



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 380 of 2011**

**KENNEDY ONDERI.....CLAIMANT**

**VERSUS**

**RILEY SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

This is a claim dated 2<sup>nd</sup> March 2011 on wrongful and unfair termination of the claimant's services with the respondent and failure to pay terminal benefits. The claimant is opposed in a defence filed on 20<sup>th</sup> July 2011 denying the allegations of unlawful termination.

It was submitted that the claimant was employed by the respondent in November 2004 as a security guard at a monthly salary of which over time was increased to Kshs7, 350.00 but there was no appointment letter but monthly pay slips were issued every month. That on 25<sup>th</sup> May 2010 the claimant was wrongfully and unlawfully terminated from his employment by the respondent who refused to pay his dues and a dismissal letter given to him. He now claims his termination dues as follows:

- 1. Leave for 2004-2009 all at Kshs. 30,870.00*
- 2. Pro rata leave for 6 months all at Kshs. 2,572.00*
- 3. Pending house allowance from Dec 2009 to May 2010 all at Kshs. 5,826.00*
- 4. Miscalculated May 2010 deductions all at Kshs. 600.00*
- 5. Salary in lieu of notice all at Kshs. 7,350.00*
- 6. Uniform dues deducted all at Kshs.2,000.00*

*Total claim at Kshs. 49,218.00*

That despite the claimant serving the respondent with diligence, his services was terminated unfairly hence his claim in court. His prayers were that he should be paid the Kshs. 49,218, compensation for wrongful dismissal, costs of the suit with interests.

The respondent on the other hand submitted that the claimant was indeed their employee on contractual basis from time to time with his last contract running from 26<sup>th</sup> December 2009 on a daily salary of

kshs350.00 that he was dismissed on 25<sup>th</sup> May 2010 for gross misconduct following an incident reported on 20<sup>th</sup> May 2011 where as a dog handler on duty at the Chiromo Campus at the University of Nairobi he was found to have tied the dog, a thing that he was not supposed to have done. That this was taken to be gross misconduct that warranted immediate dismissal as spelt out under his contract.

That the matter was reported to the Kenya Union of Commercial Food and Allied Workers and a meeting convened between the parties on 17<sup>th</sup> July 2010; however the claimant decided to proceed to Court as he felt the Union negotiations on his behalf were not fair. He was also not represented by his Union in this matter even though he had been a member.

In evidence the claimant stated that that he worked with the respondent firm from October 2004 until May 2010. That on 20<sup>th</sup> May 2010 he was at Chiromo Campus, University of Nairobi. He was handling a dog as part his security work. That around midnight, his supervisor came, this was a person who was new but there had been a history that he would harass askaris on duty by demanding bribes and on this occasion they had a quarrel on allegations that he had tied the dog on a door with broken glass and after five minutes he left. This resulted in his termination.

That at termination he had earned leave days, he had been deducted 600/- in May 201, uniform deductions at 2000/- and his service from 2004 to 2010 had not been paid.

On cross-examination he confirmed that the respondent does not give appointment letters that the contract attached to the response was a strange document to him. That he only went on leave in 2009. That he later signed a contract that was brought to him by Mr. Muliro but he never read it as this was the practice of the respondent. His job description was that of handling a dog even though he did not have any training on it.

That on 20<sup>th</sup> May 2010, his job was to patrol the physical science building at the Chiromo Campus when the supervisor came at around midnight and found claimant with the dog he was handling for the last two years. This was at a corridor. That there were no broken window and even though the supervisor stated that he had tied the dog on some broken window, he challenged this and wrote his statement to this effect. That this supervisor would occasionally demand money which was unspecified.

That he had never been trained to handle the dog but he knew that it would react aggressively to strangers. It was however meant to serve for patrols to and would recognize those wearing uniform and the student did not have uniforms and since it was at night, there was no reported incident. The supervisor was there for about 5 minutes when he demanded to have his work number and how many security guards there were at this site. He was later called to the office when he was told that he had been terminated yet there was no letter asking him to explain as to why he had to be terminated.

The only explanation given was that he was accused of having tied the dog at the window. That as a unionized member he reported to his Union but following meetings he felt there was no justice and he opted to come to Court.

