



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 295 OF 2015

BETWEEN

PAUL OCHIENG'CLAIMANT

VERSUS

THE KK GROUP OF COMPANIES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Otwere & Associates, Advocates for the Claimant

The Federation of Kenya Employers [FKE] for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 6th May 2015. He states he was employed by the Respondent as a Security Guard on 1st November 2002. His contract was terminated by the Respondent on 26th November 2013. He was alleged to have left his duty post without authorization. He was not given notice, heard fairly and/or paid terminal benefits. His last monthly salary rate, according to his Statement of Claim, was Kshs. 18,627. He asks the Court to find termination was unfair and grant him Judgment against the Respondent in the following terms:-

- a) N.S.S.F funds deducted and not remitted for 4 months, at Kshs. 1,600.
- b) N.H.I.F funds deducted and not remitted for 4 months at Kshs. 1,600.
- c) 1 month salary in lieu of notice at Kshs. 18,627.
- d) November 2013 salary at Kshs. 18,627.

e) Gratuity at half monthly salary for each of the 11 years completed in service at Kshs. 102,448.

f) 12 months' salary in compensation for unfair termination at Kshs. 223,524.

g) Annual leave pay over a period of 11 years at Kshs. 204,897

Total...Kshs. 517,323

2. At paragraph 11 of the Statement of Claim, the total sum of Kshs. 517,323 is pleaded. The Claimant follows this up with separate prayers for other items which are already included in the total sum. Why does the Claimant plead items which are already included in the total sum of Kshs. 517,323 separately? This sort of pleading does not assist the Court or the Claimant, in clarification of issues and making a fair determination. Other prayers include house allowance, costs, interest and any other suitable relief.

3. The Respondent filed its Statement of Response on 18th June 2015. It is admitted the Claimant was employed by the Respondent on 1st November 2002. His contract was terminated on 26th November 2013 by the Respondent. His last gross monthly salary, as shown in his pay slips was Kshs 12,629. He deserted his post on 21st November 2013. He was spotted at a village in a place called Bangladesh within Mombasa City, in his work uniform. He admitted he abandoned his post. His conduct left Respondent's Client's property without security. The Respondent risked having its contract with the Client cancelled. The Claimant was suspended and fairly heard before dismissal. The Respondent offered to pay Claimant terminal dues at Kshs. 57,932 net, as shown in Respondent's annexure 2. He declined to collect his dues from the Respondent.

4. The Claimant was heard, and rested his case, on 13th October 2015. Security Supervisor Fredrick Khamala gave evidence for the Respondent on 8th December 2016. Parties agreed to have the Witness Statement of Sophia Mohammed for the Respondent, admitted as part of Respondent's evidence. It was explained that the Lady left employment and was not available to give evidence. Proceedings closed on 10th July 2017.

5. Paul told the Court he was assigned guard duties at Capitol Reef in Changamwe Mombasa, by the Respondent. He worked under seasonal contracts. Guards attended parade once every week. The Claimant failed to attend parade once and was issued a warning letter dated 5th July 2013. He continued working. On 21st November 2013, he left his Colleague at the Capitol Reef duty station. He went to buy milk. He left his Colleague Stephen guarding alone momentarily. He returned after 15 minutes. The following day he was suspended. He was heard on 26th November 2013. He was accompanied by Stephen at the hearing. There was no Trade Union Representative present. He clarified this part of his evidence saying Leonard Muinde, not Stephen, was the Colleague who accompanied him. There was also in attendance a Shop Steward who was imposed on him by Management. The Claimant attempted to apologize. The Respondent did not accept this. He was slammed with the letter of termination. He was asked to clear, which he did. He was not paid for his 11½ years of service. He stated he utilized his annual leave, and did not therefore wish to pursue this item.

6. Cross-examined, he told the Court he was invited to a hearing. He was informed about the allegation against him. He was told he abandoned his post. Parade issue was in July 2013. He was warned over this. He went to buy milk on 21st November 2013. He also explained he had gone to buy drugs. His basic salary as of October 2013 was Kshs. 10,912. He did not know details of N.S.S.F contributions made. He was not paid for his years of service. He affirmed on redirection that he was advised of his right to be accompanied by a Colleague or Shop Floor Trade Union Representative to the hearing. Charges were explained to him.

7. Khamala told the Court he was Claimant's immediate Supervisor. He was called by a Day Guard, Benson Khaemba on 21st November 2013, and told the Claimant had been sighted by Benson, while in work uniform, enjoying a drink at a public house bar [pub], within the Bangladesh area. Khamala called the Claimant on the phone. He could not reach the Claimant. He called Claimant's Colleague Muinde. Muinde told Khamala that the Claimant had just gone to buy cigarettes. Khamala rushed to Capitol Reef and waited for the Claimant. He did not show up. Khamala called Respondent's control room and was availed a replacement Guard for the night. The Claimant called Khamala later that night, and was advised to report to Respondent's Office the following day. He did so and was suspended.

