



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 436 OF 2013

1. HUSSEIN DIBA KOSI
2. SAMWEL MUNGAICLAIMANTS

VERSUS

1. MOMBASA MAIZE MILLERS LTDRESPONDENTS
2. READY CONSULTANCY COMPANYTHIRD PARTY

J U D G M E N T

INTRODUCTION

1. The claimants have brought this claim seeking employment dues from the respondent following their summary dismissal on 14/8/2013. They are not represented by counsel. Their claim is for one month salary in lieu of notice, leave days not utilized, service pay and overtime.
2. The respondent has denied liability and averred that the claimants were not her employees. She has further averred that the claimants were employed by the third party and as such there was no way she could dismiss them from employment. She further averred that it is the claimants who absconded work after suspension. The Third Party has also denied liability and averred that the claimants were employed by the respondent. She further averred that her obligation was only to pay the claimants with directions from the respondent. She also averred that it is the claimants who absconded work after they were given suspension for misconduct.
3. The suit was heard on 30/7/2014 when the first and second claimants testified as CW1 and CW2 respectively while the defence did not call any witness but only relied on the written statements filed with their pleadings.

1ST CLAIMANT'S CASE

4. CW1 stated that he was employed by the respondent on 16/8/2010 as a Security Guard. The contract was verbal and he worked continuously for 6 days a week and rested every Friday. He started with a wage of ksh.365 per day which was later reviewed to ksh.415 for day shift and ksh.525 for night shift. The wage was paid daily by the third party. No NHIF or NSSF remittances were paid by his employer. He never went for any leave during his whole period of service.
5. CW1 told the court that he was verbally dismissed from work on 14/8/2013 by the respondent's Chief Security Officer Mr. Suleiman Nagele. He prayed for his dues as prayed in the claim totalling to kshs.487000 plus compensation for unfair dismissal which was done without any

- reason.
6. On cross examination by the respondent's counsel, CW1 maintained that he was employed by the respondent on 16/8/2010 as Security Guard. His supervisor Mr. Isaya used to assign him work station and shifts. He maintained further that he worked continuously from 16/8/2010 till the date of dismissal.
 7. He explained that on the day he was dismissed he resumed work from one week suspension by Mr. Ali Muhammed but the said Mr. Ali Muhammed told him to see Mr. Suleiman Nagela first. When CW1 went to see Mr. Nagela, the latter told CW1 to go away even to the labour office or court.
 8. CW1 left and went to report to the labour office. Thereafter he secured another employment at TSS in September 2013 because he had a family to support.
 9. On cross examination by the third party's counsel, CW1 stated that he was employed by the respondent when Mr. Suleiman Nagela, the respondent's Chief Security Officer recruited him. He denied any knowledge of the agreement between the respondent and the third party. He further stated that his daily wage was as set by the government for 4 years he served. He however prayed for overtime because he used to work from 6am to 6pm. He contends that he was dismissed by Mr. Nagela.

2ND CLAIMANT'S CASE

10. CW2 stated that he was verbally employed by the respondent in 2009 and worked continuously for 5 years. He never went for any leave during his period of service but he used to get one unpaid off day per week. He was not paid for the overtime worked. He contended that his services were terminated without notice.
11. CW2 prayed for dues and compensation as outlined in his claim. According to him he was dismissed without any reason.
12. On cross examination by the respondent's counsel, CW2 stated that he was suspended with 3 others for 7 days but when he returned from the said suspension, the Senior Security officer Mr. Nagela dismissed him. CW2 contended that he was discriminated because some of the guards who were suspended with him were not dismissed.
13. CW2 stated that he used to work for 6 days per week on night shift and rested on the 7th day without pay. He explained that he used to be assigned duty by Mr. Wajige but later Mr. Ali Muhammed took over the responsibility. CW1 explained further that he used to be paid at the respondent's office.
14. On cross examination by the third party's counsel, CW2 stated that he used to sign attendance register belonging to the respondent when he arrived for work. He denied knowledge of the third party.

RESPONDENT'S CASE

15. Mr. Ali Muhammed wrote his statement on behalf of the respondent on 3/3/2014. He stated that the claimants herein plus 2 others guards developed the habit of leaving work before the scheduled time and before handing over to the relieving guard. As a result, he suspended them for one week with the instructions of his seniors. After the one week suspension the other 2 guards, Mr. Andrew Embong and Alman Jirali returned but the claimants did not. Instead the claimant returned after one month with a letter from the labour office alleging that the claimants had been dismissed. He and his boss Mr. Suleiman Nagela (Lucky) responded to the labour officer's letter denying the alleged dismissal and clarifying that the claimants were only suspended but failed to report back to work.
16. Mr. Kamau Nducu, DPT Internal Security MMM wrote his statement also on behalf of the respondent. He stated that he received report from the supervisor of night guards that some of the night guards were leaving duty before handing over to the days guards. He further reported that the habit had persisted despite warnings and therefore suspended the claimants plus two other guards. After suspension, the 2 other guards resumed work but the claimants did not. Instead the claimants returned after 3 weeks with a letter written to MMM by the labour officer alleging that the claimants had been dismissed from work. He and Mr. Ali Mohammed responded to the

letter by the labour officer denying the alleged dismissal and clarifying that the claimants had only been suspended for misconduct.

