



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.454 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SILVANO NJERU.....CLAIMANT

VERSUS

KENYA REDCROSS SOCIETY.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant brought a claim for unlawful termination vide his claim dated 7th March, 2017.

The Respondent filed a response dated 28th June, 2017.

CLAIMANT'S EVIDENCE VIDE PLEADINGS/EVIDENCE

2. The Claimant states he was employed by the Respondent as an ambulance driver and he used to drive vehicle No. KCF 258L.

3. He says on 17th October 2016 he was informed vide a letter from Human Resource Deputy of the Respondent that he was required to show cause. He says he was accused of various lost items including 21 strobe lights from various ambulances from logistic centre.

He says he responded by his letter of 18th October, 2016 and explained everything.

4. He further says on 21st October, 2016 he was summoned for a disciplinary meeting. He says in the disciplinary meeting was investigator from Akili Police Station who however did not produce any evidence of the alleged lost strobes.

5. He says he was then dismissed from employment on 28th November, 2016.

RESPONDENT'S CLAIM

6. The Respondent in his statement of response states that the Claimant was given a notice to show cause on the loss of strobe lights and also working for three consecutive shifts without the approval. He says Claimant had admitted he was aware of the missing strobes lights.

7. Respondent further states the Claimant wrote a letter and admitted changing rota and working two consecutive shifts contrary to company rules and regulations.

8. The Respondent admits the Claimant was invited to a disciplinary hearing and he was given an opportunity to explain himself and also to appeal. He says the outcome of the appeal was communicated to the Claimant.

9. The Respondent avers that the Claimant was treated fairly and the suit should be dismissed with costs.

CLAIMANT'S EVIDENCE

10. The Claimant on 15th November, 2021 during the hearing adopted his witness statement as his evidence in chief.

He says on 17th September, 2017 he was on night shift but on 20th September, 2017 he was told to go to the police station and make a statement about loss of strobe lights. He says he found other of his colleagues present and he wrote his statement.

11. He says he was suspended for about one week and was later called for a management meeting in the presence of his Human Resource Manager and his lawyer and supervisor.

He says one of the ambulances of the person he was alleged to have sold the strobe light was inspected but none of the strobe lights were found in his ambulances.

12. He says that other proprietors had their ambulances inspected as well and strobe lights were not found.

13. He says on October, 2016 he was dismissed on the accusation of stealing of strobe lights. He says the day he was accused of stealing strobe lights there were about seven security guards in the premises.

14. In cross examination Claimant says he had been asked by Kennedy if he could buy strobe lights and he gave Kennedy contract of a mechanic who could help him but he did not talk to that mechanic. The mechanic was called Okoth.

He says he went on three continuous shift and was not supposed to go on continuous shift because of exhaustion.

15. Respondents witness Lucy Hudson says she is the Human Resource Manager of the Respondent. She adopted his witness statement of 20th June, 2017 and she confirmed that Claimant went through proper disciplinary process. She accused Claimant on working for unauthorised shifts.

She says Claimant also failed to report of any missing strobes from the ambulance in his custody. The said vehicle was KCF 258L. He later in cross examination admitted that Claimant was driving vehicle KCF 259L.

16. The witness says they have CCTV in the offices but not on the parking lot.

17. The Respondent filed his witness dated 31st January, 2022 even though he had been given a deadline of 30th January, 2022. The court accepted and considered the Respondent's submissions. The Claimant's submissions were however not availed to the court.

ISSUES FOR DETERMINATION

18. (a) was the Claimant unlawfully terminated?

(b) Is he entitled to the reliefs sought?

DECISION

The Respondent accuses the Claimant of stealing strobe lights. The Claimant was given a warning on 2nd February, 2016 for not adhering to the Company's procedure.

19. On 26th September, he was suspended for two weeks allegedly to allow for investigations.

20. The Respondent then served the Claimant with a notice to show cause why disciplinary measures should not be taken against him.

The same was dated 17th October, 2016 and allegations against him inter alia were that he worked for three shifts on 17th September, 2016 without approval. He was also accused of making logistic unexplained trips on motor vehicle KCF 258L on 18th September, 2016 and also was said to have said that he had noted strobe lights were missing and held information from the management as he did not report to the management as he did not report to the management.

21. The Claimant responded to the notice to show cause and admitted he worked on three shifts without approval and he knew it was against company's regulations.

22. He says he did not get involved with any theft of strobe lights that a Mr. Kenneth was inquiring about them and he just referred him to Okoth an electrician.

He admits he knows he caused losses to the company and he knows his credibility has been doubted.

23. The role of the court in matters employment and termination is to ascertain the employer has given a valid reason for terminating an employee from employment.

