



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 591 OF 2010

BETWEEN

DAVID MATATA MBONZA

..... CLAIMANT

VERSUS

SECUREX AGENCIES KENYA LIMITED
 RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Wanyanga instructed by Akolo Wanyanga & Company Advocates for the Claimant

Mr. George Masese instructed by the Federation of Kenya Employers for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 28th May 2010. The Respondent filed its Statement of Reply on 5th October 2010. The Parties were heard and closed their respective cases before Hon. Justice Charles Chemmutut, on 6th July 2011. The file was referred to this Court by the Principal Judge Nderi Nduma on 11th January 2013. It was last mentioned on 2nd April 2013, when Parties confirmed the filing of their Closing Arguments and were advised Award would be delivered on Notice.
2. The Claimant’s position is that he was employed by the Respondent Private Security Firm as a Guard, sometime in January 1995. His services were terminated on the 24th October 2008. He worked as Guard initially, and thereafter moved to be ‘Cash in Transit’ Crew for about 5 years. He had reported for work on 24th October 2008 ready for deployment. The equipment for deploying the Guards was not made available. The Human Resources Officer Raymond Mwangi came, and when confronted by the Guards wishing to know why they were not deployed, he issued them with letters of summary dismissal.
3. The Guards were peaceful during the confrontation. Mwangi advised the Guards to come back after 1 week to collect their final dues. The Claimant obliged, returning one week later, when he received what was described by the Respondent as the final dues. He explained that he accepted the payment because he apprehended his family would go hungry. Dismissal was unwarranted as the Claimant had not done anything wrong. He was not paid 1 month salary in lieu of notice and his service pay for the 14 years

worked. He has not secured alternative employment after dismissal. His gross monthly salary at the time of his dismissal, as shown in his pay slip for the month of September 2008, was Kshs. 10,402. He seeks the following orders:-

- a. Payment of service pay at Kshs. 87,376;
- b. 1 month salary in lieu of notice at Kshs. 10,402;
- c. Compensation at 12 months' salary at Kshs. 124,824;
- d. Certificate of Service;
- e. Recommendation letter;
- f. Costs;
- g. Interest; and any other suitable relief the Court may deem suitable to grant.

4. The Respondent answers that the Claimant was employed as its Security Guard, effective from 21st January 1995. His contract provided that he would receive and execute all lawful orders from his employer, pertaining to the performance of his duties. His contract was subject to the Employment Act 2007, permitting the Employer to summarily dismiss him.

5. On 22nd October 2010, [2008?] he refused to sign the Attendance Book. He was issued a warning letter on 23rd October 2008, and advised further misconduct would result in severer disciplinary action. The Respondent states that on 24th October 2010 [2008?], the Claimant reported for duty but refused to take up the assigned duties as a Cash-In –Transit Crew, despite having been given clear instructions by his Supervisor to take up such duties. The Respondent was forced to get replacement staff, disrupting normal business operations of the Respondent.

6. The Respondent was compelled to summarily dismiss the Claimant on 24th October 2008. He was accorded the opportunity to appeal. He appealed and his appeal was dismissed. He was paid uniform refund of Kshs. 6,636.80; leave entitlement of 5 months at Kshs. 1,000; and 4 months' salary advance of Kshs. 2,675- total Kshs. 8,811.88. He accepted the sum as the full and final settlement, and discharged the Claimant from further obligation.

7. The Claimant went on to report the dispute to the District Labour Office. Upon investigations, and hearing of the two Parties, the Labour Office affirmed the position of the Respondent. He moved on to his Advocates who wrote a demand letter on 18th December 2009, for the sums tabulated in the Claim. The Respondent answered the demand letter on 23rd December 2009, reiterating the contents of the Statement of Reply filed herein. The Respondent submits it acted justifiably, fairly, appropriately and in accordance with the law. The Claim ought to be dismissed and costs awarded to the Respondent.

The Court Finds and Awards:-

8. The Respondent did not offer sufficient material to establish the existence and validity of the grounds used in justifying summary dismissal of David Matata Mbonza, who, is agreed by both Parties worked as a Security Guard/ Cash-in-Transit Crew, from 21st January 1995. The letter of summary dismissal states the Claimant disregarded lawful instructions. The officer giving those instructions did not give any evidence in Court. The Respondent states the Claimant refused to take up assigned duties as Crew, disregarding the instructions of his supervisor to do so. This supervisor did not appear in Court to justify this ground. There are allegations made against the Claimant, one after the other, which make the ultimate decision by the Respondent, rather questionable.

9. He is said to have refused to sign the attendance register on 22nd October 2010, which the Court is ready to accept as 22nd October 2008. He was then issued a warning 1st warning letter on 23rd October 2008. It is stated he then came to work on 24th October 2008, a day after he received the first warning, and refused to take up the assigned duties as Cash-in Transit Crew. There was no second or final letter of warning, just a letter of summary dismissal. There is no explanation why an employee would just report to work and refuse to work, unless there was some form of industrial action. The Respondent had the duty

to justify its decision, but from the sketchy material on record, it would be unsafe for the Court to find that this duty has been discharged. The process from warning to dismissal appears to have been accelerated, and it boggles the mind why an employee, outside the confines of collective industrial action, would repeatedly with-hold his labour. There was a yawning gap in the justification given by the Respondent. The Claimant gave a consistent version of events in his pleadings and the appeal after dismissal. He reported ready for deployment. He changed into his uniform. Work tools were not availed. The Human Resource Officer Raymond came and there was a confrontation over the lack of deployment. The facts as stated by both Parties suggest the existence of some general problem, beyond one individual employee refusing to work. It was for the Respondent to reveal the entire case scenario, and justify dismissal, which the Court finds was not done. There was no valid reason or reasons shown to justify dismissal.

10. The procedure did not meet the minimum disciplinary statutory procedures. The Respondent did not hear the Claimant any time after issuing the first warning on 23rd October 2008. There were no other subsequent warnings before the summary dismissal. There was no letter asking the Claimant to show cause why he should not be disciplined. There is no record of formal charges. There is no record showing that the Claimant was invited to a disciplinary hearing, explained to him in a language understood by him, the charges. He was not offered the opportunity to explain himself, accompanied by a co-worker or workers' representative, at a disciplinary hearing. The procedure prescribed under Section 41 of the Employment Act 2007 is completely absent from the process leading to the summary dismissal. Termination was therefore unfair both for want of valid reason and for procedural deficiencies.

11. The Claimant is granted 1 month salary as notice pay at Kshs. 10,402. He is allowed compensation for unfair termination, computed at 10 months' salary, totaling Kshs. 104,020. The pay slip annexed as appendix 2 in his Claim, shows he was subscribed to the Workers' National Social Security Fund [N.S.S.F]. He is not eligible to receive additional social security payment in form of service pay. He is ineligible under Section 35[6] of the Employment Act 2007 to receive service pay. The Court has no authority to order an employer to issue a recommendation letter to an employee, but does have the authority to order an employer to issue the certificate of service, in accordance with Section 51 of the Employment Act 2007. In sum, IT IS HEREBY ORDERED-:

- a. ***Termination of the Claimant's contract of employment was unfair;***
- b. ***The Respondent shall pay to the Claimant 10 months' salary in compensation at Kshs. 104,020;***
- c. ***The Respondent shall pay the Claimant 1 month salary in lieu of notice at Kshs. 10,402;***
- d. ***The total sum of Kshs. 114,422 shall be paid by the Respondent to the Claimant, within 30 days of the delivery of this Award;***
- e. ***Certificate of Service be availed to the Claimant by the Respondent forthwith; and,***
- f. ***No order on the costs and interest.***

Dated and delivered at Nairobi this 18th day of September 2013

James Rika

Judge