17. Gloria Endekwa wrote her statement on 4/3/2014 also on behalf of the respondent and stated that she works for the third party as the Operations Manager for the last 5 years. She stated that the claimants had disciplinary issues with their supervisor at Apex area where they were guarding. The problem was that for more than one month, the claimants were leaving work at 4.00am or 5am without handing over. The claimants and 2 other guards were therefore suspended for one week by the supervisor on 14/8/2014. The other 2 guards resumed work but the claimants never returned after the one week suspension. Instead, they brought a letter from the labour office. She denied that the claimants were dismissed from employment.

THIRD PARTY'S CASE

18. Mr. Ali Muhammed wrote another statement on behalf of the third party on 10/6/2014. He stated that he was a supervisor with Mombasa Maize Millers. He further stated that the claimants were formerly working as night guards with Mombasa Maize millers. He further stated that some night guards including the claimants began leaving duty before the scheduled time and as such they were suspended for 2 weeks by Suleiman Nagela, who is the Head of Security at Mombasa Maize Millers. The other guards returned after the 2 weeks suspension but the claimants did not and instead they brought a letter from the labour office. He responded to the said letter with instructions from Mr. Suleiman Nagela. He concluded the statement by contending that the claimants were never dismissed and accused them for not resuming to work after suspension.
19. After the hearing, the counsel for the respondent and the third party, filed written submissions of which the court has carefully considered in making this judgment.

ANALYSIS AND DETERMINATION

20. It is not disputed that the claimants were recruited by Mr. Suleiman Nagela the Chief Security Officer for the respondent. It is also not in dispute that the claimants were suspended from work on 14/8/2013 by Ali Muhammed with instructions from his senior Mr. Suleiman Nagela. There is also no dispute that the claimants were night guards earning ksh.525 per day when they were suspended. There is also no dispute that the claimants were not contributing to NSSF fund and NHIF.
21. The issues for determination are whether the claimants absconded work after suspension or they were dismissed without any reason. The other issue for determination is whether the claimants are entitled to the dues sought. Lastly the court must determine who should pay the dues awarded.

DISMISSED OR ABSCONDED WORK

22. The evidence by the claimants that they returned to work after the 7 days suspension but Suleiman Nagela dismissed them was never rebutted. The said Mr. Nagela never testified or even recorded any statement to dispute that. He also never responded to the letter by the labour officer but only directed Ali Muhammed to respond. This court believes the evidence of CW1 and CW2 that they were dismissed and rejects the defence contention that the claimants absconded work. In any case the court is at a loss as to whether the persons who filed statements were witnesses for the respondent or third party. In addition the said witnesses shied away from the witness box to avoid cross examination.
23. The court therefore finds that the claimants were dismissed verbally and no reason was given to them for dismissal. That was within the powers of the employer under Section 36 of the employment Act. The said section provides that;

“ Either of the parties to a contract of service to which Section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section ”

This court's understanding of the foregoing is that an employer can at any time terminate a private law contract, without any notice provided that the termination is not on accusation of any misconduct, poor performance or incapacity and provided that the employer pays the employee the remuneration which he would have earned had he worked during the notice period.

DUES PAYABLE

24. It is not disputed by evidence that claimants worked continuously from 2010 and 2009 respectively to 14/8/2013 as casuals being paid on daily basis. They were not going for paid leave or rest days. The court finds that this is a good case to exercise its power under Section 37 of the Employment Act to convert the claimants from casual employee status to the status and benefits of employees otherwise known as permanent staff.
25. The claimants are each awarded one month salary in lieu of notice, leave of 21 days per year of service and service pay at the rate of 15 days per year of service. The prayer for overtime and resting days is however dismissed for lack of particulars and legal basis. The claimants asked the court to award them compensation for unfair dismissal. That request is declined because as held above Section 36 of the Employment Act entitled the employer to dismiss them without notice provided salary is paid in lieu of notice.
26. The above awards shall be based on their wage for night shift guards being Ksh.525x30=15750

1st claimant

Salary in lieu of notice	15,750
3 years leave (63 days)	33,075
Service pay for 3 years (45 days)	<u>23,625</u>
	<u>72,450</u>

2nd claimant

Salary in lieu of notice	15,750
4 years leave (84 days)	44,100
service pay for 4 years (60 days)	<u>31,500</u>
	<u>91,350</u>

The claimants prayed for any other relief that the court may deem fit. The court grants that prayer by ordering that the claimants to be issued with certificate of service

WHO IS LIABLE

27. The respondent and the third party did not tender any tangible evidence to reveal their relationship. They only treated the court with a ping pong of cleverly allegations regarding the actual employer of the claimants. The claimants have insisted that they were recruited and dismissed by Suleiman Nagela the Chief Security Officer for the respondent. As already stated above, that piece of evidence was not rebutted. That notwithstanding, the respondent has produced casual labour voucher number 3495 dated 1/7/2013 and number 1219 dated 13/8/2013 drawn on the letter head for the third party. No details were given about the role played by the third party in the said vouchers. The said vouchers therefore remains mysterious to the court and they did not help in explaining the relationship between the claimants, respondent and the third party.
28. In view of the foregoing unexplained relationship and in view of the convenient ping pong of

denial of the employer status played by the respondent and the interested party, the court finds that the two shall be jointly and severally liable to pay the claimants dues. If at all there existed an agreement between the respondent and the interested party about labour outsourcing, the same should have been produced as exhibits and the court could not have spend much time on determining who was the employer for the claimants.

DISPOSITION

29. For the reasons stated above judgment is entered against the respondent and the third party jointly and severally and in favour of the 1st and 2nd claimants for ksh.72,450 and 91,350/ respectively. They will also have certificate of service, costs and interest.

Orders accordingly.

Dated, signed and delivered this 17th October 2014

O. N. Makau

Judge