Section 45 of the Employment Act provide that no employer shall terminate the employment of an employee unfairly. The same goes further to provide that a termination of employment by an employer is unfair if the employer fails to prove;

(a) The reason for termination is valid.

24. Similarly Section 43 of the Employment Act also provide that in any claim arising out of a termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45 of the Employment Act.

25. The reasons advanced by the Respondent was that Claimant worked for continuous shifts without authority and he got a warning letter on 2nd February, 2016.

On 26th September, 2016 he was alleged to have been connected to loss of strobe lights and was put on suspension.

26. On 17th October, 2016 he was issued with a notice to show cause why disciplinary action should not be taken against him. He was accused of the loss of strobe lights and working for continuous shifts without approval.

He was also accused of being in the company of colleagues who purchase (khat) or miraa and chewed the same at the logistics centre.

27. He was asked to give a detailed explanation and show why disciplinary action should not be taken against him.

28. He put a response on 18th October, 2016 but on 26th October, 2016 he was served with a letter of summary dismissal.

The reasons given for the summary dismissal are as follows;

(a) You worked for two (2) continuous shifts on 17th and 18th September, 2016 and adjusted the duty Rota without prior notification and authority from you immediate supervisor.

(b) You aided in sourcing of strobe lights from emergency plus medical services ambulances for sale to an external market.

(c) On 18th September, 2016 you engaged ambulance registration number KCF 258F in irregular and unauthorized movements in absence of the assigned emergency medical technician or paramedic which is a violation of KRCS Vehicle Rules and Regulations.

(d) You seemed to be aware that your colleagues were involved in suspicious activities that may have led to the loss of company property (strobe lights) but you deliberately withheld this key information from management which is a violation of company code of conduct.

29. The same reasons for termination have not been proved evidence whatsoever as no witness testified that Claimant sourced for the strobe lights to sell to outsiders. There is even no circumstantial evidence adduced to implicate the Claimant for theft of strobe lights.

30. The evidence given by the Respondent is that Claimant had asked his colleagues about missing strobe lights. Again that allegation does not point directly or indirectly to theft of such items.

31. Indeed all the three charges in (b), (c), and (d) are mere allegations unfortunately levelled by the Respondent and there is no evidence to show the involvement of the Claimant.

32. Indeed the only accusation that the Claimant admitted was that he worked for two continuous shifts without authority. The Respondent however did not demonstrate how this was such a gross misconduct to deserve summary dismissal. The Claimant admitted it and said he was intending to go see his sick mother. That may have called for a warning but may not have deserved summary dismissal.

33. As held in the case of **LOICE OTIENO VS KENYA COMMERCIAL BANK LIMITED CASE NO1050 OF 2019** the court held that Employment Act 2007 had caused a radical and fundamental shift in both the jurisprudence and practice in employment law in Kenya. The court held that the doctrine of natural justice or procedural fairness is now essential part of employment relationship and therefore, an employee had to comply with the procedures set out in Section 41 of the Employment Act. Even in circumstances where summary dismissal or "instant dismissal" was contemplated.

The court in the above case found that the termination of the Claimant was not in compliance with parameters set out in Section 41 of the Employment Act and therefore was procedurally unfair.

Even if Claimant appealed against the termination the same could not cure the fact that termination was not in accordance with Section 41 of the Employment Act.

34. In the case of **RAYMOND CHEROKWE MRISA VS CIVICON LIMITED (2014) eKLR** the court held that the main issue for determination in termination of employment cases was whether termination was for a valid reasons and whether fair procedure was followed.

35. In this case the court finds that the reasons given for terminating the Claimant's employment have not been proved so far as the test of being valid and fair as provided in Section 45 of the Employment Act is concerned.

36. The point is the three main conditions in order to pass the fairness test on the part of the employer are a reason that is valid and

adherence to fair procedure.

Even if the Respondent invited the Claimant for a disciplinary meeting the reasons given were not substantiated and were hard to verify.

37. In the often cited case of **WALTER O. ANURO VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** the court held that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.

38. In all fairness I do not find substantive justification in the case before me and so I am persuaded the Respondent has failed to prove valid reasons in terminating the Claimant from his employment.

The court therefore enters Judgement in favour of the Claimant for unlawful and unfair termination.

REMEDIES

39. The court proceeds to award the Claimant the following:-

- (a) Three months gross salary at Kshs.165,000/=. In the same way the prayer for reinstatement is declined as three years have expired since the said termination.
- (b) One month salary in lieu of notice Kshs.55,000/=-.
- (c) The other prayers for general damages and mesne profits are well covered in prayer one.
- (d) Costs are awarded to the Claimant.
- (e) Interest is also provided at court rates from date of judgment till full payment.

40. The total effect of this award will be Kshs.220,000/-.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 23RD DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE