



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 14 of 2011

KENYA GUARDS AND ALLIED WORKERS..... CLAIMANT

VERSUS

PATRIOTIC GUARDSRESPONDENT

(Before Hon. Justice Byram Ongaya on 26th October, 2012)

JUDGMENT

The Claimant Kenya Guards and Allied Workers Union filed the Claim and submission on 24th March, 2011. The Respondent Patriotic Guards Limited filed the memorandum of Reply on 16th June, 2011 through Ndirangu Kamau Advocates. The Respondent's written submissions were filed on 24th October, 2011.

The claimant filed the claim on behalf of its members, the grievants, namely:

- (a) Winnie Akinyi,
- (b) Paul Onyoni,
- (c) Daniel Kimaiyo Kiprop,
- (d) Clarence Shijali Luyeti,
- (e) Daniel Onyango Matuchi,
- (f) Christopher C. Cheruiyot,
- (g) Jacob Oduya Okepa,
- (h) Francis Alakanya Afune
- (i) William Ruto, and
- (j) Gideon Moriasi

The Claimant prayed for judgment against the Respondent for the Respondent to pay the grievants:

- (a) One month's salary in lieu of notice;

- (b) Difference of salary resulting from under payment;
- (c) Severance pay at the rate of 18 days pay for each completed year of service being severance pay;
- (d) Public Holidays worked and not paid;
- (e) Overtime worked and not paid;
- (f) Uniform refund of Ksh.2,000/= illegally deducted from the wages of the grievants;
- (g) 12 months wages being compensation for loss of employment; and
- (h) Any other benefits which the court may find appropriate.

The grievants were employed by the claimant on diverse dates as security guards. The Respondent had entered into a contract for provision of security services with National Cereals and Produce Board Deport in Eldoret. The grievants were therefore stationed at the Deport on deployment as security guards and as staff of the Respondent.

In July 2006, the Respondent's contract with the National Cereals and Produce Board Deport in Eldoret was terminated with effect from 1st August, 2006. The Respondent wrote a letter dated 28th June 2006 addressed to each of the grievants stating thus,

“Dear Sir/Madam

RE: TERMINATION OF ASSIGNMENTS – NATIONAL CEREALS AND PRODUCE BOARD

We refer to the above matter and regret to inform you that the assignment above has terminated our services. In the premises you are kindly asked to report to the head office on the 1st August, 2006 at 8.00 a.m. for deployment without fail.

Please note that failure to report to the head office as requested will result in you being declared a deserter.

Kindly comply.

Yours faithfully,

For Patriotic Guards Limited

SIGNED

Pauline Kiplagat, Advocate

Legal Officer

c.c. General Manager”

Each of the grievants endorsed on their respective letters the time they had received their respective letters being either on the evening of 1st August, 2006 or on the morning of 2nd August, 2006. The grievants promptly reported their predicament to the claimant's Eldoret office which wrote the letter dated 1st August, 2006 to the Respondent's Management Director as follows:

Dear Sir,

RE: TERMINATION OF CONTRACT

We received a letter dated 28th June, 2006 addressed to affected employees of Eldoret and Kitale respectively. In that your letter you write and requested all affected employees to report to the Head Office, Nairobi on 1st August, 2006 at 8.00 a.m. for redeployment without fail.

The employees have complained to this office over that your letter because you failed to provide the transport to the employees knowing that this is against the Protective Security Order paragraph (18)

Cap. 229 Laws of Kenya. The workers cannot travel to Nairobi without knowing their fate or transport allowances.

We are now requesting to meet you in your Eldoret Branch office on Friday, 4/8/06 at 10.30 a.m. to finalize this matter with you amicably.

I hope you will cooperate with us accordingly.

Yours faithfully,

SIGNED

PETER ODIMA

BRANCH SECRETARY – ELDORET

**c.c. Branch Manager, Eldoret
District Labour Officer, Eldoret
Secretary General, KEGAWU – Nairobi”**

The Respondent replied the claimant’s letter by the letter dated 3rd August, 2006 as follows:

“Attn: Peter Odima

Dear Sir,

RE: TERMINATION OF CONTRACT

We are in receipt of your letter dated 1st August, 2006 whose contents are duly noted.

