



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2461 OF 2016

BETWEEN

CHARLES NYAGAKA MOMANYI.....CLAIMANT

VERSUS

K.K. SECURITY.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Listins & Smith Advocates for the Claimant

Waruhiu, KOWade & Ng'ang'a Advocates for the Respondent

JUDGMENT

1. The Claimant states, through his Statement of Claim, filed on 29th November 2016, that he was employed as a Dog Handler by the Respondent, on or about the year 2005.
2. He signed a contract dated 21st May 2005. His monthly salary was Kshs. 21,089.
3. He was suspended for 5 days without pay, through a letter from the Respondent dated 23rd July 2015. He was summarily dismissed on 30th July 2015. The Respondent alleged that the Claimant was found sleeping while on duty on the night of 22nd July 2015.
4. He states that termination was unfair and prays for Judgment against the Respondent for: -
 - a. 1-month salary in lieu of notice at Kshs. 21,089.
 - b. 12 months' salary in compensation for unfair termination at Kshs. 253,068.
 - c. Annual leave for 2015 at Kshs. 14,762.

Total ... Kshs. 288,919.

 - d. Costs, interest and any other suitable relief.
5. The Respondent filed its Statement of Response on 13th February 2017. It is conceded that the Claimant was employed by the Respondent as a Dog Handler, on a monthly salary of Kshs. 21,089. He was employed in August 2005. He was found asleep by the Night Manager, while on duty, on the 22nd July 2015. He left Respondent's Client's life and property exposed.
6. The Respondent suspended the Claimant for 5 days and investigated. He was heard on 28th July 2015. He was summarily dismissed on 30th July 2015 after a fair hearing. He exercised his right of appeal. He was heard and Appeal declined. His terminal dues were computed and

paid. The Claim has no merit. The Respondent prays that it is dismissed with costs.

7. The Claimant gave evidence and rested his case on 1st October 2021. Respondent's Human Resource Officer Nerine Silwe, gave evidence on 3rd November 2021 when the hearing closed. The Claim was last mentioned on 2nd February 2022, when Parties confirmed filing and exchange of their Submissions.

8. The Claimant restated details of his employment with the Respondent. He did not sleep at work. The Night Manager visited the site at night. The Claimant was at the back of the premises. The Manager called him to the front and alleged that the Claimant was sleeping. He was instructed to report to the office the next day. He complied, was suspended and eventually summarily dismissed. It was not possible for him to sleep while he had a fierce dog by his side. He was dismissed on 30th July 2015. He appealed the same day, and the original decision was upheld. He was not paid his benefits. He had worked for 10 years.

9. On cross-examination, the Claimant told the Court that his contract had a termination clause. He was a member of a Pension Scheme. He was not negligent. He was heard and dismissed. There was no Union Official at the disciplinary hearing. The Claimant appealed on 30th July 2015. The Appeal was heard on 14th August 2015. Dismissal decision was upheld. The Claimant was advised to clear, to facilitate payment of terminal dues. He cleared. He was not issued the clearance document. He did not write to the Pension Scheme to follow up on his pension. He did not recall for how long he worked. He did not receive a warning letter. There were 2 letter of suspension. One had issued stating the wrong place of work. The other was a correction. He returned the work uniform but was paid nothing. He was alone at the disciplinary hearing.

10. Silwe adopted her Witness Statement and Documents filed by the Respondent, in her evidence. She was not in employment at the time the Claimant was dismissed. She relied on his personnel file.

11. Cross-examined, she told the Court that she has a Degree and Higher Diploma in Human Resource Management. She is familiar with human resource management. On suspension, an Employee is presumed innocent. The Respondent suspended the Claimant without pay. Investigations took place. The report of the Investigator was not before the Court. The findings are not available. They were not available to the Claimant. He was not invited by the Investigator to state his case. There was no invitation to disciplinary hearing, separate from the suspension letter. A few procedures were not observed. The minutes of the disciplinary hearing have not been exhibited. From the record, hearing was not fair. Minutes of the Appeal hearing are not available. Silwe would not know if procedure was followed on appeal. She told the Court on redirection that the Appeal was heard, as per the letter dated 14th August 2015.

12. The issues are whether the Claimant's contract was terminated through a fair procedure; whether the Respondent established valid reason; and whether the Claimant merits the remedies sought.

The Court Finds: -

13. There is substantial admission on the part of the Respondent that procedure was not fair. The Respondent suspended the Claimant without any pay. Investigations followed, but no report was generated. The Claimant was not given any. The Court was not shown any. The Claimant was not interviewed by the Investigator. The suspension letter served as the invitation to the disciplinary hearing. What was the use of the Investigations, if a decision had already been made to take the Claimant before the disciplinary forum? The appellate proceedings were not recorded. It is therefore impossible to say whether those proceedings adhered to the basic standards of fairness. Procedure was fundamentally flawed.

14. Without the Investigation Report and the evidence of the Night Manager, the Court cannot say that there was a valid reason shown by the Respondent, to justify dismissal. The Claimant states that he was side by side with a ferocious guard dog, on the night he was accused of sleeping on the job. His position is that he could not have slept, while the dog was present. He also explained that he was guarding at the back, when the Night Manager called him to the front, alleging that the Claimant had been sleeping. All these explanations needed to be discounted by the Respondent. It was necessary to bring the Investigator or the Night Manager to give evidence.

15. In the end the Court finds termination was unfair, under Sections 41, 43 and 45 of the Employment Act. The Claimant has established his Claim for unfair termination, while the Respondent has failed to justify its decision, as required under Section 47[5] of the Employment Act.

16. The Claimant was employed effective 21st August 2005, and left 10 years later, on 30th July 2015. His record was clean. There are no warnings letters shown to have been issued to him on any allegations. He did not contribute to the decision by the Respondent, to terminate his contract. He was not paid any terminal dues, although the Respondent alludes to an offer for payment, subject to the Claimant clearing with the Respondent. It was not clarified what such clearance entailed.

17. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 253,068.

18. The prayer for notice is granted at Kshs. 21,089.

19. The Claimant seeks annual leave pay for the year 2015 at Kshs. 14,762. The Respondent did not discount this prayer. No leave records have been exhibited by the Respondent showing that the Claimant utilized annual leave entitlement or that he was paid cash in lieu of utilization. ***He is allowed the prayer for annual leave pay at Kshs. 14,762.***

20. Costs to the Claimant.

21. Interest allowed at court rates, from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 253,068; notice at Kshs. 21,089; and annual leave days at Kshs. 14,762- total Kshs. 288,919.

c. Costs to the Claimant.

d. Interest allowed at court rates from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT CHAKA, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF APRIL, 2022

JAMES RIKA

JUDGE