



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 761 of 2010

PETENALI LUYUNDI MUYUKA.....CLAIMANT

VERSUS

TANDU ALARM SYSTEMS LTD RESPONDENT

JUDGMENT

The Claimant is Petenali Luyundi Muyuka. The Respondent is Tandu Alarm Systems Limited. The claimant's memorandum of claim was filed on 3rd July 2010. The Reply to memorandum of claim was filed on 15th July 2010 through Kantai & Company Advocates. The respondent's supplementary bundle of documents was filed on 5th December, 2012.

The claimant has prayed for judgment against the respondent for:

- a) One month's pay in lieu of notice Ksh.6,839.00/=.
- b) Pay for 21 leave days per year for 8 years – Ksh.38,298.40/=.
- c) House allowance at 15% per month for 8 years – Ksh.59,911.80/=.
- d) Compensation for wrongful dismissal at a maximum of 12 months being Ksh.82,068/=.
- e) Total – Ksh.141,979.80/=.
- f) Costs and interest.
- g) Any other relief the court deems just.

The respondent opposed the claim and prayed that it be dismissed with costs.

The case came up for hearing on 5th December 2012.

The claimant testified that on 22nd, 23rd, and 24th and 25th February 2010 he was on official off. He was called by one Osogo on 25th February 2010 and asked to attend duty because his workmate one Oduor was scheduled to be absent to attend the burial arrangement of a departed relative. The claimant testified that he attended as scheduled and reported to work on the evening of 25th February 2010. He was employed as a night guard.

On the morning of 26th February 2010 the claimant together with other four night guards were called at the respondent's office. At the office they were informed that they had failed to comply with the changes in the shift. They were released to go home without being allowed to make their respective explanations.

On 26.02.2010, the claimant testified that he reported at work for the evening duty. A call came through requiring him to go back home and to report at the office on the morning of 27.02.2010. He left his duty station at the construction site at Strathmore University and walked to his home at Kawagware in Nairobi.

On the morning of 27.02.2010, he reported at the office and the respondent manager one Kabuga served him the letter of summary dismissal. The letter stated that on 25.02.2010 the claimant was instructed by his supervisor to change shift but he had refused to do so. That the claimant had insubordinately responded to the respondent's operations manager one Lloyd Kabuga by stating that he could not work on day shift. That the claimant had also incited his colleagues to appear at the operations manager's office in protest against the instructions to change shifts. The letter stated that the claimant's actions were tantamount to incitement. Accordingly he was summarily dismissed with effect on 27.02,2010 under Section 44 (4) (d) of the Employment Act, 2007. The claimant was offered a right of appeal. The claimant was never invited for the hearing of the appeal and the appeal has never been decided.

The respondent's witness No.1 was Llyod Kirimi Kabuga. He was the respondent's Operations Manager since February 2006. He was the one who signed the claimant's letter for summary dismissal. He had instructed the claimant's supervisor one Osogo to convey to the claimant change from night to day shift. Some scrape metal had been stolen from the construction site the claimant had been deployed to and it was desirable that the claimant was redeployed to another station. The claimant rejected the deployment so he was summarily dismissed for failing to comply with the instructions to change shifts. It was the claimant's objection that he could not go to Sigona due to transport costs. The witness stated that the claimant lived in Kawangware with other staff working at Sigona. He was experienced and he earned more than such other staff working at Sigona. Having disobeyed the instructions, the claimant was sacked. The claimant's terminal dues had been processed as per folio 3 on the reply to memorandum of claim. However the claimant refused to collect the dues. The dues included one leave day for Ksh.236 and uniform refund of Ksh.4,000/=. Folio 1 of the respondent supplementary bundle of documents showed that the claimant had been paid Ksh.10,336.20/= for his leave arrears and that he undertook not to make any further claims against the Company. The witness referred the court to the leave application forms on the supplementary list to show that the claimant had taken his annual leave as expected.

The respondent's 2nd witness was the claimant's immediate supervisor one Santa Osogo. He testified that he had informed the claimant about the change of shift. After the claimant refused to change to the day shift he was sacked and another guard was employed to replace the claimant. He confirmed to have called the claimant to report on duty from the off on 25.02.2010. He admitted that it would be difficult for claimant to have worked on the night of 25.02.2010 and changed to day shift on the morning of 26.02.2010.

