



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1002 OF 2010

*(BEFORE D.K.N. MARETE)*

**NICHOLAS OKUKU KHABANDI .....CLAIMANT**

**VERSUS**

**ARMADA SECURITY LIMITED .....RESPONDENT**

**JUDGEMENT**

This matter was brought to court vide a memorandum of claim dated 26th August, 2010. It does not disclose the issue in dispute on its face.

The Respondent denies the claim and as is custom prays that the same be dismissed with costs.

The claimant's case is that at all material times to this suit and particularly from 1st June, 1999 until 30th November, 2010, he was employed by the respondent as a guard. He further submits that on or about 30th November, 2008, while he was on duty, he was arrested following a spurious incident. He was, as a consequence of this arraigned in court in Cr. Case No. 3720/2008 and released on board on 3rd December, 2008.

Upon release, he returned to work but the respondent's Manager took back the uniform from the claimant and informed him that he had been summarily dismissed from employment. He was not given a chance to be heard.

The claimant further submits that the criminal case against him was dismissed on 9th December, 2009 when no complainant turned up to testify. When he went back to the respondent he was literally chased away and not reinstated. He was also not paid his terminal dues and compensation for unlawful/unfair termination.

He prays for;

- i. *One month's salary in lieu of notice* *Ksh. 4,500/=*
- ii. *Salary for the month of November 2008* *Ksh. 4,500/=*
- iii. *Statutory service payable for each completed year*

*of service at 18 days salary for every calculated*

*yearly  $8/30 \times 4500 \times 9$*

*Ksh. 24,300/=*

*iv. Unpaid and untaken leave for the entire period*

*Being Kshs.4,500/= x 10*

*Ksh. 45,000/=*

*v. Compensatory damages for unlawful and*

*unfair dismissal from employment being 12*

*months gross salary being  $12 \times 4500$*

*Ksh. 54,000/=*

***Total Claim***

***Ksh.132,000/=***

The respondent's case is that the claimant was employed by the respondent on 18th February, 2005 as a security guard. He worked from 2005 to July, 2007 and he left until December, 2007. He came back in January, 2008 and worked until 30th November, 2008 when he was arrested and charged for theft.

The respondent posits and submits that the claimant was arrested for good measure and did not report to the company of the charges in court, progress or proceedings and he (respondent) only came to know of this eventuality at the inception of this suit. He(claimant) has not returned the uniform issued to him since 30th November, 2008. The issue of termination therefore did not arise and that the claimant deserted/absconded from work from the time he was charged in court. The respondent submits that the claim is unsustainable in law and prays the same be dismissed with costs.

The matter came for hearing on 5th July, 2013 when the claimant testified in support of his case. He reiterated his case as expressed in the claim that he worked for the respondent from 1st June, 1999 and offered continuous service until 30th November, 2008 when he was arrested and arraigned at Karen Police Station on the following morning. He was later released on bond and when he reported back to work he was sacked.

DW I – Robert Owino Ichwara also testified in defense. He said he was the General Manager of the respondent and knew the claimant who was employed in 2005 and not 1999. He testified that the respondent did not receive the demand letter from the claimant and neither did the respondent participate in his being charged of the offence. He was not even a witness in court. He admits that the claim could have been paid the following on demand;

- i. Salary for November, 2005
- ii. Leave for two years

Notice in lieu is not payable at all. He also testified on re-examination that

the respondent did not have a record of employment in 1999.

The issues for determination therefore are;

1. Was the claimant in the employ of the respondent from 1999 to 2009?
2. Whether the claimant deserted duty as alleged by the respondent
3. Was the termination of the claimant unlawful, unfair and wrongful?
4. Whether the claimant is entitled to the remedies sought in his memorandum of claim?

The 1st issue for determination is whether the claimant was in respondent's employment from 1999 to 2009. In his testimony, he states that he was employed in 1999 through an agreement *inter parties*. The respondent, through DW 1 – Mr. Ichwara testified that the claimant was employed on 18th February,

2005. The respondent who in law should be the maker and custodian of employment records did not produce documentation of employees before 2005. The recruitment form of 2005 is denied as not being an authority for employment by the claimant. The respondent was not able to rebut the claimant's assertion on date of recruitment/employment.

