



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 747N of 2009

Daniel Mulonja

Claimant

Jaswant Singh & Bros Ltd

Respondent

AWARD

Background

1. This Claim was heard by Justice Chemmutut on 10 March 2011 after which he directed the parties to file written submissions and that he would deliver an award on Notice. The issue in dispute was stated as *'wrongful and unlawful termination of claimant's services and failure by the Respondent to pay terminal benefits to the claimant'*.
2. Justice Chemmutut however did not prepare or pronounce an award before ceasing to hold office as a judge of the Industrial Court sometime in July 2012. It for this reason that on 10 September 2012, the Registrar of this Court wrote to the parties to appear before me on 21 September 2012 for purposes of taking directions on how the Cause should proceed.
3. On 21 September 2012 I did not sit due to official engagements elsewhere and a notice was appropriately put up advising the parties to appear before me on 24 September 2012. On this date only Mr Nyamweya holding brief for Mr Osoro for the Claimant appeared.
4. I directed the Claimant to serve a mention notice upon the Respondent and set a further mention date for 1 October 2012. On this latter day again, the Respondent was not represented though he had been served and an affidavit of service filed. I directed the Claimant to again serve the Respondent and come back to court on 12 October 2012.
5. On 12 October 2012 Mrs. Nyaencha held brief for Mr. Osoro for the Respondent and she sought an adjournment to enable Mr. Osoro appear personally to take directions. Mr. Osoro's whereabouts or reasons for not attending court were not given and taking into consideration that he had twice failed to attend court, I ordered that I would pronounce an award on 16 November 2012.
6. I took this course of action because this is one of the older Causes pending before the Court and the hearing had been closed way back in March 2011 and yet over a year later an award had not been pronounced. The disputed termination was in 2005.
7. In any case in my determination I will consider the Memorandum of Claim filed in Court on 30 November 2009, the Memorandum of Defence filed on 6 May 2010, the Claimant's written submissions filed in Court on 7 April 2011 and the Respondent's written submissions filed in Court on 21 April 2011.

Claimant's case

8. It is the Claimants case and it is not disputed that he was engaged by the Respondent as a security guard sometime in 1986 at a salary of Kshs 3,900/ until 12 March 2005 when he pleaded his services were terminated.

9. According to the Claimant his termination was wrong, unlawful, without justifiable cause, notice or reasonable cause and arbitrary.

10. The Claimant pleaded he served with dedication and loyalty under difficult circumstances but was never given weekly rest days, holidays or overtime and was terminated verbally. As a result, he seeks two months' unpaid salary for January and February 2005, one month salary in lieu of notice, leave allowance for 19 years, unpaid overtime, service gratuity, NSSF/NHIF contributions deducted but not remitted, NHIF employers contributions, public holidays worked but unpaid and house allowance all totalling Kshs 905,900/.

Respondent's case

11. For the Respondent it was argued that the termination of the Claimant was not wrongful and that an audit had revealed that certain materials at the site under guard by the Claimant had disappeared and a report was made to the Police at which point the Claimant was temporarily suspended pending investigations but the investigations did not bear any fruit

12. According to the Respondent, the Claimant was requested sometime in March 2005 to collect his dues and resume duty but he declined. It is the case of the Respondent that the Claimant absconded duty.

13. The Respondent further pleaded that leave, overtime and holidays worked were paid while NSSF and NHIF contributions were remitted and that the Claimant was housed and therefore not entitled to a house allowance. The Respondent prayed that the suit be dismissed with costs.

14. The central issue for determination is whether the termination of the Claimant was wrong and unlawful, though regrettably there is no prayer to find the termination so, I will examine whether the termination was unlawful and /or unjustifiable and then deal with the heads of claim individually.

15. I need to state for purposes of clarity that the primary operative statutory regime applicable to the determination of the Claim herein will be the repealed Employment Act, Cap 226 Laws of Kenya and the Regulation of Wages and Conditions of Employment Act, Cap. 229.

Whether the termination was wrongful and unlawful

16. All I have before me are the parties' pleadings and written submissions. According to the Claimant, he was informed verbally of the termination of his services. His case is that this was *without justifiable cause, notice or reasonable cause, arbitrary and against the rules of natural justice*. According to the Respondent, the Claimant *absconded* from duty.

17. Unlike the current Employment Act, 2007 at sections 41, 43 and 45, natural justice or the giving of reasons was not part of the statutory obligation placed upon an employer by the repealed Employment Act.

18. This legal position was confirmed by several decisions of the Court of Appeal which were made on the basis of the then prevailing legal framework. I need only refer to two cases. One is *Court of Appeal at Nakuru, Civil Appeal No.27 of 1992, Rift Valley Textiles Limited v Edward Onyango Oganda* where the Court held that:

the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to

assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise

19.The decision in the *Oganda* case was referred to with approval in the latter case of *Court of Appeal at Mombasa, Civil Appeal No.38 of 2005, Kenya Ports Authority v Silas Obengele*.

20.Placing reliance on these two decisions and noting that this Cause falls or succeeds based on the legal framework then in place, it is my humble opinion that it is not open to the Claimant to challenge the termination on the grounds of failure to observe the rules of natural justice or failure to give reasons.

21.Another ground relied on by the Claimant in challenging the termination of his services was that it was not *justifiable*. Under section 17 of the repealed Employment Act, it was open to an employee to bring a challenge as to whether the facts giving rise to a summary dismissal were justifiable or lawful grounds.

22.I have considered the claim herein under this aspect. The Claimant argued he was terminated. The Respondent argued that the Claimant absconded. No evidence was led before me on either case to enable me to establish the veracity and credibility of the opposing claims. It was desirable for evidence to be led and tested on this aspect of the Claim, unfortunately the parties had agreed to rely on pleadings and written submissions.

23.In the circumstances I am afraid that I don't have enough material even on a balance of probabilities to decide whether the Claimant's services were terminated or he absconded from duty. If the Cause fell to be decided under the provisions of the Employment Act,2007,it would have been incumbent upon the Respondent to produce the records regarding the attendance of the Claimant to prove the validity and fairness of the Claimant absconding from duty as a ground to terminate his services.

Conclusion

24.The net effect of the foregoing is that I reject the contention that the Respondent terminated the services of the Claimant without justifiable or lawful reasons or that the failure by the Respondent to observe the rules of natural justice rendered the termination unlawful or wrongful.

25.Bearing in mind the conclusion I have reached it is not necessary for me to consider any of the individual heads of relief sought by the Claimant. The Claim is therefore dismissed with no order as to costs.

Dated and delivered in open Court in Nairobi on this 16th day of November 2012.

**Justice Radido Stephen
Judge**