The court has considered the evidence, the pleadings, submissions and makes the following findings.

1. The court finds that the claimant was employed by the respondent as a night guard as pleaded at a monthly gross pay of Ksh.13,719/= as per his pay slip of December 2009 appendix 6 on the memorandum of claim.
2. The claimant was not accorded a hearing as envisaged under Section 41 of the Employment Act, 2007. Such hearing was mandatory. It was not disputed and the claimant as well as the respondent's 2nd witness proved by their evidence that on 25.02.2011, the claimant was off duty and it was his fourth day of the off entitlement. In the circumstances, it is the court's finding that the claimant was not accorded reasonable notice of the alleged change of duty and having been on duty on the night of 25.02.2006, it was impossible to expect him to change to the day shift on the morning of 26.02.2006. The claimant had already demonstrated his commitment for duty by accepting to forego his off on 25.02.2006 and stepping in to work for his colleague who had to be away at the material time. The reasons for termination were therefore not genuine and the court finds that the termination was unfair and unlawful.

The court has noted that it was the evidence of the respondent's first witness that the claimant protested against transfer from the site at Strathmore University to Sigona on account that he did not have any fare or the relevant fare to commute to the new station of deployment from his aboard in Kawagware.

The witness further stated that the claimant protested against change from the night shift to the day shift because the night service attracted better pay than the day shift.

The court has considered that evidence against provisions of Section 48(h) of the Employment Act, 2007 which provides that an employee's initiation or proposed initiation of a complainant or other legal proceedings against his employer unless the complainant is shown to be irresponsible and without foundation does not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty. The court has already found that the respondent had required the claimant to comply with an impossible operational directive namely to work on the night of 25.02.2010 and to change to a day shift on the next morning 26.02.2010. The respondent then was proceeding to require the claimant to increase the cost of commuting to work in circumstances whereby his income was to substantially reduce. The claimant was expected to comply without any due notice to rearrange his affairs. The court finds that in the circumstances of this case, the claimant had a responsible and well founded complaint against the respondent.

The court upholds its decision in the case of *Grace Gacheri Muriithi -Versus - Kenya Literature Bureau, Industrial Court of Kenya Cause No. 44 of 2011* that its unfair labour practice for an employee to be punished in circumstances whereby the alleged misconduct relates the unresolved valid grievances. In that case at page 33 – 34 of the typed judgment, the court stated thus;

“Employees must be committed to the implementation of the employer’s policies and programmes. Employers are entitled to determine and prescribe such policies and programmes. Employees are also entitled to raise grievances about their work place welfare. Grievances or complaints may relate to fellow staff, clients or the employer. Where the operation policies, manuals or systems expose the employ to risks, it is sufficient that the employee raises the deficiencies or reports them and in particular circumstances, takes such decisions that shall be reasonable in view of the deficiencies. Employers expect the employees to remain committed and take decisions of omission and actions towards satisfactory performance of the contract of employment.

To ensure stable working relations between the employers and employees the court finds that it is unfair labour practice for the employer to fail to act on reported deficiency on the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub-Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal will invariably be unfair and therefore unjust.”

The court upholds the findings in that case and further finds that they apply to the present case. The claimant was unfairly terminated and is entitled to compensation. Accordingly, he is awarded **Ksh.164,628/=** for unfair termination being 12 months gross salary. He is also entitled to **Ksh.6,839/=** being one month pay in lieu of the termination notice.

3. The claimant claimed payment for leave days due but not taken. The court has considered the evidence on record and finds that the complainant took all his due leave days except the one day admitted by the respondent as pending. The respondent has also admitted that the claimant was entitled to a refund of Ksh.4000/= for the uniform that he returned. The court therefore finds that the claimant is entitled to **Ksh.4,236/=** for the one leave day and refund of the uniform as admitted by the respondent.

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

- a) the respondent to pay the claimant a sum of Ksh.175,703/= plus interest at court rates at the date of the judgment;
- b) the respondent to issue and deliver to the claimant the statutory certificate of service; and
- c) the respondent to pay the costs of the cause.

Signed, dated and delivered in court at Nairobi this 14th day of December 2012.

BYRAM ONGAYA
JUDGE