



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR COURT

AT NAKURU

ELRC CAUSE NUMBER 527 OF 2014

ALPHAEUS KIPKOSKEI TARUS.....CLAIMANT

-VERSUS-

GROUP 4 SECURITY SERVICES (K) LTDRESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. Vide a Memorandum of Claim dated 21st October, 2014 filed in court on 23rd October, 2014 the Claimant herein prays for the following:-
 - (i) A declaration that the termination of the Claimant was unfair, wrongful, unlawful and illegal.
 - (ii) Payment of a sum of Kshs.121,392 (See the particulars as per items a-f) and issuance of certificate of service.
 - (iii) Costs of the suit.
2. Accompanying the Memorandum of Claim is as expected, a verifying affidavit, a list of witnesses, list of documents, and copies of the said documents.
3. Upon receipt of summons, the Respondent entered appearance and filed a Memorandum of response dated 17th December, 2014, a list of documents and copies thereof, and a list of witnesses.
4. The Claimant filed a response to the reply to Memorandum of Claim dated 27th January, 2015.
5. Counsel for both parties filed a statement of agreed issues dated 28th June, 2016 and the Respondent further filed a supplementary list of documents dated 1st March, 2019.
6. This cause proceeded for hearing before Lady Justice Mbaru on 24th January, 2019 and 16th October 2019. The Claimant testified alone while the Respondent called two (2) witnesses.
7. Upon conclusion of the hearing the Respondents counsel filed written submissions dated 7th November, 2019 and the Claimant's counsel filed theirs dated 9th November, 2021 on 11th November, 2021.

II. CLAIMANT'S CASE

8. The Claimant's case in summary is that he was employed by the Respondent for the period from November, 2001 to 23rd September, 2014 when he was summarily dismissed in a manner that he considers to have been unlawful, wrongful, and unjustified.
9. As at the time of dismissal the Claimant held the position of Crew Commander. He urges that he was not issued with a notice, or given a valid reason, or a fair hearing leading upto his summary dismissal.

10. During the hearing in court the Claimant testified alone in support of his case and reiterated the above allegations as expressed in the Memorandum of claim, witness statement, and the written submissions.

III. RESPONDENT'S CASE

11. The Respondent's case as expressed in the Memorandum of response, oral testimony by RW1 and RW2, and the written submissions is that while the Claimant was its employee as alleged, the summary dismissal was lawful both in substance and form in that there was a valid reason and that the procedural steps taken were in accord with the law.

12. Further, the Respondent urges that the Claimant was paid all that was due to him as at the time of dismissal and it prays that this cause be dismissed with costs.

13. The Respondent urges that the Claimant was summarily dismissed for alleged gross misconduct and as such he is not entitled to any compensation.

IV ISSUES FOR DETERMINATION

14. Counsel for both parties filed a statement of agreed issues on 28th June, 2016. Arising from the pleadings, oral testimonies, and documentary evidence tendered, and the filed written submissions from both sides, this court wishes to condense the issues for determination as follows:-

(a) Was the summary dismissal of the Claimant by the Respondent fair and lawful?

(b) Is the Claimant entitled to the remedies sought?

(c) Who meets the costs of this cause?

V. TERMINATION – SUBSTANTIAL FAIRNESS

15. It is not disputed that the Claimant was suspended from duty vide a letter of suspension dated 16th September, 2014 and subsequently summarily dismissed vide a letter dated 23rd September, 2014. Both those letters were produced by the Claimant as exhibits. It is that dismissal that the Claimant alleges was unlawful, wrongful, unfair, and unprocedural.

16. On the other hand the Respondent urges that the said summary dismissal of the Claimant was lawful, fair, and procedural.

17. In the letter of suspension dated 16th September, 2014 the Respondent indicated that the Claimant failed to join a response crew as expected since he was the crew commander, but later on joined the team after the crew had arrested two members of the public one being a student by the name of JOHN GITAU NJOROGE (John). The Respondent asserted that the crew, headed by the Claimant, held John for over an hour without informing the Respondent's central command and without delivering him to the police station. The Respondent further stated that the Claimant and his team asked John for a bribe in the sum of Kshs.4,000/= and drove him to at least two Mpesa outlets to withdraw cash and that the Claimant and his team finally obtained the said bribe and then released John without informing the office.

18. The Respondent urges that the alleged conduct of the Claimant was unlawful and against the policy and values of the company and that the same amounted to gross misconduct.

19. Accompanying the aforementioned suspension letter was a Form GD3 headed **“NOTICE OF DISCIPLINARY ENQUIRY/HEARING.”** The charge/offence section in that form reads as follows:-

“While assigned Response duties you delegated crew escort to attend an activation in your absence at Biashara Plaza on 11th September, 2014 at 2115 hours. You later jointed them in harassing a student they had arrested by subjecting him to risk of attending another activation with him on board and solicited a bribe of Kshs.4,000/= from him to buy his freedom.”

20. On the second page of this form the Claimant was accordingly informed of his rights before, during, and after the inquiry/hearing. The Claimant, as per page 1 of the form was to appear for the hearing on 18th September, 2014 at 1000 hours, and the form was received by the Claimant on 16th September, 2014.

21. On 16th September, 2014 the Claimant wrote to the Respondent explaining what had happened on 11th September 2014 but did not admit misconduct as alleged by the Respondent. The letter dated 16th September 2014 was produced by the Claimant as an exhibit.

22. It would appear that the disciplinary hearing took place on 19th September, 2014 between 1000 Hours and 1409 hours as per the minutes of the hearing produced as exhibit by the Respondent in the list of documents dated 17th December, 2014 and filed in court on the same date.

23. During the disciplinary hearing the Claimant was present and the two (2) complainants/accusers JOHN and KEVIN WANJALA. (Kevin) attended and testified against the Claimant. In attendance were representatives for the accused JEREMIA MAINA NDIRITU and WILSON NYAGA. The report indicates that the Claimant was given an opportunity to question the complainants and to argue his defence.

24. Upon conclusion of the disciplinary hearing the panel concluded, *inter alia*, that the Claimant had abdicated his duties by failing to accompany the crew to the activation site, Biashara Plaza, and failing to inform the control room of the arrests made, and further soliciting and obtaining bribe of Kshs.4,000/= from JOHN. It was on the basis of this finding that it was decided by the Respondent to terminate the Claimant by way of summary dismissal.

25. The Respondent also produced an investigation report dated 19th September, 2014 in support of its case containing summary of the testimony/statements of the complainants, findings, and recommendation that the complainant be dismissed summarily for gross misconduct.

26. It is on the basis of the investigation report above and the disciplinary hearing that the Respondent proceeded to summarily dismiss the Claimant for gross misconduct as formally communicated vide a letter dated 23rd September, 2014.

27. Upon dismissal the Claimant instructed his counsel to write a demand letter dated 1st October, 2014 which the Claimant tendered as evidence in this cause and subsequently proceeded to file this cause.

28. **Section 44 of the Employment Act** (the Act) provides as follows:

“(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2)---

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

29. Further, **Section 44(4)** provides examples of conduct by an employee that shall constitute gross misconduct and hence render an employee amenable to summary dismissal and the relevant provisions to this cause provide that an employee may be summarily dismissed if:-

“(e) an employee knowingly fails, or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by employer.”

30. Further **Section 44(4) (g)** provides that it amounts to gross misconduct if:-

“(e) an employee commits, on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”

31. The Respondent’s case is that the Claimant failed or neglected to join the activation response crew that he was in command of and only joined the crew after they had arrested two suspects at Biashara Plaza in Naivasha Town. The Respondent further alleges that the Claimant later joined the crew and took part in a scheme to extort and obtain a bribe from the arrested persons and that the Claimant obtained a sum of Kshs.4,000/= from JOHN after driving the arrested persons from one Mpesa outlet to the next for the withdrawal of the bribe money.

32. The two arrested persons JOHN GITAU NJOROGE (John) and KEVIN WANJALA (Kevin) recorded statements with the Respondent and testified during the disciplinary hearing. Their recorded statements were produced in the bundle of Respondent’s documents, without any objection from the Claimant, as were JOHN’S Mpesa statements.

33. It is evidently clear that the Claimant failed and/or neglected his duties as the crew leader/commander. Further it is clear from the evidence placed before this court that the Claimant took part in an elaborate scheme of extortion and or unlawfully obtaining money from JOHN, one of the arrested persons.

34. On a balance of probability this court is convinced that the Claimant in concert with others took part in the above unlawful acts. Further, this court is convinced that in the circumstances the Respondent had reasonable and sufficient grounds to suspect that the Claimant had committed a criminal offence to the substantial detriment of the Respondent. This is clearly a ground for summary dismissal under **Section 44(4)** of the Act.

35. The argument that the Claimant was not or has not been charged with a criminal offence in respect of the events that took place on the material date does not count because the proof in civil cases, unlike in criminal cases, is on balance of probability and not beyond reasonable doubts.

36. In the circumstances, the Respondent has ably demonstrated that it had a good reason in dismissing the Claimant as the Respondent genuinely believed the existence of the foregoing circumstances of gross misconduct by the Claimant and hence the Respondent met the requirements of **Section 43** of the Act.

37. In essence this court holds that the Respondent had good reason and ground for summarily dismissing the Claimant and as such substantial fairness was served.

