



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 588 OF 2010

ISAAC SIMIYU.....CLAIMANT

VS

SECURITY GROUP (K) LIMITED.....1ST RESPONDENT

FACTORY GUARDS LIMITED.....2ND RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 26th May 2010 and amended on 2nd May 2012, the Claimant brought a claim against the Respondents for unfair termination of employment. The Respondents filed a Defence on 22nd July 2010 and a Reply to the Amended Memorandum of Claim on 22nd May 2012. The matter opened for trial on 5th November 2012 and in between a number of adjournments at the instance of the parties, hearing was closed on 10th July 2013. The Claimant testified on his own behalf and the Respondent called Patrick Otieno Owoko, a former Sector Manager with the 2nd Respondent. Both parties filed written submissions.

The Claimant's Case

2. According to the Claimant's Memorandum of Claim, he was employed by the 1st Respondent on 17th March 1997 at a monthly salary of Kshs. 12,621. The Claimant was attached to the 2nd Respondent which was a subsidiary of the 1st Respondent until 28th September 2007, when he was transferred to the 1st Respondent at a basic salary of Kshs. 6,906 plus 15% as house allowance. On 1st November 2007, the Claimant was re-transferred to the 2nd Respondent.

3. On 6th November 2007, the Claimant was demoted from the position of driver to security guard on allegations of having caused an accident, which he denied. His basic salary came down to Kshs. 5,796 plus Kshs. 1,000 as house allowance. According to the Claimant, no reason was assigned for this change.

4. On 25th January 2008, the Claimant was suspended, on allegations of absconding from his duty assignment at Asai Motors and on 11th February 2008, he was summarily dismissed. He denied absconding duty stating that he had gone to answer a call of nature when his supervisor went to the Claimant's duty station. It was the Claimant's case that he was not given an opportunity to defend himself and was not paid his benefits.

5. The Claimant told the Court that at the time he was dismissed, he was servicing a Kshs. 300,000 loan from Equity Bank Limited which the Respondents had guaranteed and that as a

consequence of his dismissal, he defaulted in repayment resulting to an accumulated loan balance of Kshs. 271,111.95 as at 14th April 2012.

The Claimant claimed the following:

- a. Salary for January and February 2008 at Kshs. 12,621 per month
- b. Kshs. 14,117 being pay in lieu of notice
- c. 12 months' pay in compensation for unfair termination at Kshs. 12,621 per month
- d. Leave allowance for 2007 and 2008 amounting to Kshs. 25,242
- e. 15 days' severance pay for each year of service amounting to Kshs. 63,105
- f. General and exemplary damages
- g. An order compelling the Respondents to service the Claimant's outstanding loan with Equity Bank or the accrued interest from 11th February 2008 until payment in full
- h. Costs and interest

The Respondents' Case

6. In their Defence, the Respondents admitted having employed the Claimant at different times. They however denied that the Claimant was unfairly dismissed. They further denied that the 2nd Respondent was a subsidiary of the 1st Respondent. It was the Respondents' case that the Claimant was employed by the 2nd Respondent as a guard in 1997 at a basic salary of Kshs. 5,796.

7. Following an interview the Claimant was taken in as a driver with the 1st Respondent at a basic salary of Kshs. 6,906. Upon employment by the 1st Respondent, the Claimant caused an accident with the 1st Respondent's motor vehicle occasioning extensive damage to the said motor vehicle. The Claimant was therefore transferred to the 2nd Respondent as a guard at a basic salary of Kshs. 5,796 effective 1st November 2007.

8. In the course of his work as a guard, the Claimant was assigned to guard Asai Motors Limited and on 24th January 2008, he reported for duty at 6.00 pm and then absconded duty. A Director of Asai Motors Limited went to the premises and finding the Claimant missing, proceeded to the Respondents' offices from where he was accompanied by the Respondents' Duty Manager back to Asai Motors. Having confirmed that the Claimant was indeed missing from his duty assignment, the Respondent deployed another guard. The Claimant reported back to Asai Motors after midnight and was asked to proceed to the Respondents' offices. Thereafter, the Claimant was dismissed. According to the Respondents, the dismissal was lawful and justifiable.

Findings and Determination

9. The first issue for determination in this case is whether the 1st and 2nd Respondents are properly joined in this matter. It was common cause that the Claimant was employed by the 1st and 2nd Respondents interchangeably. It was the Claimant's contention that the 2nd Respondent was a subsidiary of the 1st Respondent, which was denied by the Respondents. The Respondents' witness, Patrick Otieno Owoko however testified that the two companies were sister companies with the same directors. The 1st Respondent dealt with alarm systems and services while the 2nd Respondent was engaged in guarding services. From the foregoing it seems to me that there was a close nexus between the 1st and 2nd Respondents and that the Claimant worked for the two companies interchangeably. I therefore find that the 1st and 2nd Respondents are properly joined in this case.

