



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 5 OF 2011

JOHNSTONE MWAIZINGA.....CLAIMANT

-VERSUS-

DELMAS SECURITY SERVICES.....RESPONDENT

Mrs. Kamau for Claimant.

Mr. Uviu for Respondent.

JUDGMENT

The Claimant filed this suit on 10th January, 2011 seeking various reliefs to wit:

- i. *One month's salary in lieu of notice in the sum of Kshs.3,500/=.*
- ii. *84 days in lieu of leave days not taken.*
- iii. *Salary under payments in the sum of Kshs.290,315/=.*
- iv. *Payment for off days (3,500 x 368/30) – the sum of Kshs.42,933/=; and*
- v. *12 months compensation for wrongful termination in the sum of Kshs.42,000/=.*

*Total claim **Kshs.403,248/=.***

The Respondent filed its Statement of Response on 10th March, 2011 wherein it is prayed that the entire suit is not merited and same be dismissed with costs to the Respondent.

It is common cause that the Claimant was employed on 22nd December, 2002 as a security guard and worked continuously for the Respondent till 30th November, 2009.

That he was promoted to the position of supervisor which position he held until he left the employment of the Respondent.

That the Claimant was summarily dismissed for alleged misconduct which he denies.

The Claimant alleges that at the time of dismissal he earned a monthly salary of Kshs.3,500/= per month whereas the Respondent told the court that the Claimant earned a monthly salary of Kshs.5,500/=. During the hearing the Respondent promised to produce a master roll which indicated the monthly salary of the Claimant but this was eventually not produced.

The Claimant told the court that upon receipt of the monthly salary, he signed for it in a book but he had no pay slip.

Statutory deductions of **National Social Security Fund (NSSF)** and **National Hospital Insurance Fund (NHIF)** were made from his monthly salary.

It is the Respondent's case that the Claimant was summarily dismissed on 31st November, 2000 for failure to obey lawful and proper command to deploy a night security guard at Eastleigh, Nairobi. That he had also failed to go to the site on the material night as a supervisor. That by this misconduct the Claimant had fundamentally breached his contract of service hence the summary dismissal.

The Claimant on the other hand told the court that he was dismissed without notice and no reason was given for the termination. He was not given a letter of dismissal. That he was only called by the Managing Director to his office after the termination wherein he explained to him that his services were terminated for allocating work to a guard who had deserted service and that he had replaced a guard who was absent with another without authority.

The Claimant told the court that he was not paid any terminal benefits upon dismissal yet the Respondent owed him as follows:

Notice

That he should have been paid one month's salary in lieu of notice in the sum of Kshs.3,500/= but was not paid. He claims the same. The Respondent states that upon summary dismissal the Claimant was not entitled to payment in lieu of notice.

Off-days and annual leave

The Claimant told the court that for the entire period he served, he was not given annual leave and he was entitled to twenty one (21) days leave annually. He claims payment of eighty four (84) days in lieu of leave therefore.

That he had from time to time requested for unpaid leave to attend to his personal affairs.

The Respondent on the other hand told the court that the Claimant went off duty once a week and a reliever was brought in while he was away. The Respondent further explained that the Claimant had taken twenty one (21) days leave annually but did not produce any leave records in support of this allegation though **Mr. Daniel Njuguna Maina**, the Managing Director told the court that the Respondent kept leave applications forms and master roll to indicate that indeed the Claimant went on leave.

The court allowed the Respondent to produce the documents before close of the case, but none were produced even though the Respondent filed written submissions on 23rd April, 2013 and could have attached these records thereof.

The Claimant further denied that he was given one day off in a week stating that he worked seven days a week hence he was from time to time forced to apply for unpaid leave to attend to his personal affairs.

Indeed the Respondent produced a letter dated 3rd June, 2007 wherein the Claimant applied to be granted unpaid leave of five days to attend to the funeral of his father.

The Respondent also produced a letter dated 29th January, 2008, wherein the Claimant applied for seven days leave to attend to a matter with his assistant chief. In the letter he stated that four out of the seven days should be his official off days and three days be unpaid. He also requested for a soft loan of Kshs.3,000/= to replace a phone that had gotten lost. He offered to repay in installments of Kshs.500/= per month.

This letter contradicts the Claimant's testimony that he was not entitled to off-days.