S.74.(1) of Employment Act, 2007 states that 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 the particulars.

This tilts the matter of the date of employment of the claimant in his favour and I make a finding that he was employed in 1999. The evidence of the respondent on this was not satisfactory or proof.

The 2nd issue for determination is whether the claimant deserted duty as alleged by the respondent. His (claimant's) testimony is that on 3rd December, 2008, he was released on bond and returned to work where he found DW 1 – Mr. Ichwara, the respondent's General Manager who told him about his dismissal and the return of uniform. The respondent denies this and points out a case of desertion from duty. He further denied knowledge of incarceration and arraignment in court of the claimant. This is not realistic. Inasmuch as the Respondent denies knowledge of the eventualities of arrest and charge of the claimant, it must be admitted that these were related to his employment and services as a guard. He was arrested and charged out of a matter relating to his work and station and the respondent cannot therefore be heard to deny knowledge of the same. If as admitted this was the complaint of the owner of the premises guarded by the claimant, then this must have been reported to the respondent as the said owner was indeed their client. The respondent is therefore reasonably supposed to be privy to this information and any other version is mere denial. The allegation of desertion therefore comes out as farfetched and is not convincing. It should therefore be dismissed.

The 3rd issue for determination is whether the termination of the claimant's employment was wrongful, unfair and unlawful. It was. The termination was verbal and summary. It did not inform the claimant of the reasons for termination as expected of S.41(1) of the Employment Act, 2007.

*41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

Section 43(1) of the Employment Act, 2007 binds the employer to adduce grounds and reasons for termination of employment and in the absence of these, the termination is deemed unfair in accordance with Section 45 of the Act. Not to add that these grounds must be proof, tangible and convincing. This is not the case here.

*43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

S.45, Employment Act, 2007 defines unfair termination. Unfairness arises when the employer fails to prove that the reason for termination is valid in S.45(2)(1). It also offends the procedural aspects of a fair termination.

45.(1) .....

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
  - i. *related to the employees conduct, capacity or compatibility; or*
  - ii. *based on the operational requirements of the employer; and*
- c. *that the employment was terminated in accordance with fair procedure.*

(3).....

(4).....

(5).....

Article 41 of the Constitution of Kenya, 2010 entitles every person a right to fair labour practices. This is non-negotiable. This is not demonstrated in the circumstances and therefore a case of unfair termination of employment.

*Article 41 on Labour relations;*

41. (1) *Every person has the right to fair labour practices.*

(2) *Every worker has the right –*

(a) *to fair remuneration*

(b) *to reasonable working conditions*

(c) *to form, join or participate in the activities and programmes of a trade union;*

(d) *to go on strike*

(3) *Every employer has the right-*

(e) *to form and join an employers organization; and*

(f) *to participate in the activities and programmes of an employers organization*

(4) *Every trade union and every employers' organization has the right-*

(a) *to determine its own administration, programmes and activities;*

(b) *to organize; and*

(c) *to form and join a federation.*

(5) *Every trade union, employers' organisation and employer has the right to engage in collective bargaining.*

The 4th issue for determination is whether the claimant is entitled to the relief sought. This being a clear case of unfair termination, he is so entitled and I so find. The respondent in her testimony admits part of the claim. I allow the claim and award the Claimant relief in the following terms;

i. One month's salary in lieu of notice	Ksh. 4,500.00
ii. Salary for the month of November 2008	Ksh. 4,500.00
iii. Unpaid and untaken leave for the entire period	
being Kshs.4,500/= x 9	Ksh.40,500.00
iv. Compensatory damages for unlawful and	
unfair dismissal from employment being 6	
months gross salary which is 6 x 4500.00	<u>Ksh.27,000.00</u>
<b>Total Claim</b>	<b>Ksh.76,500.00</b>

The costs of this claim shall be borne by the respondent.

Dated, delivered and signed the 20th day of December, 2013.

**D.K.Njagi Marete**

**JUDGE**

**Appearances:**

1. Akhaabi instructed by Namada & Co. Advocates for the claimant.
2. Mr. Moindi instructed by Moindi & Co. Advocates for the Respondent.