In evidence the respondent called Mr. Joseph Paul Mutua who worked for the respondent as a supervisor having worked for the respondent at various sites. That on the night of 20<sup>th</sup> May 2010, he was assigned duties to supervise guards at the University of Nairobi and conducted spot checks at Chiromo Campus and at the Physical Science building he found the claimant dog tied to the door. That the dog barked at him and he could not be able to gain entry into the building. That on this site there were two security guards with one locked inside the building.

The witness further stated that on this night he met over 50 security guards at various sites and that only the claimant was not properly on duty. That he however found two officers sleeping they apologized and he allowed them to resume work. He filed his report of this incident and the claimant was summoned to explain the incident.

It is important for this Court to state that every employer has the right to discipline any errant employee.

Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct. In the instant case, upon events that took place on the night of 20<sup>th</sup> May 2010, the Respondent did give the Claimant the opportunity to make any representations or evidence that related to events of what their supervisor observed. It thus extended to the Claimant the opportunity to make representations and therefore there is no other conclusion I can reach except that the dismissal of the Claimant was procedurally fair.

Despite the fact that the respondent witness stated that he witnessed other employees who were sleeping on the job and he decided to pardon them, this claim relates to the conduct of the claimant and not that of the respondent witness or fellow employees. It was his case and he had a duty to give his employer his best service the conduct of others notwithstanding. If indeed the claimant had not tied the dog as alleged he would have called his fellow colleague at the Physical Science building of Chiromo Campus at the university of Nairobi to write his statement in defence or to appear in Court and give evidence.

To buttress this finding, the claimant was unionized, his Union did make presentations on his behalf before his employer but since the claimant was unhappy with the proceeding and or the fact that he was not included he decided to ignore that process and instead come to Court. It is noteworthy that this Court recognizes the important role played by Unions in the arbitration of disputes and any case that commences using this procedure is part of the recognized laws of Kenya. Unions are recognized entities under the Labor Relations Act and whatever negotiations they undertaken for and on behalf of an employee's eases the work of this Court.

That as the case maybe and upon the Court finding that the termination was procedural, I note that there are several other claims from the Claimant, despite the fact that he was summarily dismissed, his annual leave and other unfair deduction are his entitlements his termination notwithstanding.

It was the evidence of the Claimant that he had never taken his annual leave for the entire duration of his employment. This was not refuted by the respondent in the pleadings or in evidence and submissions. I note that every employee is entitled to his or her annual leave and where leave is due to an employee who is declared terminated for any reason, the same must be in cash. I therefore find for the claimant that his leave payments are due and owing in the amount of Kshs. 30,870.00.

There was no evidence and or rationale for the pro rata leave sought in the claim. This was not proved in evidence and this court will not grant the same.

The claim for the House allowance was vehemently opposed by the respondent, who stated that the daily calculated rate of Kshs. 350.00 was applicable and paid on a monthly basis that was all inclusive. The Claimant signed the contract and even though he states that this was brought to him by Mr. Muliro and he signed without reading, his ignorance of this issue is not defence at law. He should have been more careful on the consequences of appending his signature to the document. This will therefore not be granted.

The claim for the miscalculated salary for may amounts to Kshs.600.00. this Court has been at pains to go through all the records submitted by the claimant is support of this claim, indeed in the payment of the terminal benefits to the claimant, the respondent omitted this in their calculated and this forming the dues worked for by the Claimant, this Court will award the sum of Kshs.600.00 to the Claimant.

The claim for the uniform dues deducted was part of the requirements for the job for which the claimant was employed. It was the duty of the respondent to provide these tools of trade to its employees at all material time. This deduction was not what was contemplated under Section 19 of the Employment Act deductions from an employee's salary. In any event, if this deduction was contemplated by the respondent, it should have formed part of the contract and detailed as per Section 10 of the Employment Act. This was not the case here. This Court will therefore grant the same at Kshs. 2000.00

For the above reasons this court makes the following orders:

- 1. That the termination of the Claimant was procedural and no notice pay is due;**
- 2. Based on the above this Court finds that all payments pending before the said termination are due and owing that being:**
  - a. Payment of leave days earned amounting to Kshs. 30,870.00**
  - b. Miscalculated deductions amounting to Kshs. 600.00**
  - c. Uniform dues deducted amounting to Kshs. 2,000.00**

**Total dues Kshs. 33,470.00**

- 3. The costs of the suit to the Claimant.**

These are the orders of this Court.

Dated and delivered in open Court at Nairobi this 14th day of December 2012.

**Justice Monica Mbaru**

**Judge  
Industrial Court of Kenya**

**Appearances:**

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