The Respondent further produced a letter dated 5th July, 2009 wherein Claimant's application to take four days off duty was granted for the period 9th – 12th July, 2008. Another letter dated 8th January, 2009 is a request by the Claimant to take seven days unpaid leave from 9th – 15th January, 2009. This was also granted. Further the Respondent produced a letter dated 5th November, 2009, wherein the Claimant applied for four days unpaid leave between 9th – 12th November, 2009, which request was granted.

The court is surprised that the Respondent readily produced application letters for off-days and unpaid leave, yet it was unable to produce even one application form for paid annual leave.

Section 74 of the **Employment Act** provides as follows:

“(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 particulars –

(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.”

Whereas the court is prepared to give the benefit of doubt to the Respondent with respect to the off-duty days, clearly the Respondent has failed to produce even a single record of annual leave days taken by the Claimant in spite of the undertaking by the Respondent to do so during the hearing of the case. The court has made an adverse presumption against the Respondent that indeed, no such records exists because the Claimant was not given paid annual leave of twenty one days for the seven years he served the Respondent. The court therefore finds that the Claimant is entitled to payment in lieu of eighty four days leave in the sum of Kshs15,340/= (5,500 30 x 84).

Salary underpayments

In the Memorandum of Claim the Claimant avers that he was entitled to a monthly salary of Kshs.3,500/= at the time of termination.

In his sworn testimony, he told the court that his gross salary was Kshs,4,000/= as a supervisor. He however admitted under cross-examination that he earned Kshs.5,500/= later on though he could not remember the effective date. He added that by the time of termination his monthly salary was Kshs.5,500/=. The Claimant did not tabulate the claim for under payment except giving a global figure of Kshs.290,315/=.

Given the contradictory evidence given in this respect, the court finds that the claim for under payments remains unproven and the same is dismissed.

Compensation for unlawful dismissal

The Claimant was not provided with a letter of summary dismissal. He told the court that he was

first dismissed and then given the reasons later. That he was provided no opportunity to explain a reason why he should not be summarily dismissed in blatant violation of **Section 41** of the **Employment Act**.

The Claimant told the court that he had served the Respondent faithfully for seven years as a security guard and later as a supervisor. He had a good record at work and was surprised by the sudden turn of events.

He denies he had committed any misconduct as alleged by the Respondent or at all.

Mr. Daniel Njuguna Maina, the Managing Director of the Respondent confirmed that the Claimant was called to his office a day after the termination. He said that a hearing was not necessary because the misconduct committed by the Claimant was not in dispute. He added that he had merely called him to give him the reasons why he had been dismissed. He told the court that the Claimant had previous warnings but admitted that the same had expired though they remained in his file.

Upon a careful assessment of the evidence presented by the Claimant *vis a vis* that of the Respondent on the issue of summary dismissal it is clear that the Claimant was not confronted with the reason(s) for the summary dismissal before it was effected. The Claimant did not know why he was dismissed and was not given opportunity to explain why he should not be summarily dismissed.

The court finds that the Respondent failed the procedural threshold under **Section 41** of the **Employment Act** to the loss and detriment of the Claimant.

The court further finds that though the Respondent may have had a good reason to summarily dismiss the Claimant, this was not put to test by allowing the Claimant to provide an explanation that may have resulted in a different decision.

Considering all the circumstances of the case, the court finds that the Respondent summarily dismissed the Claimant contrary to **Section 45 (2) (c)** of the Employment Act, in that the summary dismissal was not in accordance with a fair procedure considering that the Claimant had served the Respondent for a period of seven years.

That the Claimant had suffered loss of his source of self support and that of his family. That the termination was aggravated by the abrupt manner in which it was done. The court grants the Claimant six months' salary as compensation for unfair dismissal in the sum of Kshs.35,000/=.

The employer confirmed that the Claimant earned a monthly salary of Kshs.5,500/= at the time of termination of his services. The court finds that the Claimant is entitled to payment of one month's salary in lieu of notice in the sum of Kshs.5,500/=.

The calculation for the award of eighty four days in lieu of leave is also to apply the undisputed salary of Kshs.5,500 at the time of termination, giving a total of Kshs.15,340/= (5,500 x 30 x 84).

In the final analysis the Claimant is awarded the following:

1. *Kshs.5,500 being one month's salary in lieu of notice;*
2. *Kshs.15,340 being payment in lieu of eighty four days leave;*
3. *Kshs.35,000 being six months' salary compensation for unlawful dismissal;*

*Total: **Kshs.55,840/=**; and*

4. *Costs of the suit.*

It is so ordered.

Dated and delivered at Nairobi this 14th day of August, 2013

MATHEWS N. NDUMA

PRINCIPAL JUDGE