



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 126 OF 2016

JULIUS KIPYEGO BUTIA.....CLAIMANT

VERSUS

ST. MATHIAS MULUMBA SENIOR SEMINARY TINDINYO.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant by a Memorandum of Claim dated 22nd April, 2016, and filed in court on 19th May, 2016, seeks a declaration that his termination is unlawful, un-procedural and therefore unfair.
2. The Claimant further seeks payment of **Kshs.731,349/-** being one-month's salary in lieu of termination notice, 12 months' salary as compensation for unfair termination, 9 months' salary in lieu of the unserved term of contract, unpaid leave, and unpaid salary for the month of March, 2015.
3. The Respondent entered appearance, and filed a Response to the Memorandum of Claim on 24th August, 2016 through the **Firm of O.N. Makau & Mulei Advocates**. The Claimant filed a reply to the response to the Memorandum of on 11th May, 2017.
4. The Claimant testified during the hearing in support of his case. he adopted his witness statement and produced his bundle of documents as his evidence in the matter.
5. The Respondent presented one Fr. Douglas Mwija, the Priest In-charge of the Seminary to testify on her behalf. The witness adopted his statement and produced the bundle of documents filed in the matter in support of the Respondent's case.
6. Both parties filed submissions in the matter.

The Claimant's Case

7. The Claimant's case is that he was employed by the Respondent as a security guard. It is his further case that he was employed on an annually renewable contract of service from 3/5/2004 to March, 2015 and which contracts, were renewed to run between January and December of each year.
8. The Claimant avers that he was paid a monthly salary of Kshs. 4.295/- at the beginning of his first contract all the way to the year 2012, when he got a pay increment to Kshs. 8975/- and which was his salary at the time of termination.
9. The Claimant states that he served the Respondent with diligence, loyalty and dedication until 13th March, 2015, when the Respondent unlawfully, unfairly and un-procedurally terminated his services.
10. It is the claimant's case that one **Fr. Lelei** maliciously accused him of stealing a phone from one of the students. It is his case that **Fr. Douglas** called the Claimant and orally terminated his services, and caused him to be arrested and taken to Chepsonoi Police Station.
11. The claimant states that he was charged with being in possession of stolen property, charges he was later acquitted of. It is the Claimant's case that he was not given an opportunity to make representation before he was terminated. He further stated that the reasons given for his termination were not valid and justified.

12. It is the Claimant's case that his termination is a violation of Sections 41, 44(4) and 45(2) of the Employment Act, 2007, hence unlawful and unfair.

13. The Claimant states that upon termination, the Respondent did not pay him his terminal dues. He states that the Respondent owes him one-month salary in lieu of notice, compensatory for unfair termination, pay for breach of contract, overtime pay, unpaid leave and 13 days' wages for the month of March, 2015.

The Respondent's Case

14. The Respondent's case is that she employed the Claimant on an annually renewable contract of service; with the first contract between them being executed on 3rd March, 2005. It is the Respondent's case that the terms of the employment relationship were expressly provided in the contract between the parties, and which terms the Claimant willingly accepted.

15. It is the Respondent's assertion that she paid the Claimant all his dues whenever they fell due.

16. It is the Respondent's case that a person found in possession of a stolen phone implicated the Claimant as being the one who sold the phone to him. It is the Respondent's further case that policemen went to the Respondents Seminary and demanded to mount an investigation parade where the Claimant was identified and accused as having stolen a mobile phone, and was soon thereafter arrested and later charged with the offence of handling stolen property.

17. It is the Respondent's case that it did not play any role in the investigation and eventual arrest of the Claimant. The Respondent states that she not able to tell whether the Claimant was acquitted of the charges as she was not at all involved in either in the investigations, or the prosecution of the Claimant.

18. The Respondent avers that upon arrest, the Claimant never returned to her premises and that she has never either orally or in writing terminated the services of the Claimant. It is the Respondent's position that the Claimant absconded duty immediately after his arrest which necessitated his replacement in the interest of the security of the Seminary.

19. It is the Respondent's case that the employment relationship that existed between her and the Claimant has irretrievably broken down on account of his desertion of duty.

The Claimant's Submissions

20. It is submitted that the termination of the Claimant is both procedurally and substantively unfair. The Claimant sought to rely on the holding in the cases of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd (2013) eKLR* to buttress this position.

21. It is submitted that the Claimant is entitled to the reliefs sought premised on the fact that he was not issued notice or paid in lieu thereof, and that for reason that he was unfairly terminated, he is entitled to compensation. The Claimant cited the case of *Benjamin Langwen v National Environment Management Authority (2016) eKLR* for the holding that unfair termination entitles a litigant to the remedies under Section 49 of the Employment Act.

The Respondent's Submissions

22. It is submitted for the Respondent that the particulars of the Claimant's claim are baseless, spurious and only intended to unjustly enrich the Claimant. The Respondent submitted that she employed the Claimant for over a decade and all this time despite his grave shortcoming, she has treated the Claimant with decorum. The Respondent states that she provided the Claimant with good working conditions, a good salary, benefits and allowances due to him.

23. It is further submitted that the Respondent is a Christian Institution that is a firm believer in human rights, the rule of law and natural justice. It is the Respondent submission that the job that the Claimant held with her institution was crucial and could not be left unattended in the absence of the Claimant and hence the reason it replaced him.

24. It is submitted for the Respondent that the remedies under Section 49 of the Employment Act are not available to the Claimant, as to award him will amount to awarding misconduct. The Respondent sought to rely on the holding in the case of *Naqvi Syed Qmar v Paramount Bank Limited & another (2015) eKLR* to support this position.

Analysis and Determination

25. I have considered the pleadings, the witnesses' oral testimonies and the written submissions filed in the matter. The issues for determination are: -

- i. Whether or not the Claimant was dismissed, and if yes, whether the Dismissal was unfair.
- ii. Whether the Claimant is entitled to the remedies sought.

Whether or not the Claimant was Dismissed, and if yes, whether the dismissal was unfair.

26. The Claimant's case is that he was unlawfully, un-procedurally and unfairly terminated. The Respondent on her part avers that she did not terminate the Claimant, instead, he left her employ upon arrest never to return until the filing of this suit. The Respondent admitted stopping the Claimant's salary and employing someone else in his place on the ground that the Claimant had absconded duty.

27. The Respondent did not tell this court whether the Claimant's replacement was a temporary measure taken on account of the Institution's security. In my opinion, the stoppage of salary coupled with a permanent replacement, implied a termination of the Claimant, for even if he returned, there would be no work available for him.

28. I find and hold that contrary to the Respondent's assertion, the Claimant was terminated from the service of the Respondent.

29. The second question become whether the termination was fair. The Claimant asserted that he was neither issued with a show cause letter, an opportunity to make representation and that the reason given for his termination were not valid, fair and justified reasons based on the fact that he has been acquitted of the criminal charges.

30. An employer is permitted to initiate disciplinary action against an employee for criminal offences committed by the employee against the employer or the employer's property (*George Ogembo, Employment Law Guide for Employers pg.11*). In the instant case, the criminal offence that the Claimant faced, occurred outside the work place. The question become whether or not there was a link between the offence committed with the employer or her property. In *Strowbridge v Re/Max United Inc 1994 Can.II 7355(ND SCTD)* the court stated:

“While arbitrators are generally of the view that employers are not custodians of their employee's character, whether an employee may be disciplined for off-duty conduct will depend on whether the conduct is work related. This will involve a consideration of the nature of the offence, the employee's duties, and the nature of the employer's business. In particular, it will depend upon whether the employee's conduct:

(a) Detrimentially affects the employer's reputation;

(b) Renders the employee unable to properly discharge his or her employment obligations; and

(c) Inhibits the employer's ability to efficiently manage and direct the production process.”

31. The Claimant was a security guard. His role was to ensure security of the Respondent and the Respondent's property, yet, here he was being charged with stealing and handling stolen goods. Further the Respondent being a Christian institution, such character would be detrimental to its reputation.

