



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI CAUSE NO. 2065 OF 2011

Albert Owino Otieno.....CLAIMANT

v

Director, Flamingo Hill Camp, Ltd.....RESPONDENT

JUDGMENT

1. On 7th December 2011, the Claimant filed this cause against the Respondent.

The following were the issues in dispute:-

- i. unfair termination
- ii. gross underpayment

The Claimant alleged that he had been employed on 26th February 2007 as a maintenance artisan and that he worked for the Respondent in other capacities until termination in July 2011.

2. The Respondent defended the Cause by a Reply to Statement of Claim on 9th March 2012. The Respondent denied the averments regarding the employment and in particular stated that the Claimant was employed on 1st February 2006 as a security guard.

3. The hearing was fixed for 18th September 2012 on which date the Claimant testified. He stated in his evidence in chief that he was a Mason by profession and that he resided in Nakuru. He stated that he was employed on 26th February 2006 as a General maintenance at Flamingo Hill Camp as a plumber, electrical & carpentry work. He did not have any documentation to show and stated that his salary was 6,000/- per month. He stated that in July 2010 his daughter went missing and in an effort to trace her the Manager allowed the Claimant the use of a company vehicle to assist in the exercise. He testified that he made it to the school and thereafter went to the Police Station as advised by Headmaster. He stated that he called the Manager Alex Moriswao and the driver returned to the camp. The Claimant testified that the driver returned with the Manager who sought to know why the Claimant was incarcerated. The Manager came back the following day as the Claimant was in custody for 4 days. The co-workers of the Claimant also visited and he testified that he was released on 28th which was a Monday at 4.00 p.m after being in remand for 2 weeks. He testified that the money which was alleged to have been paid by the Respondent was money from the tip box which the staff had decided to give as a gift to him due to his woes. He stated that during the trial he was in touch with his managers Lebow and Mr. Alex. He stated that his advocate wrote a letter to the Company and that is when he knew he was terminated. He was acquitted of the charges of alleged defilement of his daughter. He sought payment of his dues and

certificate of service.

4. The Claimant was cross examined by the Counsel for the Respondent Mr. Morintat. The Claimant insisted he was hired in 2007 as General Maintenance though he conceded he had applied for a job in 2006 after doing some construction work in 2006 for the company. He denied the signature on DFHC1 was his. He maintained that he received tip box money and not money from the employer. He confirmed that he was due to be on off between 1/5/10 to 23/5/10 as per defence exhibit marked DFHC 6(d).

5. The Respondent called Mr. John Leboo a company manager Flamingo Camp. He testified that the Claimant was employed in 2006 as a security guard. He testified that he witnessed the Claimant sign the letter of employment exhibited as DFHC 1. He stated that the Claimant was dismissed for absenteeism. He testified that the Claimant was paid 1 month's notice, leave allowance pay plus 20 days which he had accrued. He testified that staff contributed 20,000/- which was also paid to the Claimant. He testified that the company was not aware of the arrest of the Claimant.

6. He testified that there was increase in pay over the years except for 2008 due to the post election violence as there were no tourists. He testified that he was not aware of what Mr. Alex did and that he did not go to Bondeni Police station. He stated that in 2006 the Claimant could not have been employed as a mason as the Contractor left toward the end of 2006. He testified that the Claimant worked as a security guard and at times did some maintenance but he was in the security department.

7. In cross examination he stated that the Claimant worked for the Contractor and he sought masonry work with the Respondent but he was given a security job as a guard. He stated that the Claimant was both security and maintenance. He stated that the staff contribution was not through the company. He stated that he was not aware of the arrest of the Claimant and was only aware after dismissal.