Whilst we appreciate the issues raised by yourselves we write to inform you have not given us sufficient notice and in the premises we shall be unable to attend the proposed meeting.

Further that the company has machineries in place to deal with such items as recovery of monies expended on transport in the case of such travel. That notwithstanding, we are willing to discuss the matter with you with an aim of settling it out at a convenient time.

We await word from you.

Yours faithfully,

For: Patriotic Guards Limited

Signed

Pauline Kiplagat, Advocate

Legal Officer”

By the letter dated 10th August, 2006 the claimant reported a trade dispute to the District Labour Officer, Eldoret. The District Labour Officer invited the parties to a meeting on 18th August, 2006 at 9.00 a.m. but the Respondent failed to attend. By a letter dated 21st September 2006 the claimant reported a trade dispute to the Minister of Labour and Human Resource Development in accordance with Section 4 of the then Trade Disputes Act, Cap. 234. By the letter dated 27th November, 2006 the Minister accepted the report of the dispute and invited parties to submit, in writing, their respective memorandum within seven days from the date of the letter.

By the undated letter Ref. No. ME/ELD/IR/57/73/2206 the Minister's appointed investigator reminded the parties to submit their respective memorandum.

The Minister's investigation report was communicated by the letter Ref. No. ML/IR/57/73/2006 dated 18th August, 2009. The report documented the submissions by the Respondent as follows:

“Submission by the Management

The management submitted that Winnie Akinyi and the ten others were employed on various dates from 1996 as security guards. Their services were terminated on 1st August, 2006.

The management further submitted that since the contract it had with the NCPB was ending on 30th July, 2006, it issued letters dated 29th June, 2006 to the eleven complainants requiring them to report to the head office on 1st August, 2006 for redeployment. None of them reported to the head office as instructed. They were therefore declared deserters. They were therefore declared redundant because there were vacancies in other branches they could have filled.

The management then submitted that they did not owe the affected employees any dues other than the uniform money which they are ready to refund upon return of the uniform”.

The issues for determination in this case are as follows:

1. Whether the Respondent terminated the grievants' employment. If yes, whether the termination was fair or unfair.
2. Whether the claimant is entitled to the remedies as prayed for.

On the first issue it has been submitted by the claimants that the grievants' employment was terminated on 1st August, 2006 at a time when the grievants were earning Ksh.4,200.00 per month. The grievants lost their guarding contracts and therefore they were terminated. For the Respondent it was submitted that the grievants were redeployed from Eldoret Station to Nairobi by the Respondent's letters of 1st August 2006 addressed to each of the grievants. The grievants failed to comply with the request for redeployment and they were never rendered redundant since the Respondent was willing to redeploy them.

It is not disputed that the grievants received the Respondent letter dated 28th June, 2006 on, 1st August, 2006. The letter required the grievants to report to the head office in Nairobi the same 1st August, 2006 at 8.00 a.m. for deployment without fail. The court finds that the Respondent imposed unrealistic obligation upon the grievants. The Respondent was asking too much of its employees to comply with a request without due notice of the fundamental change in the grievants' service delivery coupled with failure on the part of the Respondent to facilitate the grievants the necessary resources to comply. The court finds that it was unfair labour practice for the Respondent to require the grievants to move from Eldoret at short notice and without an offer of financial assistance with the movement. As such, the Respondent acted in contravention of Article 41 (1) of the Constitution on the right to fair labour practices by requiring the grievants to comply with the requirement to move branches without giving any notice and without offering any financial assistance.

In every contract of employment, there exist an implied term that the employer shall act reasonably. In the instant case, the court finds that the Respondent acted unreasonably. The court also finds that the Respondent, like with accidental and not premeditated precision of a prophet, in the letter of 1.8.2006, wrote to the grievants, thus,

“please note that failure to report to the head office as requested will result in your being declared a deserter”.