VI. PROCEDURAL FAIRNESS

38. **Sections 42 and 45** of the Act provide for the procedure to be adopted before termination. Section 41 must be read together with the relevant provisions of the **Fair Administrative Actions Act and Article 47 of the Constitution**.

39. Disciplinary hearings are not court proceedings and hence they need not comply with the technical procedural formalities of a court trial.

The essence of disciplinary proceedings is to establish whether an employee has conducted himself in a manner that is so out of line that a disciplinary action need to be taken against such an employee.

40. However, an employer should not use disciplinary proceedings as a mechanical formality aimed at dismissing an employee. An employer should approach disciplinary proceedings with an open mind because it is possible for the subject employee to demonstrate and prove his innocence in such proceedings.

41. The importance of both substantial and procedural fairness has been emphasized and affirmed in many decisions of this court including **Walter Ogal Anuro VS. Teachers Service Commission (2013) eKLR; Loice Otieno VS Kenya Commercial Bank Limited (2013) eKLR; Mary Chemweno VS. Kenya Pipeline Company Limited (2014) eKLR**, among others.

42. As far as procedural fairness is concerned, the Respondent invited the Claimant to a disciplinary hearing through form GD3 which was sent out together with the letter of suspension from duty dated 16th September, 2014. As stated elsewhere in this judgment the Claimant was informed of the charges he was facing, time and place of hearing, and his rights before, during, and after the hearing were clearly spelt out in that form. The Claimant submitted written submissions to the charges as per the letter dated 6th September, 2014 and in addition attended the hearing. The Claimant submitted all the above documents as exhibits.

43. The minutes of the disciplinary hearing were produced as an exhibit by the Respondent and clearly the Claimant was afforded a fair hearing including a provision of a clear statement of allegations/charges, an opportunity to cross-examine or question the accusers, and a chance to express his views and state his defence. As stated elsewhere in this judgment disciplinary proceedings are not court proceedings and it would be wrong to expect such proceedings to apply the technical rules of procedure and evidence as applied in a trial court of law.

44. In his oral testimony the Claimant alleged that he had filed an appeal with the Respondent in respect of his dismissal. However, no evidence was tendered to confirm that indeed an appeal had been filed.

45. In the circumstances this court takes the view, finds, and holds that the Respondent complied with the procedural fairness stipulated in Section 4 of the Fair Administrative Actions Act, Sections 41 and 45 of the Employment Act, and Article 47 of the Constitution.

46. The upshot of the foregoing paragraph is that the Respondent accorded the Claimant the necessary substantial and procedural fairness in accordance with the law and as such the summary dismissal of the Claimant by the Respondent was fair, just, and lawful.

VII. RELIEFS

47. If the dismissal of the Claimant was lawful and fair, and this court has found in the affirmative, the Claimant is only entitled to that which was due and payable as at the time of dismissal. In other words, based on the findings of this court above, the Claimant is not entitled to any compensation as a result of the dismissal that the court has found to have been lawful in substance and procedure.

48. The reliefs sought by the Claimant have been set out at the inception of this judgment as reproduced from the statement of claim. Prayer (i) fails for reasons stated above. Severance pay is not payable as the Claimant was lawfully and summarily dismissed on lawful grounds. He was not terminated on account of redundancy under Section 40 of the Act. The claim for compensation also fails for the same reason as severance pay.

49. In a discharge Form and Receipt dated 10th October, 2014 the Respondent paid to the Claimant various items including 23 days worked in September, 2014, overtime, and house allowance for 23 days of September, 2014. After various deductions as indicated therein the Claimant received a sum of Kshs.8,174/= for which he signed.

50. Since there is no proof from the Claimant that there were other entitlements that were due and payable as at the time of the dismissal, this court is unable to award any other payments beyond what the Respondent paid for as above. There was no challenge to the Respondent by the Claimant to produce documents/records on other leave days pending or overtime payable. This court in the circumstances is unable to award any money on those items.

51. However, the Claimant is entitled to be issued with a certificate of service under **Section 51 of the Act** and the Respondent is ordered to deliver the same to the Claimant's counsel within 30 days of the date hereof for onward transmission to the Claimant.

VIII. COSTS

52. Costs ordinarily follow event as a general rule (see Section 27 of the Civil Procedure Act (Cap 21). However, this court has unfettered discretion in awarding costs. The Claimant testified that after he lost his job his family was broken and his wife left. His current financial status is unknown and recovery of costs may become a protracted litigation if the same are awarded to the Respondent. To bring this cause that has been pending in court since 2014 to conclusion, this court orders that each party shall meet own costs.

53. In essence this cause is dismissed with each party bearing own costs.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 11TH DAY OF JANUARY, 2022.

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DAVID NDERITU

JUDGE