



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 83 OF 2013

BENARD OLAKITARI ORINYO CLAIMANT

VERSUS

TOTAL SECURITY SURVEILLANCE LIMITED RESPONDENT

J U D G M E N T

Introduction

1. This is a suit claiming Kshs.414604 as accrued employment benefits plus compensation for unfair termination of the Claimant's employment by the Respondent on 10.1.2012. The basis of the suit is that the dismissal of the Claimant was unfair and unjust for being done in contravention of Section 35, 41 and 51 of the employment Act and Article 47(1) of the Constitution in that due process was not followed.
2. The Respondent has admitted that Claimant was dismissed on 10.1.2012 but denied that the same was unfair and in breach of any constitutional rights. She averred that the Claimant was justifiably dismissed summarily under Section 44 of the Employment Act for suspected criminal conduct against the Respondent and after according him a fair hearing.

Background

3. The suit was initially initiated by the Claimant jointly with 2 other Claimants who later withdrew their Claims before the suit was heard. The suit was heard on 15.10.2014 when the Claimant testified as CW1 and the Respondent called Patricia Kinyanjui as RW1.

Claimant's case

4. CW1 was employed by the Respondent on 1.10.2010 as a Night Guard. His salary was Kshs.7000 which was paid through the bank. He used to report at 5.45 p.m. And leave at 6.00 a.m. The official working hours agreed was 8 hours per day and the rest was overtime. The contract was orally made and was never reduced into writing.
5. On 11.1.2012, CW1 was told by Mr. Danson Chira (MD) that computer boxes for 8 vehicles had been stolen at Mitchell Cotts where CW1 was guarding with other guards. CW1 recorded a statement as requested by the MD. Thereafter he was taken to the police where he recorded yet another statement and locked up in police cells with 6 other suspects. On the following day CW1 was released on bond and continued reporting to the police until investigation were concluded and released on 20.1.2012 after exonerating CW1 of the alleged criminal offence. CW1 went to the Respondent's office the same day (20.1.2012) but the MD told CW1 to go away and wait until a

- report was received from Nairobi. After the lapse of 3 weeks, CW1 returned to the Respondent's office but the MD told CW1 to return his uniform because there was no more employment there. According to CW1, he was unfairly dismissed on 1.10.2012 without being given a hearing to defend himself. CW1 maintained that he was falsely accused of theft. CW1 contended that RW1 called him over the phone and told him that the dues he was demanding was not going to be paid.
6. He prayed for leave for the two years worked, salary for 10 days worked in January 2012, public holiday worked and uniform deductions at the rate of Kshs.300 per month for the period worked and which was refundable upon surrender of the uniform. CW1 also prayed for salary arrears arising from under payment of salary. According to CW1, his colleague guards were being paid Kshs.10,000 per month. He further prayed for compensation for unfair termination of his employment. He also prayed for overtime at the rate of 4 hours per day for days worked in the 2 years.
 7. On cross examination by the defence counsel, CW1 admitted that he was assigned to guard Mitchell Cotts with two other guards between September 2011 and 10.1.2012. CW1 denied knowledge of any theft at the Mitchel Cotts. He admitted that he was under obligation to guard the vehicles which were allegedly vandalised. He denied that he was employed on 14.10.2010. He denied attending a meeting on 10.1.2012 with Hussein Zaid, Alexander Katambo, Issa Ojilo, John Mwendwa and Dadson Chira. He contended that he recorded statement in the Respondent's office on 11.1.2012 before being taken to the police.
 8. CW1 explained that he was not sure that Legal Notice No. 64 of 10.6.2011 provided for a minimum wage of Kshs.7586 for Mombasa. He maintained that he was always working as a night guard. He admitted being member of NSSF but contended that the Respondent never remitted the money after deducting his salary. Hence his claim for service pay. He maintained further that he was deducted Kshs.300 for uniform for 24 months. He admitted that he got an alternative employment before the lapse 12 months after dismissal by the Respondent.

Defence case

9. RW1 is the HR Manager for the Respondent based in Nairobi office. She confirmed that CW1 was employed by the Respondent on 14.10.2010 as a Security Guard and worked until 10.1.2012 when he was dismissed. The reason for his dismissal was theft of property valued at Kshs.1.6 million at Mitchel Cotts where CW1 was guarding with other guards. The Respondent's Branch Manager allegedly summoned all the guards attached to the scene of the theft and recorded statements from them on 10.1.2012 but they all denied knowledge of the alleged theft. The guards were asked to attend another meeting on 11.1.2012 but they failed to attend and as such no letter of termination were served because the guards did not attend the meeting.
10. RW1 contended that CW1 was issued with a written contract in 2010 and 2011 providing for a salary of Kshs.6000 and Kshs.8000 per month respectively. According to her, Clause 9(3) of the 2 contracts provided that the company shall recover from the employee's salary, any loss incurred due to the employee's negligence. In this case RW1 produced a letter from Mitchel Cotts dated 18.1.2012 demanding Kshs.1.6 million lost due to the negligence of CW1 and other colleague guards. John Mwendwa one of the guards allegedly wrote a letter dated 10.12.2012 admitting that theft took place as alleged by the client. Consequently, according to RW1, the company had a valid reason for dismissing CW1. Again, according to RW1, CW1 was heard before dismissal according to the minutes dated 10.1.2012 (Exh. d.6).
11. RW1 admitted the Claimant was entitled to Kshs.4060 being salary for 10 days worked in January 2012 but denied the prayer for salary in lieu of notice. She also admitted that CW1 never went for any leave during his service but denied that he used to work on public holidays. She further admitted that CW1 was entitled to refund of his money deducted towards the official uniform but maintained that the sum was only Kshs.3950. She denied that CW1 was underpaid in terms of salary and maintained that the minimum statutory salary was Kshs.7586 which was way below the Kshs.8000 which CW1 was earning. In addition RW1 denied the claim for service pay on ground that CW1 was a contributor of NSSF which was promptly remitted. She further contended that the salary given to CW1 was consolidated and it included a standard overtime pay of Kshs.500. In conclusion, RW1 prayed that if any sum shall be found due to the CW1 by the court, the same should be set off against the loss suffered by the Respondent.

12. On cross examination by the Claimant's counsel, RW1 admitted that CW1 had signed 2 contracts dated 15.10.2011 providing for Kshs.10,000 and Kshs.8,000 salary respectively but before 2 different people. RW1 admitted further that she was not present when Mr. Chira summoned CW1 and the other guards on 10.1.2012 but maintained that Mr. Chira conducted a disciplinary hearing on 11.1.2011 at 8.00 a.m. And all the guards were asked to avail their witnesses. According to RW1, CW1 never objected about the short notice to the hearing. She maintained that CW1 was dismissed for a valid reason being careless performance of duty.
13. She confirmed that Legal Notice No. 6408 of 2011 provided for minimum salary of Kshs.8463 for night watchmen and admitted that by paying CW1 Kshs.8000 was an underpayment. She maintained that Clause 7(a) of the contract provided for a standard overtime pay. She admitted also that the NSSF Statement had gap of unremitted contributions. She also clarified that CW1 never admitted negligence of duty.
14. After the hearing both parties filed written submissions, which have been carefully considered herein.

Analysis and Determination

15. There is no dispute that CW1 was employed by the Respondent as a Night Guard between 1.10.2010 and 11.1.2012. There is also no dispute that CW1 was summarily dismissed from employment on 11.1.2012 for gross misconduct. The issues for determination is whether the dismissal was unfair and whether the reliefs sought should issue.

Unfair termination

16. The Claimant believes that his dismissal was unfair because there was no valid reason and also that he was never accorded a fair hearing to defend himself before the dismissal. He believes that there was no valid reason because the alleged theft of property was never proved. In addition, CW1 contended that the police investigated the alleged offence and exonerated CW1. On the other hand, RW1 contended that there was a valid reason to warrant dismissal based on a confession written by John Mwendwa who was guarding the same premises with the CW1. The confession is contained in Mwendwa's letter dated 10.12.2012 of which only a photocopy was produced by RW1 who was not the author. The author did not testify to confirm the authenticity of the letter and as such the court will not rely on the letter to make any finding in favour of the defence because there is a danger of prejudice against the Claimant. Even though this court is not bound by strict rules of evidence, it is bound by the constitution to do justice through fair trial. In addition to the foregoing, the court finds that the allegation by RW1 that CW1 was accorded a fair hearing was mere hearsay. She was not present in the alleged hearing and as such the said hearsay evidence is dismissed. Consequently the court believe the evidence of CW1 and finds that the dismissal of the Claimant from employment was unfair within Section 45 of the Act. Section 43 and 45 of the Employment Act puts the burden of proving existence of a valid and fair reason of termination on the employer. Likewise Section 45 of the Act puts the burden on the employer to prove that fair procedure was followed in dismissing an employee. Fair procedure is provided for under Section 41 of the Act which basically involves an oral hearing of the Claimant before dismissing him. The hearing must be in a language the employee understands and must be in the presence of another employee of the accused persons choice. In the present case the Respondent failed to discharge his burden in proving both substantive and procedural fairness within the meaning of Section 45 *Supra*.

Reliefs

17. Under Section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment dues plus compensation for unfair termination. Before making any award the court needs to determine the correct salary for the CW1. CW1 contended that he was underpaid from 2010 until 2012 when he was dismissed. RW1 admitted that although the contract of employment provided for Kshs.6000 in 2010 and Kshs.8000 in 2011 the wage order in Legal Notice No. 64 of 2011 provided for Kshs.8463 as the minimum wage for the Night Guards.

That figure was only the basic pay exclusive of allowances. The court however is going to apply the Kshs.10000 as the CW1's rightful salary because it is contained in the contract of employment filed in court by the defence on 21.5.2013 and 2.9.2013. The salary was the same for other guards of the Respondents including Mr. William Wesa. Consequently CW1 is awarded Kshs.10,000 as one month salary in lieu of notice. He will also get Kshs.2000 per month for under payment for the period between May 2011 and December 2011 being Kshs.16000. The claim for underpayment between 2010 and April 2011 is dismissed for lack of evidence. According to CW1, the salary then was fluctuating. As regards the leave earned, RW1 admitted that CW1 never took any leave. He worked for 15 months which translated to 26 leave days earned valued at Kshs.8,750. CW1 contended that he worked during 16 holidays but no particulars were given or evidence adduced in support. Consequently that claim fails. RW1 admitted that only Kshs.3950 was deducted from the Claimant for uniform. The same is granted for lack of any other evidence by CW1 to the contrary. RW1 also admitted salary for 10 days worked in January 2012 being Kshs.4060. The prayer for overtime is dismissed because the Kshs.10000 pay was consolidated pay including standard overtime. Lastly the court awards CW1 Kshs.60000 being six months salary as compensation for unfair termination of employment because CW1 admitted that he secured another employment before expiry of 12 months.

Disposition

18.For the reasons above judgment is entered for the Claimant in the sum of Kshs.102760 plus costs and interest.

Dated signed and delivered this 10th December 2014

O.N. Makau

JUDGE