



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 571 OF 2012

FELIX KYANIA MULWACLAIMANT

-VERSUS-

WELLS FARGO LIMITEDRESPONDENT

Mrs. Mutua for the Claimant.

Mrs. Njui for Respondent.

JUDGMENT

It is common cause that the Claimant was employed by the Respondent as a security guard from 9th May, 2005 and worked continuously in that capacity up to 21st January, 2012.

At the time he left employment, he was earning Kshs.8,463/= per month inclusive of house allowance.

The claimant states that his employment was terminated unlawfully and unfairly on the pretext that he had deserted work when in fact he had been asked by a senior manager to go home to shave his beard and wash his uniform and not to come back until when he was recalled.

The manager in question was **Mr. Mwangi** and the incident took place on 23rd January, 2012.

Earlier on 20th January, 2012, the Claimant was serving as a night guard at the **Nation Newspaper Plant** in Mlolongo. After he had checked-off, he went to sleep and later in the day came to collect his uniform to wash.

His superior saw him and asked him to go to work but he explained that was his rest day and he had only come to collect his uniform to wash.

The superior did not listen to him and instead recorded that the Claimant had reported to work late and was asked to report to the duty manager on 23rd January, 2013, a Monday.

The Claimant narrated that he was not recalled back and on 17th February, 2012 he went back to find out why he was not called back to work. The personnel manager, **Mr. Maiyo** told him that he had deserted work and asked the Claimant to return his uniform immediately. He was asked to go home and was not served with a letter terminating his employment. He was also not paid any terminal dues.

It is instructive that the Claimant had served the Respondent for seven (7) years and he claims:

- a. *Payment of service pay at the rate of 15 days salary for each completed year of service in the sum of Kshs.34,177.50/=.*
- b. *Payment in lieu of notice in the sum of Kshs.8,463/=.*
- c. *Unpaid salary for the month of January (13 days) in the sum of Kshs.4,237.50/=.*
- d. *Payment in lieu of 21 days leave for the year 2011 in the sum of Kshs.6,835/50.*
- e. *Uniform allowance Kshs.5,000/=.*
- f. *Transport allowance of Kshs.850,00 and;*
- g. *Maximum compensation for unlawful and unfair dismissal.*

The Respondent relies on the Statement of Response dated 31st May, 2012 and filed on 4th June, 2012 wherein it is averred that on 23rd January, 2012, the Claimant appeared at the Respondent's office very untidy and with an unshaved beard contrary to the company's rules and regulations. That he was advised to go and shave his beard and clean his uniform and come to the office the following day but the Claimant failed to do so.

The Respondent denies that the duty manager asked him to go home and wait until he was called back by phone to resume his duties.

The Respondent avers that the Claimant deserted work for twenty four days and returned on 17th February, 2012.

That he alleged through a self recorded statement that he had been sick and had gone to seek the services of a herbalist in Makueni District. The averments were supported by **Mr. Patrick Kipkemoi Maiyo**, the Human Resource officer of the Respondent who testified under oath.

He told the court that any employee who was asked to report to the duty manager's office usually made a statement as to why they went there. That the Claimant had voluntarily made such a statement explaining why he had deserted work.

The witness further explained that the Claimant's terminal benefits were tabulated but he failed to collect his cheque. A certificate of service was also prepared for his collection.

The Respondent states that as per the service agreement dated 9th May, 2005, produced by the Respondent, an employee who deserted work for seven consecutive days without leave or lawful cause shall be regarded to have terminated his or her employment without notice by desertion.

The Respondent also produced a letter dated 10th February, 2012 written to the Claimant stating that the Claimant had not reported for duty as from 21st January, 2012 without any explanation and was regarded to have deserted his employment.

In terms of the letter he was to receive Kshs.4,000/= being refund for uniform deposit; salary up to 21st January, 2012; overtime up to 20th January, 2012; overtime carried forward to 23rd December, 2013 – 31st

December, 2011; payment for 42 days accrued leave less one month in lieu of notice. He was advised to read the letter and make any further claims before payment.

The Claimant denies that he received this letter which in any event had the Respondent's address and therefore could not have reached the Claimant unless he reported to work.

The Claimant states that he only came back on 17th February, 2012 after he was weary of waiting for a phone call from the Respondent to resume work. He told the court that he had no reason to desert work after serving the Respondent for seven years and had accumulated service pay for the period.

He told the court that Mr. Kimaiyo deceived him to write an apology letter so that his employment was not terminated only to turn against him after he wrote the hand written note dated 17th February, 2012 submitted by the Respondent. In the note he states that on 13th January, 2012, he was told by the in-charge **Mr. Barasa** to go and iron his uniform but while at home he fell sick and had gone to Makueni to seek medication from a herbalist. He added in the note that he had then stayed home until he was well and had reported for clearance. He ended the note by stating that he regretted the inconvenience to the Respondent.

The testimony by the Respondent is contradicted by its own document in the list of Respondent's documents at page 14, wherein on 3rd May, 2012, **Mr. John Mwangi** the District Manager wrote to the Operations Manager Guarding Services informing him *inter alia* that he had told the guard (Claimant) that he will not work until he complies with the instructions handed over to him. The guard left and was never heard from again and his salary was stopped.

This letter corroborates the Claimant's evidence that he was stopped from working by Mr. Mwangi and sent home.

According to the witness for the Respondent **Mr. Patrick K. Kipkemoi**, Mr. Mwangi did not ask the Claimant to go home. He told the court that one **Mr. Kioko** had done so. Clearly the Respondent's version of events does not add up.

Furthermore, the Claimant should have been charged with desertion upon his return on 17th February, 2012 but he had already been dismissed in his absence.

The terminology used by the Respondent under **Clause 7 (c)** of the Service Agreement that:

“An employee who fails to report for duty for seven consecutive days without leave or lawful cause shall be regarded to have terminated his or her employment without notice by desertion.”

is not only illogical but also is contrary to **Section 44 (4) (a)** which provides that:

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

In that the employee must be afforded opportunity to show “*Lawful cause*” for absenteeism before the dismissal or termination is effected.

For this reason alone, the termination of the Claimant by a letter dated 10th February, 20-13 was contrary to **Section 44 (4) (a)** as read with **Section 41 (1) and (2)** of the **Employment Act**.

The subsequent inducement by the Respondent to get the Claimant to implicate himself was of no consequence as the dismissal had already taken place without giving the Claimant an opportunity to explain his case.

Furthermore, the court faults the credibility of Mr. Patrick Kipkemoi Maiyo and does not believe his version of what actually took place leading to the summary dismissal of the Claimant.

To this extent, the court finds the version told by the Claimant as to the circumstances leading to his dismissal credible and probably true. The court also finds that the Claimant was misled to incriminate himself after the summary dismissal had already taken place.

Accordingly the Claimant has satisfied the requirements of **Section 47 (5)** of the Employment Act. He has proven that a wrongful dismissal took place and the Respondent has in the converse failed to demonstrate that the reason for the summary dismissal was justified and in accordance with a fair procedure.

With regard to the claim for terminal benefits, the court notes the offer for payment made by the Respondent in the letter dated 10th February, 2012 as follows:

1. *Kshs.4,000/= uniform allowance.*
2. *42 days accrued leave.*
3. *Salary for days worked up to 20th January, 2012.*
4. *Overtime for days worked up to 20th January, 2012 and;*
5. *Overtime carried forward from 23rd December, 2011 – 31st December, 2011.*

The offer is retailed in paragraph 9 of the Statement of Claim.

The Respondent stated that the Claimant declined to collect the cheque. The court notes that these are statutory payments due and owing to the Claimant and should be paid whether or not they are contained in the Statement of Claim. Indeed the computation was produced by the Respondent on page 10 of the list of documents. Taking all the evidence into account, the court directs the Respondent to pay terminal benefits to the Claimant as follows:

1. *Kshs.8,463/= being one month's salary in lieu of notice.*
2. *Kshs.4,231.50 being unpaid salary for the month of January.*
3. *Kshs.11,844/= being payment of 42 days salary in lieu of leave days not taken.*
4. *Kshs.4,000/= being uniform allowance.*

The court finds that the claim for service pay for the seven years worked is not payable because the Claimant was registered with National Social Security Fund (NSSF) and contributions were remitted accordingly.

With respect to the claim for compensation, the court finds that the Claimant had served the Respondent for seven (7) years. He did not have a very clean record and may have contributed to the eventual dismissal from the various warning letters in his file. The court awards him six (6) months gross salary (including house allowance of Kshs.1,269/=) as compensation for unlawful and unfair termination in the sum of Kshs. 58,392 (8,463 + 1,269 x 6).

Total award is Kshs.86,930/50.

The Respondent to pay costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 21st day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE