



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 193 OF 2013

EDWARD SHABAYA.....CLAIMANT

v

K.K. SECURITY LIMITED.....RESPONDENT

JUDGMENT

1. Edward Shabaya (Claimant) was employed by K.K. Security Ltd (Respondent) as a security guard on casual basis in 1995 and on 1 December 1996 he was confirmed as a response crew.

2. The Claimant rose through the ranks until the time his services were terminated on 25 June 2009 on the ground that he had performed his work negligently leading to loss of confidence.

The Claimant was aggrieved and on 8 July 2013 he lodged a Memorandum of Claim with the Court, stating the issue in dispute as *wrongful dismissal, unpaid terminal benefits, arrears and payment in lieu of notice and damages for defamation*.

3. The Respondent was served and it filed its Memorandum of Defence on 16 September 2013.

3. On 19 March 2014, the Claimant filed an Amended Memorandum of Claim pursuant to leave granted on the same day. Although the Respondent was granted liberty to file an Amended Response, it did not file any.

4. The Cause was heard on 4 June 2014 and 16 July 2014.

Claimant's case

5. The Claimant's pleaded case is that the Respondent unlawfully dismissed him on 25 June 2009 without complying with the Employment Act, 2007, the rules of natural justice, contractual terms or giving him one month notice or pay in lieu of notice.

6. The Claimant testified. He stated that he was employed by the Respondent in 1996 through a dispatch letter and rose through the ranks.

7. On the process leading to the termination, the Claimant did not lead any evidence on the process followed prior to termination but in cross examination, he stated that he was asked to explain why he had not recorded the incident leading to termination on the log sheet and was also called before a Panel comprising of the Respondent's Operations Manager, Assistant Human Resources Manager and Guard

Commandant.

8. He impugned the termination because the letter was signed by the Respondent's Branch Manager and not the Human Resources Manager.
9. On the reasons and circumstances of the termination, the Claimant testified that on the material day, he received an anonymous phone call about an incident at NOTCO yard in Changamwe. The caller refused to identify himself but he instructed the nearest back-up crew to go to the scene and also informed the Respondent's Investigating Officer Peter Onyango.
10. The Claimant further stated that the back up team reported back that there was no incident and the report was entered into the control room OB and that he was terminated for not entering the incident in the Control Room Log Sheet.
11. He stated that the Respondent's procedures did not require him to make entries in the Control Room Log Sheet if the incident was not major like in the instant case.
12. On the specific heads of claim, the Claimant stated that he had unpaid overtime at the time of termination and that he filed overtime sheets (appendix 6 in Response) and that he had 436 outstanding overtime hours. He also stated that he was entitled to Kshs 130/- per hour as overtime.
13. The Claimant seeks declaration that his dismissal was wrongful, damages for wrongful dismissal, unpaid overtime and costs and interest.

Respondent's case

14. The Respondent opted not to call any oral evidence. Mr. Molenje for the Respondent informed the Court that he would rely on his cross examination of the Claimant and the Response and documents filed in Court.
15. In the Memorandum of Defence, the Respondent admitted employing the Claimant from 1 December 1996 and terminating his services on 25 June 2009, when his consolidated wage was Kshs 13,530/-.
16. Regarding the process followed, the Respondent pleaded that the Claimant was afforded a fair hearing before termination and he failed to exonerate himself.
17. On the reasons for dismissal, it was pleaded that the Claimant was dismissed for negligently and carelessly performing his duties in November and December 2008 in that he failed to document an incident which happened in the Control Room Incident Log Sheet as required.
18. On the respective heads of claim, the Respondent pleaded that the Claimant was a member of the National Social Security Fund and Respondent's pension scheme and that the Claimant was paid all his overtime and accrued leave, one month pay in lieu of notice and ex gratia service pay (appendix 8).

Issues arising

19. From the pleadings, this being primarily a complaint of wrongful dismissal, the core issues arising for determination are whether the termination was unfair and if so appropriate remedies. The Court has considered the written submissions filed by the parties (Respondent's submissions were filed on 4 September 2014 instead of 30 July 2014).
20. The Court has also noted some ancillary issue which the parties did not address and it relates to limitation. A few observations on limitation before the Court evaluate each party's respective case.

Limitation

21. From the record, it is not disputed that the Claimant was terminated on 25 June 2009. Pursuant to section 90 of the Employment Act, 2007 the Claimant should have instituted the claim on or before 24 June 2012.

22. The Claim herein was instituted on 8 July 2013. It was pleaded that the Claimant had filed Mombasa Senior Resident Magistrates Court Civil Case No. 484 of 2010 but the same was *summarily adjudged that the matter be filed in the Industrial Court*.