The court finds that the Respondent did not enjoy the precision of a prophet on the consequences of the

letter, but, the Respondent designed its unreasonable moves to bring the grievants' contracts of employment to an end. The court holds that the Respondent constructively dismissed or terminated the grievants from employment.

Was the termination fair or unfair? Under Section 43 of the Employment Act the employer is required to prove the reasons for termination failing which the termination is unfair Under Section 45 of the Act. The reason for termination in the present case is alleged to have been desertion arising out of failure to report at the Nairobi office for redeployment. The court has found that the reason did not exist for want of due notice and financial assistance from the Respondent. Thus, the termination was unfair under the cited provisions of the Employment Act, 2007.

The final issue for determination is whether the grievants are entitled to the remedies as prayed for. The court will deal with each of the remedies as follows:

1. The claimant has prayed for one month salary in lieu of notice. The claimants were entitled to the notice before termination in accordance with Section 35 (1) (c) and the court finds that each of the grievants is entitled as prayed. Each is awarded a sum of Kshs.6,665.40/= being the lawful monthly salary under Legal Notice No.38 of 2006 and as confirmed by the findings in the Minister's report. On this prayer, the Respondent shall pay a sum of Ksh.73,319.40/= for the eleven grievants.

2. As found by the Minister's report the grievants were entitled to Ksh.6,665.40/= and not Ksh.4,200.00 per month. The Ksh.6,665.40/= was prescribed under Legal notice No. 38 of 2006. The Respondent shall therefore pay the eleven grievants a sum of Ksh.52,152/= resulting from the underpayment.

3. The claimant has prayed for severance pay at the rate of 18 days pay for each completed year of service being severance pay. The court has found that the grievants were not rendered redundant but they suffered unfair constructive termination. The claim for severance pay on account of redundancy will therefore fail. Under Section 35 (5) of the Employment Act, 2007, the grievants would be entitled to service pay for every year worked, the terms of which were to be fixed by contract. The claimant has not proved such fixed terms and the court is unable to grant any service pay.

4. The claimant has prayed for payment for public holidays worked and not paid as well as over time. On this subject, the Minister's report stated, thus,

“The union also complained that the victims used work for overtime which was not paid for. There were pending leave and unpaid public holidays which had not been paid at the time of termination. The employer neither commented on these allegations nor produced any record to prove the union wrong”

In view of the report's findings, the court finds that for public holidays worked and not paid the Respondents shall pay each grievant Ksh.5,698/= making a sum of Ksh.62,678/=. In addition, each of the grievants shall be paid Ksh.29,802 as computed by the claimant making a sum of Ksh.327,822/=.

5. The Respondent admitted deducting each of the grievants Ksh.2000/= for uniform refundable upon return of the uniform. The court finds that such deduction was unfounded in law. The deduction was not permitted under the provisions of Section 19 of the Employment Act, 2007 providing for deductions an employer may make from the employees' wages or salary. The court finds that each grievant is entitled to a refund of Ksh.2000/= and the Respondent shall pay a refund of a sum of Ksh.22,000/=.

6. The court has found that the Respondent unfairly terminated the grievants. For the unfair constructive termination in gross violation of the Constitutionally protected right to fair labour practices, the Respondent shall pay each of the grievants twelve months gross salary making a sum of Ksh.879,832.80/=. This compensation is made in accordance with Section 49 (c) of the Employment Act, 2007.

In conclusion, judgment is entered for the claimant against the Respondent for:

- (a) A declaration that the Respondent constructively terminated the grievants' employment and the termination was unfair;
- (b) Pay to the grievants a sum of Ksh.1,417,804.20/= plus interest at court rates from 1st August, 2006 till full payment; and
- (c) Payment to the claimants of costs of the cause.

Signed, dated and delivered this 26th day of October, 2012.

BYRAM ONGAYA
JUDGE