will now consider each of the prayers.

1. One month's salary in lieu of notice.

Having been unfairly dismissed the Claimant is entitled to notice as provided under Section 49 (1) (a) of the Employment Act. The Claimant's last gross salary was Shs. 11,173.36 made up of basic salary, house allowance, driver/car commission allowance, responsibility allowance, cleaning allowance and long service allowance. I therefore award him Shs. 11,173.36 as pay in lieu of notice.

2. Service Gratuity

Under the Regulation of Wages (Protective Security) Order, the Claimant is entitled to gratuity under Rule 17 (1) at the rate of 18 days salary per completed year of service.

The Claimant worked for 13 years. He is therefore entitled to Kshs. 87,152.20.

I award him Shs. 87,152.20 as gratuity.

3. Compensation

The Claimant also prayed for compensation equivalent to 12 months' salary. Taking into account his long service of over 13 years, the manner in which he was dismissed and all the factors provided for under Section 49 (4) of the Employment Act it is my opinion that 12 months' salary as compensation is reasonable in the circumstance.

I therefore award the Claimant Shs. 134,080.32 as compensation equivalent to 12 months' salary.

4. Costs and Interest

The Respondent shall pay the Claimant's costs for this suit.

The Respondent shall also pay interest on the decretal sum and costs from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Ombima holding brief for Mr. Namada for Claimant

No appearance for Respondent