23. The Respondent did not raise the issue of limitation. In *Achola & another v Hongo & another* (2004) 1 KLR 462 the Court of Appeal dealt with the issue of limitation and held that under order VI rules 4(1) and (2) of the provisions of the Civil Procedure Rules (then) a party was required to specifically plead limitation/ statute on whose provisions he relied in seeking to defeat a claim. The Respondent here was obliged to specifically plead limitation based on statute but did not. The decision further held that it was not right in allowing the issue of limitation to be raised when it had not been pleaded.

24. This Court would therefore not belabor the issue of limitation.

Whether the termination was unfair

Procedural fairness

25. An employer is under a statutory duty to comply with the requirements of section 41 of the Employment Act, 2007 before terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*.

26. The grounds/reasons given in the Claimant's letter of termination is performance/negligence and section 41 of the Employment Act is therefore implicated.

27. The Claimant acknowledged he appeared before a panel comprising of Respondent's senior officers. According to the Respondent's written submissions, this was a demonstration that the Claimant was accorded a fair hearing.

28. However, the Court cannot accept this submission because the parties and more so the Respondent did not clarify whether this was an investigation/inquiry to establish the facts upon which to commence disciplinary action or a disciplinary hearing as contemplated by law. The two processes have distinct purposes and objectives.

29. And if the process was a disciplinary hearing, the Respondent has not established that the Claimant was informed of the charges to confront and was afforded an opportunity to state his case.

30. To my mind, procedural fairness under section 41 of the Employment Act, 2007 envisages **WHAT, WHEN, WHO** and **HOW** questions which have not been answered. The **What** question relates to what is the employee charged with, the **When** aspect relates to when the hearing will/took place, the **Who** question turns on who heard the disciplinary case and lastly, the **How** question relates to how the hearing took place.

31. The Respondent opted not to call witnesses. No record or minutes of the Claimant's appearance before the panel was produced. There is no material placed before Court to answer the four questions, there is even no evidence that the Claimant was informed his dismissal was under consideration. The Respondent has failed to demonstrate that it was in substantial compliance with the procedural fairness safeguards in section 41 of the Act.

Substantive fairness

32. The substantive reason given for the termination of the services of the Claimant was that he failed to record an incident in the Respondent's Control Room Incident Log Sheet.

33. The unchallenged evidence of the Claimant was that only major and not minor incidents would be logged into the *Control Room Incident Log Sheet*. The Claimant testified that minor incidents would be entered into the *control room OB* and the particular incident was logged in the *control room OB*. Even this latter evidence was not controverted.

34. As to who was meant to do what, the job description of the Claimant produced in Court was that of 2002. The job description was signed by the Claimant as a Shift Leader. In 2002, the Claimant, according to documents exhibited in Court was a Controller. In 2008, there was a restructuring and the Claimant was required to report to a Control Room Shift Leader. In evidence he stated he was a Shift Controller on the material day.

35. The incident in question was entered into an OB and not Incident Log Sheet because according to the Claimant it was a minor incident. There was some record somewhere and in the view of the Court, the Respondent has failed to prove the reasons for the termination of the services of the Claimant, and that the reasons were valid and fair.

36. The Court finds the termination substantively unfair.

Appropriate relief

Damages for wrongful dismissal

37. The Court has found the termination of the services of the Claimant unfair. One of the primary remedies pursuant to section 49 of the Employment Act is the equivalent of not more than twelve months gross wages as compensation.

38. The remedy is discretionary and the Court is enjoined to consider the factors outlined in section 49(4) of the Act.

39. The Claimant served the Respondent for 13 years. He was paid terminal dues. Considering these factors the Court would award him the equivalent of 10 months gross wages under this head of claim which is assessed at Kshs 135,300/-.

Unpaid overtime

40. The Claimant sought Kshs 56,680/- under this head. His evidence remains uncontroverted. The Court would award him Kshs 56,680/-.

Costs

41. The Claimant has succeeded and the Court would award him costs of the Cause.

Conclusion and Orders

42. In conclusion, the Court finds and holds that the termination of the services of the Claimant was procedurally and substantively unfair and awards him and orders the Respondent to pay him

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|--|----------------|
| a. 10 months gross wages as compensation | Kshs 135,300/- |
| b. Overtime | Kshs 56,680/- |

TOTAL

Kshs 191,980/-

43. Costs to the Claimant.

Delivered, dated and signed in open Court in Mombasa on this 8th day of September 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Hayanga instructed by A.I. Hayanga & Associates

For Respondent Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers