



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 1294 OF 2011

BETWEEN

JAIRUS MAKORI
 CLAIMANT

VERSUS

LAVINGTON
 SECURITY.....RESPONDENT

Rika J

CC Leah Muthaka

Mr. Khalwale instructed by Khalwale & Company Advocates for the Claimant

Ms. Murimi instructed by Ashfords & Company Advocates for the Respondent

ISSUE IN DISPUTE: WRONGFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 2nd August 2011. The Respondent replied through a Statement of Reply filed on 29th September 2011. The Claimant testified and closed his case on 18th October 2012. The Respondent gave evidence on 8th November 2012 through its Operations Manager Erastus Arum and on 13th February 2013 through its Human Resource Assistant Kevin Kipkemboi Rono when hearing closed. The Parties’ respective Advocates made their Closing Arguments on 2nd May 2013 when the Court advised Award would be delivered on notice.

2. The Claimant stated he was employed by the Respondent as a Guard in February 2001. His starting salary was Kshs. 6,200. He was elevated to be the Guard-In- Charge, supervising 11 Guards from February 2010. His salary was reviewed to Kshs. 9,500. In November 2010, the Operations Manager sent the Claimant on 15 days of compulsory leave. At the end of the 15 days, he reported back to work and was assigned duty at the Kenya High School in Nairobi. However, two days after resumption of duty, the Claimant’s contract of employment was terminated by the Operations Manager. He was asked to hand over the Uniform to the Deploying Officer on 13th December 2010. He worked for a total of 9 years and 9 months. At the time of termination, his salary was Kshs. 9,500

3. The Claimant testified he served well and had an impeccable record. When serving as the Guard-In-Charge, he was not paid the difference of his salary, which was Kshs. 9,500 – Kshs. 6,200 = Kshs. 3,300 for 11 months, added at Kshs. 36,300. The Respondent continued to pay the Claimant the old salary of Kshs. 6,200 per month after promotion. In November 2010, he was only paid a salary of Kshs. 2,931 leaving a balance of Kshs. 6,569 for the month. After he returned the Uniform, he was not paid his terminal dues as promised by the Respondent. He explained that he was Guard-In-Charge at Utalii House.

4. He explained, that prior to the compulsory leave, a lady passenger was driven to the Utalii House by a taxi. There was a delay in letting the taxi through at the gate. She was the wife of the Property Manager. She called her husband who came to the gate and the taxi was let through. The following day the Claimant was called by the Operations Manager and asked not to report on duty. He was instructed to report to the Office later, and questioned why he had failed to open for the wife to the Property Manager. It was after this that he was placed on 15 days unpaid leave. He still worked at Utalii after the leave, and gave the places he was assigned duty as Kenya High School, and Nairobi School. He produced a Despatch Note dated 11th December 2010, showing he had worked at Nairobi School where there was a wedding occasion. The Chief Operations Manager enquired why the Claimant had left Utalii House. The Claimant told him he did not know why, and the two men then went to seek answers from the Operations Manager. The Operations Manager explained to the Chief Operations Manager that the Claimant's behaviour was intended to deny the Respondent the contract for provision of services at Utalii. It was then that the Chief Operations Manager asked the Claimant to surrender his uniform and collect his terminal dues the following day. When the Claimant approached the Operations Manager the following day, he was not paid the terminal benefits; he was instead told by Mr. Arum that he had been speared, and should await his death. He has not been paid terminal benefits to-date. He was not taken through any disciplinary process. It was not true as alleged by the Respondent that the Claimant deserted work, after being instructed to attend a refresher course. He seeks the following orders:-

[a] The Respondent releases all the money meant to have been paid the N.S.S.F and N.H.I.F to the Claimant.

[b] Payment of-

- i. Two months' salary in lieu of notice at Kshs. 19,000.*
- ii. Underpayment of salary of Kshs. 3,200 for 11 months at Kshs. 36,300.*
- iii. Underpayment for the month of November 2010 at Kshs. 6,569.*
- iv. Kshs. 6,000 on account of Uniform.*
- v. Leave for 9 years worked at Kshs. 56,700.*
- vi. House allowance at 15% of the pay salary [?] at $945 \times 9 = 8,505$.*
- vii. Severance pay of 15 days' salary per year for 9 years at $Kshs\ 9 \times 6,300/2 = Kshs. 28,350$.*
- viii. Two days worked in December 2010 at Kshs. 730.*
- ix. Days worked during public holidays.*
- x. N.S.S.F and N.H.I.F contributions.*
- xi. Costs of the Claim.*

[c] Certificate of service to issue.

5. Cross-examined, the Claimant stated he attended training organized by the Respondent at Kilimani upon employment, and was availed the company policy document. He was employed on permanent terms. He was issued an employment card. He did not have any document to show he was appointed the Guard-In-Charge at Utalii House. He worked as such between February and October 2010. He continued to be paid Kshs. 6,200 per month. He heard what transpired with respect to the Property Manager's wife from the other Guards. The company policy required Guards to attend refresher courses. He was deployed to Kenya High School and was still a Guard at the time. He was assigned to Nairobi School on 11th December 2010, as shown in the Despatch Note. He was reporting to Mr. Daniel Meli, and was supposed to report to the Operations Manager in event of a major issue. He reported the incident surrounding the Property Manager's wife to Mr. Meli. He clarified on redirection that he was not given a letter of employment, but had an employment identification card. He worked for a total of 9 years and 6 months.

The Respondent had an obligation to issue the Claimant a letter of employment. Makori urges the Court to grant the Claim.

6. The Operations Manager Erastus Arum testified that his duties include overseeing all operations. Discipline of the Guards at the Respondent's Business is pivotal. Around 20th October 2011, there was a complaint by a Caretaker that a Guard had formed a habit of going to duty late. The Claimant was working as an ordinary Guard, not the In-Charge. Arum went to the Site at around 6.00 p.m. The Claimant arrived late at 7.15 p.m. He was scruffy with muddy shoes, unbecoming of a Guard. Arum asked the Claimant to report to his Office the following day so that he could be sent on refresher course. The Claimant did not report as advised. He did not report to duty in the coming days. It was the policy of the Respondent that if an employee absented himself for 7 days, he would be declared a deserter. The Claimant was declared a deserter in October. He returned to the workplace in November and was informed by Arum he had to attend the refresher course. He disappeared from employment.

7. The witness testified on cross-examination that the Claimant was employed around the year 2000. Arum had not joined the Respondent then. The Claimant signed a Form on recruitment. He was not issued a letter of termination of employment. His last pay slip indicated he earned a net salary of Kshs. 6,200. His last assignment was at Utalii House. There were 27 Guards at Utalii. One Mr. Jillo was the Guard-In-Charge at night, while another Guard named Wyciffe supervised the Daytime Guards. Guards signed on the register when they reported to work. The witness did not have the register in Court. Arum did not give the Claimant a letter of warning for reporting late. Makori did not present himself to the Respondent to receive terminal benefits. There were many disciplinary letters written to the Claimant, which were in his file at the Respondent's Office. The Claimant was taken to Nairobi School for refresher course and was not entitled to be paid for this. He did not lodge a claim for refund of the Uniform fee. If he does so, it will be paid to him. He was not issued a termination letter, and the witness could not say if he was given his certificate of service. He was paid for days worked in October 2010. There was a difference of about Kshs. 2,000 in the rate payable to Supervisors and other Guards. On redirection, Arum stated that the Claimant had not cleared with the Respondent. If he cleared, he would be paid his terminal dues.

8. The Human Resource Assistant Rono testified that employees were issued a Code of Conduct upon recruitment. There are minimal education requirements for employees on recruitment. They were trained for three weeks before deployment. They filled forms, contracts and employment sheets. Makori was deployed at Utalii House. He was asked to take a refresher course of two weeks. His behaviour had changed and he was not working well. He did not clear the days assigned to him for refresher course. He was considered a deserter. Rono was not aware that the Claimant was promoted to be the Guard-In-Charge. There was a procedure for promotion, which involved employee appraisal and approval. A promoted Guard would be awarded one star, salary increased and promotion evidenced in a letter from the Respondent. N.S.S.F and N.H.I.F deductions could not be refunded to the Claimant as they were statutory deductions. He was entitled to 21 days of leave, but never applied to go on leave.

9. Rono testified further on cross-examination that he is the Assistant Human Resource Officer, the Human Resource Manager being one Mr. Koech. The Manager was engaged elsewhere and not available to give evidence. The Claimant was employed in the year 2000, but Rono was not able to tell the exact date. He was qualified for the job and went through the routine recruitment process. The employment form was the contract of employment. This was not availed to the Court. He last worked at Utalii House. Mr. Arum was overall In-Charge at Utalii, while Mr. Mose was the Supervisor. The Claimant was asked to attend a refresher course 9 years after employment. The Respondent has never issued him with a disciplinary letter. His salary was Kshs. 6,200. Supervisors earned Kshs. 9,500. He was not given notice of termination. He never requested to go on leave. Rono was not able to say if the Claimant missed out on annual leave the whole 9 years. He was taken to Nairobi School to relieve a Guard who worked there, not on deployment. There are Guards on standby. He was taken to Nairobi School after he came from Utalii. The relief also served as a refresher course. There were no trainers and the Claimant was offering his service. There was no evidence to show he was paid for this service. He was called for refresher course because he was underperforming. He was going to work late. He was given verbal warnings. There were no written warnings. Rono could not recall the dates on which the Claimant went to work late. If he reported back to work, the Respondent would continue employing him. He was not paid terminal benefits

because he was a deserter. Rono testified under redirection that a Guard could do refresher lesson as he worked at another Site. Makori never went for his benefits. The deployment sheets have all the terms of employment. The Respondent did not terminate the Claimant's services.