8. The employment of the Claimant was not denied by the Respondent only the date was in dispute. It was alleged to be on 26th February 2007 by the Claimant and 1st February 2006 by the Respondent. The Employment Act Section 74 provides as follows:-

74. (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

(a) of a policy statement under section 6 (2) where applicable; (b) specified in section 10 (3);

(c) specified in section 13;

(d) specified in sections 21 and 22;

(e) of an employee's weekly rest days specified in section 27;

(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;

(g) of maternity specified in section 29; (h) of sick leave specified in section 30;

(i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;

(j) of food rations where applicable; (k) specified in section 61;

(l) of a record of warning letters or other evidence of misconduct of an employee;

and

(m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.

(2) An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty six months to examine the record.

(3) Where an employer who employs a child maintains a register in accordance with section 61, the employer shall be deemed to have complied with this section if the register contains in relation to each child, the particulars required to be kept by the employer under subsection (1).

The Respondent produced a letter of employment which indicated employment in 2006. The Claimant stated in his claim as well as evidence that his employment was from 26th February 2007. The employer as per the provisions of Section 74 above is the keeper of records and it would seem the records show employment from 2006.

9. The termination took place in 2010. It was stated that the same was due to the absenteeism by the Claimant from work. It is not denied that the Claimant was away from work on account of travails related to the alleged criminal acts subject of the case that terminated with his acquittal. He gave his version which was that the Respondent was aware and the allegations that he absconded were a cover for the position taken on the termination.

10. It was not lost on the Court that there was a donation made to the Claimant by his colleagues, whether it was from the tip box or not, the donation was made. This was no ordinary donation, it was to assist the Claimant in his criminal trial. It follows therefore that the Claimant's arrest and arraignment were within the knowledge of the Respondent constructively. Mr Alex a manager with the Respondent company and to whom reference was made was aware the Claimant was in custody as early as the first night. In the ensuing period, it was the staff of the Respondent who went to visit the Claimant whilst still in custody. The Court notes the Claimant sent a letter termination.

11. The termination was alleged to have been as a result of the absenteeism of the Claimant. This brings the termination under the purview of Section 44 of the Employment Act. Section 44 of the Employment Act provides as follows (in the material part)

44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

The Claimant was absent, that is not denied, the Claimant however was not absent without lawful cause and to boot, the Respondent was aware of the cause of the absence. Termination was not merited on the basis of the absenteeism.

12. The Court therefore holds and finds that the termination was unfair in terms of Section 45. Section 45 provides:-

45. (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove

—
(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility;

13. The employment of the Claimant was terminated unfairly and the Court therefore has to consider whether the Claimant is entitled to any reliefs claimed.

He claimed the following as per his Statement of Claim:-

- i. One month salary in lieu of notice
- ii. underpayment for 3 years and 3 months
- iii. overtime, normal OT from Monday to Friday
- iv. overtime on Saturday, no overtime
- v. Rest days
- vi. 1 year annual leave
- vii. compensation issue on Section 49 c of the Employment Act.
- viii. Certificate of service based on Section 51 of Employment Act.

No evidence was led by the Claimant in respect of the hours of work, the rest days as well as the 1 year annual leave claimed. The Respondent was able to demonstrate that the Claimant went on leave in the year he was terminated. The Claimant alleged he was an artisan and thus claimed sums allegedly due on account of the differential wages. But the evidence led showed that the Claimant was employed as a guard and there was therefore no underpayment at all as alleged. In the premises the claims under (i), (ii), (iii), (iv), (v), (vi) all fail.

14. The Court has found the termination was unfair and grants compensation of 12 months salary being Kshs. 115,332/- on the basis of the Gross salary he was receiving in 2010 which was Kshs. 9,611/- per month. He will also have the certificate of service.

15. As the Claimant has been partially successful, he will have costs on the lower scale from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi on this **15th** day of January 2013.

Justice Nzioki wa Makau

Judge of the Industrial Court

Appearances

Mr. Otieno instructed by Gordon Ogolla & Associates Advocates For Claimant

Mr. Morintat instructed by Kiplenge & Kurgat Advocates For Respondent