10. The next issue for determination has to do with the Claimant's actual salary. It is on record that at some point the Claimant worked as a driver but was later demoted to the position of security guard. The reason for the demotion was contested but there was no evidence that the Claimant had lodged any complaint on the demotion prior to the termination of his employment.

11. The Claimant produced a payslip for January 2008, showing a basic salary of Kshs. 5,350,

normal overtime of Kshs. 3,303, overtime on public holidays of 1,236 and Kshs. 1,000 house allowance. There was no explanation from either party as to how the basic salary moved from Kshs. 5,796 to Kshs. 5,350. I have therefore adopted the figure of Kshs. 5,796 as the Claimant's basic salary as at the time he left the Respondents' employment. I have further adopted the figures of Kshs1,000 as house allowance, Kshs. 3,303 as normal overtime and Kshs. 1,236 as overtime on public holidays. The Claimant's salary for purposes of this claim is therefore Kshs. 11,335.

12. I will now deal with the Claimant's claim for unfair termination of employment. The Respondents gave the reason for the termination of the Claimant's employment as desertion of duty. In his defence against this accusation, the Claimant stated that he had gone to relieve himself at a neighbouring petrol station and that he was away for not more than half an hour. The Claimant told the Court that his dismissal was engineered by Patrick Otieno Owoko who had asked him for a bribe. The Court however, being unable to verify these allegations which were made sensationally at the trial, did not assign any evidential value to them.

13. The Respondent on the other hand stated that the Claimant was away from his duty station for at least three hours prompting a replacement. While it was not in dispute that there were no toilet facilities at the assignment site, details of alternative toilet facilities, including those at the Respondents' offices were in contention between the parties. The Claimant's written explanation on the accusations leveled against him by the Respondents was rejected and he was dismissed.

14. The Claimant's claim for unfair termination is brought under the Employment Act, 2007. Counsel for the Respondents however submitted that this law which came into effect on 2nd June 2008, could not apply to the cause of action in this case which arose on 11th February 2008. I agree and add that since there is no provision for retrospective application of the Employment Act, 2007 to employment contracts terminated before the commencement date, the applicable law in this case is the repealed Employment Act (Cap 226).

15. Under the repealed law, an employer could terminate the employment of an employee by giving the requisite notice and without assigning any reason for the termination. There was also no requirement for *viva voce* hearing as required under the current law. The repealed employment law and court decisions rendered prior to enactment of the new labour laws gave parties to employment contracts the right to terminate the said contracts upon giving the requisite notice or payment in lieu thereof.

In this regard, Section 14(5) (iii) of the Repealed Act provided as follows:

5. ***Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be:-***

(i).....

(ii).....

(iii) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminable by either party at the end of the period next following the giving of notice in writing.

This position was affirmed by the Court of Appeal in the case of ***Barclays Bank of Kenya Ltd Vs Joseph Mwaura Njau [2006] eKLR .***

16. Having looked at all the circumstances surrounding this case and with law in view, I convert the Claimant's summary dismissal to a normal termination and award him one month's salary in lieu of notice. There was no proof that the Claimant was paid his salary for January 2008. I therefore award him salary for this month plus 11 days in February 2008. The Respondent did not provide leave records to prove that the Claimant had taken his leave for 2007. I therefore award

the Claimant pay in lieu of leave for 2007.

17. The Claimant was not declared redundant and is therefore not entitled to severance pay neither is he entitled to service pay since from the payslips submitted by him, it is evident that he was a member of the National Social Security Fund (NSSF). I find no basis for the claim for payment of the Claimant's loan with Equity Bank Limited since the Claimant admitted that he had taken the loan for his own benefit. All the Respondents did was to undertake to deduct and remit repayments as long as the Claimant remained in their employment. Once the Claimant left the Respondents' employment, this responsibility was discharged.

The final effect of this Award is as follows:

a. 1 month's salary in lieu of notice.....	Kshs. 11,335
a. Pay in lieu of 21 days' leave.....	7,934
b. Salary for January 2008.....	11,335
c. Salary for 11 days in February 2008.....	<u>4,156</u>
Total.....	34,760

The Respondents will meet the costs of this case.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF NOVEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....**Claimant**

.....**Respondents**