



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1091 OF 2012

(Before D.K.N. Marete)

WALLEN NYABERI ONSERIO.....CLAIMANT

VERSUS

PROTECTIVE CUSTODY LIMITED.....RESPONDENT

JUDGEMENT

This action was brought to court vide a memorandum of claim dated the 26th June, 2012 and filed on the same date. The issue in dispute is cited as;

Wrongful, unfair dismissal and refusal to pay terminal dues, under payment non payment of annual leave and leave traveling allowance in lieu thereof, non payment of house allowance and damages incurred as a result of injuries sustained while in employment.

The respondent via response dated 12th September, 2012 and filed on 19th September, 2012 denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that at all material times relating to this suit he was employed by the respondent. He submits that particularly, between the 1st day of July, 2007 and the 12th day of December, 2010 he was employed by the respondent as a guard. On 12th December, 2010 his employment was wrongfully terminated after he demanded his pending arrears from the respondent employer.

The claimant in his memorandum further states that failure to provide an appropriate forum for notification and hearing before termination and also failure to accord him a chance on any hearing at all before termination is wrongful and unlawful and contrary to the Employment Act, 2007. He also cites the following other anomalies;

1. Failure to accord an appeal forum on the decision to terminate our client’s employment.
2. Failure to issue any warning letter on alleged non-performance.
3. Failure to issue a certificate of service as required under section 51 of the Employment Act, 2007
4. Invalid grounds of termination or no grounds at all.

He prays as follows;

- a. Salary for the month of December, 2010 that is, Kshs. 8,651.45
- b. House allowance for the period July, 2007 to 12 December, 2010 that it;
 - i. July 2007 to April 2009 using the statutory minimum wage of 2006

$$15/100 \times 5,796 = \text{Kshs. } 869.40 \times 22 = \text{Kshs. } 19,126.80$$
 - ii. $15/100 \times 6,839 = \text{Kshs. } 1,025 \times 12 = \text{Kshs. } 12,300$
 - iii. $15/100 \times 7,523 = \text{Ksh. } 1,128.45 \times 8 = \text{Ksh. } 9,027.60$
- c. Annual leave accrued $\text{Kshs. } 8,651.45 \times 3 = \text{Kshs. } 25,954.35$
- d. Severance pay at the rate of 30 (thirty) days for every completed years of service, that is $\text{Kshs. } 8,651.45 \times 3 = \text{Kshs. } 25,954.35$
- e. Damages for wrongful dismissal and unfair termination of employment contract, as per section 49 and 50 of the Employment Act, that is, $\text{Kshs. } 8,651.45 \times 12 = \text{Kshs. } 103,816.80$
- f. Underpayment for the period between April 2009 to 12 December, 2010 that is;
 - i. $(\text{Kshs. } 6,839 - 6,000 \text{ paid}) \times 12 = \text{Kshs. } 10,068$
 - ii. $(\text{Kshs. } 7,523 - 6,00 \text{ paid}) \times 8 = \text{Kshs. } 12,184$
- g. Certificate of service.

He, in the penultimate prays as follows;

1. salary for the month of December 2010, that is Kshs. 8,651.45
2. house allowance of Kshs. 40,454.40cts
3. Annual leave of Kshs. 25,954.35cts
4. Severance pay of Kshs. 25,954.35cts
5. Damages for wrongful dismissal and unfair termination of employment contract of Kshs. 103,816.80cts.
6. Under payment for the period between April 2009 to 12 December, 2010, of Kshs. 22,252.00
7. General damages
8. Certificate of severance
9. Costs of the cause.

The respondent denies the claim and submits that the claimant absconded duty and has neither communicated to the respondents nor returned the uniforms of the respondent. Therefore the claimant is not entitled to the termination dues as claimed.

When the matter came for hearing on 16th May, 2013 Mr. Nyasimi opened up by introducing the matter as one of wrongful, unfair and unlawful termination. Other issues in dispute are underpayment, non payment of annual leave in lieu, leave travelling allowances and no payment of house allowances.

CW1, the claimant, duly sworn testified that he is the claimant and worked for the respondent at the

NSSF as a watchman. He was employed on 1st July, 2007 and this was a day job. He was not issued with a letter of employment but earned Kshs. 5,000.00 at the onset and this rose to Kshs. 6,000.00 in 2009. This was to continue until December, 2012 when his services were terminated. He further contends that he was in December, 2012 underpaid by Kshs. 5,000.00 and when he enquired he was sacked. He was not given a letter on reasons for termination. He was not issued with payslips as his pay was made through the bank.

On cross – examination, the claimant reiterates that he was employed as a day guard. He states that his payslips confirm that he was employed by the respondent. In as much as he stated that he has no letter in support of his salary, an amount of Kshs. 5,000 was missing from his salary.

The respondent called Eugene Chesire, DW1 who testified that he was an employee of the respondent who also knew the claimant. He further testified that the claimant's employment was never terminated but absconded duty from 11th December, 2012. As supervisor, he tried to reach the claimant but his cell phone was switched off and he organised a replacement and even on the fourth day, the claimant did not report back to work. He made a further replacement on 3rd January, 2013 and then there was the training of a replacement, who was employed on 11th January, 2011. The claimant should have formally resigned and returned the company property but did not.

On cross-examination, he testified that he was supervisor and was not deputized by a Mr. Wafula. The respondent also called Osman Wasike Mutende, DW2, who duly sworn testified that he was the respondents Branch Manager, Nairobi. He knew the claimant who was the respondents guard at NSSF. He further testified that the claimant deserted duty and he was informed so on 16th December, 2012. The claimant absconded duty for 30 days when he organized and ordered the employment of a replacement.

The issues for determination therefore are;

1. Was there a termination of the claimant from employment?
2. Was the termination, if at all, wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this case?

The 1st issue for determination is whether indeed there was a termination of the claimants employed as alleged in the statement of claim. It is important to determine this because the parties versions of the story and evidence are different and contrasting. It is not in dispute that the claimant was employed by the respondent as a guard. The claimant in his written submissions contends that the respondent did not produce any evidence to show that they made calls to him on abscondment or any correspondence summoning him to the office to discuss the issue of termination. The claimant denies abscondment, or at all.

The respondent in his submissions reiterates his position that the claimant absconded duty and the next time he heard from the claimant was when he was served with claim.

The burden of proof of unfair termination squarely falls on the employee whereas that of justifying termination rests on the employer – Section 47 (5) of Employment Act, 2007.

Section 47 (5), Employment Act, 2007;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

This burden has not been discharged by the employee/claimant and the respondent's evidence casts a shadow on the case of termination.

In circumstances like the instant case, a test of balance of probabilities is applied to resolve situations of your word against mine, like we have here. A strict application of this would tilt in favour of the respondent and against the claimant. The claim therefore fails for want of proof and I so hold. A case for termination of employment by the respondent is therefore not founded.

If in the first instance a holding of no termination is, like above stated upheld, the other issues in dispute; numbers 2 and 3 automatically fall by the way side and are therefore not material for any analysis.

The claimant is therefore forced to bear the costs of the claim and I so hold. This resolves the last issue for determination.

I, in the circumstances, dismiss the claim with costs to the respondent.

Dated, delivered and signed this 20th day of June, 2013.

D.K. Njagi Marete

JUDGE

Appearances.

1. Job Nyasimi instructed by Nchongu Omwanza & Nyasimi Advocates for the claimant.
2. Miss Ongata instructed by Njuguna & Partners Advocates for the respondent.