8. Cross-examined, Khamala testified he did not meet the Claimant at the site on the material night. Khamala did not attend disciplinary hearing. He handed over the Claimant to the Area Manager. The minutes of the disciplinary meeting were not signed. Khamala did not know that the Claimant suffered from Tuberculosis or Asthma. He did not know that the Claimant had stepped out to buy medicine. Muinde did not call Khamala. Khamala was unable to say why this was so. Redirected, Khamala told the Court if one wished to leave his area of work, he was supposed to call his Supervisor for authorization.

9. In her Witness Statement, Sophia Mohammed confirmed the sequence of events of 21st November 2013 as narrated above by her Colleague Khamala. She states that the Claimant admitted he left his workstation. He however alleged he did so to buy some drugs and airtime. He was heard and a decision to terminate his contract made.

The Court Finds:-

10. The fact and details of Claimant's employment with the Respondent are not largely disputed. It is not contested that he was assigned duty at Capitol Reef in Changamwe, Mombasa. It is also agreed that on 21st November 2013, the Claimant left his workstation. Why he did so, is a contested item.

11. The rate of monthly pay adopted by the Claimant in his Pleadings at Kshs. 18,627 is incorrect. The Court is not able to discern what motivated the Claimant to adopt this figure of Kshs. 18,627. Where is the figure from? What is it based on? His pay slip of October 2013 which he exhibited shows a gross monthly pay, which included variable items such as overtime pay and leave travelling allowance, at Kshs. 13,804. The correct amount as stated by the Respondent, based on invariable items, is Kshs. 12,626 monthly. The Claimant misled the Court in pleading a monthly salary of Kshs. 18,627, as he did by pleading an aggregate amount of Kshs. 571, 323, while praying for all the aggregated items separately, under paragraph 11 of his Statement of Claim.

12. He did not establish that N.S.S.F and N.H.I.F contributions were deducted from his salary and not remitted. The prayer for refunds under these heads is rejected.

13. There is common evidence that the Claimant left his workstation. He did not do so with the authorization of his Supervisor. He was sighted by a Colleague drinking at a public house bar in a place called Bangladesh in Mombasa Kenya.

14. The Court does not believe that the Claimant just stepped out to buy medicine. His Advocate in cross-examining Khamala suggested the Claimant suffered from TB or Asthma, to justify the claim that the Claimant had stepped out to buy drugs. The Claimant said nothing in his evidence about suffering from TB or Asthma. It does not appear plausible that the nature of ailments the Claimant is alleged to have been suffering from, would call on the Claimant to buy drugs off the counter, at some late night pharmacy in Bangladesh. The Respondent did not know that the Claimant was ailing.

15. This explanation by the Claimant is weakened further by other reasons given elsewhere, for his absence from the workstation. Muinde told Khamala that the Claimant had gone to buy cigarettes. The Claimant testified he went to buy milk. Sophia alludes to "airtime". Which is it, milk, cigarettes, airtime, medicine or alcohol? The Court is inclined to believe the evidence of Supervisor Khamala, that the Claimant was seen by a fellow Guard, drinking at Bangladesh, while clad in full work uniform. He was not seen drinking milk. It is not surprising that the Claimant was unavailable for a considerable number of hours when Khamala visited the site. It is improbable that the Claimant would take all these hours to buy anything else, other than alcoholic beverage. He called Khamala late in the night, after Khamala had visited the site and replaced the Claimant. Conveniently, the Claimant could not be reached on the phone when his Supervisor called him earlier. The Claimant's behaviour was not consistent with an innocent absence from the place of work.

16. The Respondent demonstrated it had valid reason, under Section 43 and 45 of the Employment Act 2007, to bring the employment relationship to an end.

17. The Claimant was suspended. He was investigated. He was presented with a specific charge. He was heard in the presence of a Trade Union Representative. He did not establish his assertion that the Trade Union Representative was imposed on him. He was given every opportunity to defend himself. He sought to apologize, in effect conceding wrongdoing. The Respondent was within its discretion to accept or reject the apology.

18. Procedure was fair under Section 41 and 45 of the Employment Act 2007.

19. The prayer for compensation for unfair termination has no merit and is rejected.

20. The Respondent offered the Claimant reasonable terminal benefits as shown in Respondent's annexure 2. These comprised: 18 days' salary for the month of November at Kshs. 6,692; overtime of Kshs. 3,887; annual leave pay of Kshs. 10,912; leave travelling allowance of Kshs. 850; and service pay at Kshs. 36,109. The total before tax was offered at Kshs. 58,552 and Kshs. 57,932 after tax. Service pay was based on 8 complete years rather than 11 years. It was explained by the Respondent that gratuity scheme was frozen on 28th February 2011, placing all Employees on Pension Scheme. This offer was a reasonable way out for the Claimant.

21. In all the Court is not able to find anything is payable to the Claimant, beyond what was offered by the Respondent. IT IS ORDERED:-

[a] The Respondent shall pay to the Claimant the net amount of Kshs. 57,932 in terminal benefits, as offered in annexure 2 of the Respondent's Documents.

[b] No order on the costs and interest.

Dated and delivered at Mombasa this 15th day of December 2017.

James Rika

Judge



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