10. In his brief submissions, Mr. Khalwale stated that there was no dispute the Claimant was an employee of the Respondent. He earned Kshs. 6,200 per month, and was dismissed in December 2010. He was not issued a letter of employment or termination. He was the Guard-In- Charge from February 2010 up to the date of termination. He was not paid the difference of Kshs. 3,300 per month for 11 months served as the Guard-In-Charge. His testimony was largely uncontested. The Claimant asked the Court to rely on his pleadings, documents and submissions and allow the Claim. Ms. Murimi submitted that the Claimant's contract was not unlawfully terminated. He was asked to attend refresher course for two weeks, refused to do so and deserted. He did not support his claim for unfair treatment. He did not show he was In- Charge. Guards- In-Charge had different uniforms, and were given letters to show they were on promotion. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

11. The Claimant was employed by the Respondent as a Guard in February 2001. He was assigned duties at Utalii House and left in unclear circumstances at the end of the year in 2010. The Claimant alleges he was sent on compulsory leave after an incident involving delay in opening the gate for the Property Manager's wife at Utalii House. He was called the days after by the Operations Manager and the Chief Operations Manager. He was told his conduct could lead to cancellation of the contract between the Respondent and Utalii House. He was asked to surrender his uniform and collect his dues the day after. He surrendered his uniform but was not paid his terminal dues. After the compulsory leave he was assigned unpaid duties at Nairobi School. He also worked at Kenya High School. The Respondent's version was that the Claimant was asked to attend a refresher course, declined and deserted. After 7 days he was declared a deserter. The Respondent did not terminate his contract of employment, and according to Mr. Rono, the Respondent would continue to employ the Claimant if he went back to work.

12. The Court fails to understand why there should be a prolonged dispute, if the employer is willing to continue employing the employee. The Respondent states it did not issue the Claimant with a termination letter. It is willing to have the Claimant continue to work. Why should the Parties engage in this foofaraw and strain judicial economy? The dispute is unnecessary. The Claimant did not express his desire to return to work, and does not seem to have expressly prayed for reinstatement. This is perhaps so, because there was no clear evidence that the Respondent terminated his contract of employment; and considering that the Respondent is willing to have him back. The requirement that an employee attends refresher course should not be resisted by any employee, or trivialized by employers and employees alike. All cadre of employees need to attend continuous job training, to keep pace with rapidly changing labour markets. The Respondent appeared to trivialize its refresher course requirement, asking the Claimant to attend refresher course at Nairobi School after 9 years in employment, with no trainer, no programme and no pay. Refresher course is not a disciplinary sanction, as Arum appeared to suggest, but a serious platform for enhancing the employee's capacity with the objective of efficiency in production. An employer does not just decide that an employee should go on refresher course because the employee has appeared at work adorning unpolished shoes. It was difficult to conclude whether the Respondent was serious in requiring the Claimant to attend refresher course, or was just looking for ways to frustrate the Claimant and provoke him into staying away from work.

13. The Court is persuaded from the evidence on record that the Respondent is willing to continue employing the Claimant, as testified by Mr. Rono from the Respondent's Human Resource Department. The Claimant nonetheless has to be willing to work for the Respondent, and subject himself to refresher course, as directed by the employer. If he is not willing to work there, termination would be deemed to be at his initiative. The Court does not have any evidence at the moment to conclude that the employment relationship was ever terminated. There was no evidence that the Claimant was ever promoted by the Respondent to be the Guard-In- Charge at Utalii. There was no award of stars or letters of promotion availed to the Court by the Claimant. He does not appear to have written any demand to the Respondent for the period he claimed he was acting as the Guard-In-Charge, asking to be paid the difference of Kshs.

3,300. There was no basis to demand refund of unspecified N.S.S.F and N.H.I.F deductions. The Claimant similarly did not explain to the Court in his evidence what was the justification in his prayers for house allowance for 9 years. Severance pay or more appropriately service pay, would not be payable where an employee is, as the Claimant was, subscribed to the N.S.S.F. These and other peripheral claims had no justification and are rejected. Against this backdrop the Court Orders:-

[a] The Claimant shall report back to work within 30 days of this Award.

[b] The Respondent may place the Claimant on a properly structured refresher course before, during or after the Claimant has reported back to work.

[c] The days the Claimant has been out of employment shall be treated as years of unpaid leave.

ALTERNATIVELY-

[d] The Claimant shall be deemed, on the lapse of 30 days without having reported back to work, to have terminated his contract of employment from 31st December 2010, and shall:-

- i. Pay to the Respondent the equivalent of 1 month salary in lieu of notice at Kshs. 6,200.***
- ii. Be paid by the Respondent Kshs. 6,000 in uniform refund.***
- iii. Be paid by the Respondent annual leave pay for nine years based on 21 days' salary per year, total Kshs. 45,069.***
- iv. In total the Respondent shall pay to the Claimant Kshs. 44,869 as terminal benefits, should the Claimant opt not to return to work after 30 days.***
- v. Be supplied with the certificate of service.***

[e] No order on the costs.

Dated and delivered at Nairobi this 20th day of December 2013

James Rika

Judge