



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1599 of 2011

JOHN NYAMAGE.....CLAIMANT

VERSUS

SEARITE HOLDINGS LTD.....RESPONDENT

JUDGEMENT

1. The Claimant herein John Nyamage seeks resolution of the issue he frames as “wrongful and unfair termination of the claimant’s services and failure by the Respondent to pay terminal benefits to the claimant”. The claim filed on 21st September 2011 sought payment of one month’s salary in lieu of notice, accrued annual leave, off days and public holidays, overtime, salary for 16 days worked in June and NSSF dues not remitted (3 months). He also sought compensation for wrongful dismissal to a maximum of 12 months, costs, interest and any other relief as the Court may deem fit.
2. The Respondent Searite Holdings Limited filed a Reply to the claim on 3rd November 2011. The Respondent averred that the Claimant was summarily dismissed for gross misconduct for habitual use of abusive language, rudeness and refusal to obey instructions of his seniors. The Claimant was called to collect his dues amounting to 10,404/= but he declined to do so.
3. The matter proceeded before my brother Justice Byram Ongaya *ex-parte* on 31st October 2012. The Judgment of the Judge was subsequently set aside and the Respondent granted conditional leave to defend. M/s Makumi & Co. who took over from the previous advocates did not file any defence other than the one on record.
4. The case came up for hearing on 24th April 2013. The Claimant testified. He stated that the Respondent hired him as security guard in July 2009. He stated he signed letter of employment 2 weeks after he had been at work. He states that he sought to go on leave and that the uniform he had, needed replacement. He testified that he went to the Respondent’s offices in Kiambu where he met an official of the Respondent, a lady and he explained his problems. He spoke to the Managing Director a Mr. Daniel on phone and he was advised to return to his station. He stated that when he went to his workplace at Adams Arcade there was hostility displayed. He was not greeted, but was told he can be dismissed and he would get nothing. She was not happy he had gone to Kiambu to see Daniel.
5. He testified that when the Director of Searite came to the premises and talked to the lady, he was fired. The Director went to Kilimani Police station and came with a policeman, but by then, the Claimant had left. He subsequently went to the police station and the case was not processed as a criminal one. He was according to his testimony advised to resolve the dispute as between him and the employer. He sought help from ‘kituo cha sheria’ and Kenya National Commission of Human Rights but the dispute was not resolved hence his claim in Court.

6. He was cross-examined by Mr. Makumi for the Respondent. He stated that the lady at Kiambu is Ruth and that the policeman who called him was John Mugo. He stated that he had had a disagreement with Ruth and that Ruth did not want the claimant continuity to work at Enchanting Africa. He admitted he received payment for his services at the rate of about 7,000/= a month. There were deductions made. He stated that he worked for 1 year 2 months. He sought salary for June – 16 days as well as overtime. He stated his NSSF dues for 3 months were not remitted. He therefore claimed 119,733/=.

7. The Respondent on its part called 2 witnesses – Fredrick Kinyanje a senior supervisor and Daniel Kiratu Kafue the Director of Searite Holding their evidence was in relation to the happening on the material dates. Fredrick testified that there was a problem at Enchanting Africa. He went there and found the Claimant who he was to relieve but the Claimant attempted to hit him with his knee. He decided to leave and called his boss Daniel who came. He testified that John the Claimant was saying that he should be paid so that he can go. He testified that John had chased the day guard. He testified that the client did not want the guard (John) there. He testified that he could not fire John.

8. In cross-examination the witness stated that the Claimant found him at the entrance of the entrance of the supervisor's door. The Claimant declined to interrogate or cross-examine him further stating that the witness did not know what he was saying.

9. The Managing Director Kiratu Kafue testified that he received a call from Anne the Administrator of Enchanting Africa to the effect that John was there and he was complaining. The witness testified that the day before, John had come to the office and he had NSSF issues and an issue on uniform. He called the Area supervisor Fred (the 1st witness for the Defence) and Fred was to deal. He testified that he received a call that John was beating them and the witness drove to the offices. He stated that he found Fred and the day guard. He could not recall the guard's name. He stated that he went to Anne's office and Anne asked what they had done to John who was a good person but was now agitated.

10. The witness testified that Florian the owner called Anne and told her to resolve John's issue. The witness testified that he had to be stern with John so that work could continue. He decided to sent John to another place. He said John did not go to the office but instead went there a few months later. John and the witness sat and calculated the dues when John finally returned the uniform and the cap. He did not accept the dues. He wanted 16 days pay, pay for holidays and off days. He had a few days to go to make a full year of service. The witness in cross-examination did not recant his testimony and averred he did not fire the Claimant by the roadside. The Claimant was of the view that what happened and what was narrated to Court were at variance.

11. The issue for determination is simple. Was the dismissal of the Claimant unfair and unlawful? If so what remedies lie? The Claimant testified as to how he dismissed unceremoniously. The Respondent witness confirmed there was friction which led to the dismissal of the Claimant. It all started on 16th when he went to Kiambu and ended on 17th when Anne asked that John leaves. It is clear that the dismissal of the Claimant was not in accordance with the provisions of the law. If the Respondent is to be believed that John was to be reassigned, why was the Claimant required first to return the uniform? Why was he to clear with the employer first? It seems his fate was sealed by his visit the previous day to Kiambu leading to Anne's query "what have you done to John?". If indeed he was acting aggressively, it is not something the Court would condone if there was threat of violence on staff at Enchanting Africa. That would have been reason for dismissal.

12. No proof of the allegations leveled against the Claimant was availed and though the testimony of the 2 witnesses was similar, it differed in material respects. Fred stated he did not find a day guard, the Managing Director (Daniel) says he found one though he could not recall the name. Who is to be believed? Fred says John acted aggressively toward him. The Managing Director says when he came John went to Florian's office and he got an indicator John wanted the proprietor to intervene as she did by asking Anne to make sure John was sorted out. The Claimant may have merited a termination for whatever valid reason the Respondent may have had but since there was no compliance with section 41 and 43 of the Employment Act, I find the termination was unfair. He is entitled to compensation.

13. The Claimant did not prove the claim on overtime and public holidays. He is therefore not entitled to an award under these heads. In the final result I enter judgment for the Claimant for:

1) Accrued leave and off days	8,678/=
2) Salary for 16 days	3,728/=
3) 6 months compensation	42,000/=
Total	54,404/=

14. The Claimant will pay the Respondent Ksh. 300/= for the damaged cap.

15. The Claimant will also have costs of the suit.

It is so ordered.

Dated and delivered at Nairobi on this **21st** day of **May** 2013.

Hon. Mr. Justice Nzioki wa Makau

Judge