32. In my opinion, and persuaded by the holding in the foregoing case, the reason the Respondent terminated the Claimant was valid fair and justified.

33. The second limb in determining adherence to the fairness test, is the question of procedure. The Claimant's case is that he was neither issued a show cause letter or by other means accorded an opportunity to make representation, nor was he heard prior to the termination. The reason given for the Claimant's termination was brought up in the cause of this suit, no evidence was adduced to show that the reason(s) had been communicated to the Claimant, and allowed opportunity to respond or be heard on the same. In the Case of *Walter Ogal Anuro v Teachers Service Commission Cause No.955 of 2011*, it was held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

34. The Respondent's position is that the Claimant absconded duty and due to the sensitive nature of his position, a replacement had to be sought. This I agree. However, the Respondent ought to have communicated to the Claimant that his termination was being considered as required under Section 41 of the Employment Act. No such letter was written to the Claimant nor were there any disciplinary proceedings set in motion in relation to either absconding duty or the criminal charges or both. In *Loice Otieno v Kenya Commercial Bank Limited Cause No.1050 of 2011*, it was held that summary dismissal even in the face of a fundamental breach of the employment contract or gross misconduct, must not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismisses an employee without a hearing will be falling a foul of Section 41(2) of the Employment Act.

35. In light of the foregoing, I find and hold that the dismissal of the Claimant was procedurally unfair.

Whether the Claimant is entitled to the relief Sought

36. The Claimant's claim is for a declaration that his termination is unlawful, un-procedural and therefore unfair and payment of **Kshs.731,349/-** being one-month's salary in lieu of termination notice, 12 months' salary as compensation for unfair termination, 9 months' salary in lieu of the unserved term of contract, unpaid leave, and unpaid salary for the month of March, 2015.

Compensation for unfair Termination

37. The termination/dismissal of the Claimant has been found to be procedurally unfair. This holding entitles the Claimant to the remedies under Section 49 of the Employment Act as was held in the case of *Benjamin Langwen v National Environment Management Authority (2016) eKLR*.

38. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act (*See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR*). The Claimant's by his conduct substantially contributed to his

dismissal, first for being charge with the offence of stealing and handling stolen property, and secondly by absconding duty leaving the Respondent no option but to hire alternative security. The court is also of the view that considering the nature of the Claimant's job, he can easily secure comparable or suitable employment.

39. Consequently, and with the forgoing in mind, I deem six months' salary to be sufficient compensation of the Claimant for wrongful dismissal and is hereby awarded.

One-Month's Salary In Lieu Of Termination Notice

40. The Claimant was evidently not issued with any termination notice and neither was he paid in lieu thereof. The Claim is merited and is hereby awarded.

9 Months' Salary In Lieu of the Unserved Term of Contract

41. The Employment Act has restricted compensation for unfair termination/dismissal to 12 months' salary. Payment for un-served term is not available as a remedy for termination of a term contract. **(See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR).**

42. The claim lacks merit and is dismissed.

Unpaid Leave

43. Leave advice letters produced in evidence before court, indicates that the Claimant utilized his leave during his service with the Respondent. The prayer for payment in lieu of leave is dismissed.

Unpaid Salary for the Month of March, 2015.

44. The pay slips produce in evidence in this matter did not include the pay slip for the Month of March, 2015. There is therefore no proof that the Claimant was paid for the 13 days worked in the month of March, 2015. The claimant is awarded 13 days salary for the month of March, 2015.

45. In conclusion, Judgment is entered for the Claimant and against the Respondent as follows:

- i. Six Months' Salary as Compensation for wrongful dismissal at Kshs. 53,850/-
- ii. One Month's Salary in Lieu of Notice at Kshs.8,975/-
- iii. 13 days wages for the days worked in March, 2015 at Kshs. 3,900/-
- iv. Costs of the suit and interest until payment in full.

46. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

APPEARANCE:

MS. MIBEI PRESENT FOR THE CLAIMANT

MR. BUNDI PRESENT FOR THE RESPONDENT

CHRISTINE OMOLLO- C/A