



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/30/2017

CITATION: MOSES KIPROP MELI VS RILEY FALCON SECURITY SERVICES LTD

JUDGMENT

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

ELRC CASE NO 30 OF 2017

MOSES KIPROP MELI.....CLAIMANT

VERSUS

RILEY FALCON SECURITY SERVICES LTD.....RESPONDENT

JUDGEMENT

The Claimant averred that he was employed by the respondent on 1st January ,2006 as a Dog Handler at a monthly salary of kshs. 4,563/= per month. As at the time of his allegedly unfair termination the Claimant was earning Kshs. 7,368/= per month excluding house and other allowances.

According to the Claimant he served the respondent with dedication without any warning until the date of his alleged unfair termination on 11th June, 2014.

The Claimant further alleged that the termination letter accused him that on the material day he was drunk while on duty and caused bodily harm to his superior officer by kicking him on the thigh twice. He denied the accusation claiming the particulars were never availed to him to formally respond to. No criminal charge was preferred against him and he was never accorded a fair hearing before he was dismissed. Owing to the alleged unlawful termination, the Claimant sought from the respondent payments of his terminal benefits and compensation for unfair termination as itemized in the statement of claim.

The Claimant further averred that during the period he worked the respondent never regulated the hours of work and that he never went on leave during the period he worked for the respondent.

The respondent in its response pleaded among others that the termination of the Claimant was lawful and in accordance with the law.

According to the respondent was assigned duties as usual on 10th June, 2014 but he reported late to work at around 2.30pm contrary to usual reporting time, yet he was even supposed to prepare meals for the dog and walk it around .

The respondent as well as the Claimant's superior officer, Mr. Richard Omino while doing routine rounds found the Claimant asleep near the fire place where dogs meals were prepared. He ordered to stand up but he struggled to do so and was unable to and further refused to take orders.

The second time his superior ordered him to come to his office he walked there slowly staggering at this point his superior noted he was too drunk and looked too weak to perform his duties forcing the superior to ask him to remove his work uniform and proceed home and report back the following day for disciplinary action.

According to the respondent the action taken by the superior was to protect the respondent's image and reputation in the eyes of the public. The Claimant instead refused to obey his superiors' orders, instructions and requests. He instead started shouting in the superior office attracting the attention of the alarm technician Mr. Corrina, the Security Rose and the Controller Erick Obobe who came to the office to find out what was happening.

Mr. Cortina and Obobe then forcibly removed the Claimant from the superior office as he (the superior) followed them slowly behind. Suddenly the Claimant forced himself, came and kicked the superior twice on his thigh. The assault incident was reported to the police and booked as occurrence No OS/85/10/06/14 and the Claimant detained. The superior on the following day went to the police station to press assault charges but the Claimant pleaded for forgiveness and he was released forth too to pursue internal disciplinary measures.

A disciplinary committee was therefore constituted and the Claimant given an opportunity to present his case and to defend himself where he made his case and pleaded guilty of the allegations and charges of gross misconduct.

The Committee unanimously agreed that the Claimant be dismissed from employment on account of being drunk and disorderly while at work, causing physical bodily harm to his superior officer and being violent and temperamental which should not be associated with persons who provide security and safety to clients' property.

On 11th June, 2014 the respondent therefore wrote to the Claimant a letter terminating his contract of employment.

At the hearing the Claimant informed the Court that he was adopting his statement recorded on 25th April, 2017 as his evidence in chief. The Claimant further adopted his documents filed with the claim. It was his evidence that he was terminated on 11th June, 2014 and that he was accused of being drunk at work. According to him, he was as a result called to the Operations Manager's office and ordered to remove his uniform. He denied being drunk at work. According to him he was subsequently arrested and locked at Central Police Station, booked and released the next day. He further denied asking for forgiveness. He also denied fighting his manager.

Prior to dismissal he denied being issued with a show cause letter or notice for disciplinary hearing. During the period he worked he stated that he used to report at 6.00 am and leave at 6.00 am for day shift and 6.00 pm to 6.00 am for night shift. He denied ever going on leave and that he was never paid overtime. He further stated that he was never paid overtime.

In cross-examination he stated that throughout the period he worked he never had any disciplinary issue. He denied having any problems with Mr. Omino but Mr. Omino wanted to employ his brother in his place but before that he had no problems with him.

The Claimant denied reporting to work on 10th June, 2014 at 2.30 pm. It was his evidence that one could not report to work at 2.30pm, since if one was late a replacement would be called. He further stated that it was Obobe and Cortina who took him to the police station and reported that he had assaulted Mr. Omino which he denied. He denied the presence of any condition before he was released. According to him Obobe and Cortina came the next day and asked for his release and told him to collect a letter the following day. It was his evidence that he has never complained to the police about Obobe and Cortina ever giving false information to police.

Regarding overtime, it was his evidence that his pay slip showed overtime was not paid. He asked for overtime but was told it would be added to his salary but it was never added.

The respondent's witness Mr. Cortina Ochieng Isaac stated that he worked for the respondent as a Senior Technician. It was his evidence that he recorded a statement on 9th December, 2020 which he adopted as his evidence in chief. According to him, the Claimant was employed by the respondent as a dog handler and that he never worked as expected. On 10th June, 2014, the Claimant reported to work late and drunk and disorderly and that he caused commotion in the office. He denied the Claimant was wrongfully terminated.

In cross-examination he stated he was the Claimant's superior and that he knew Richard Omino. He was the Branch Manager at Eldoret. He stated that Omino recorded a statement which was filed in Court. It was further his evidence that Omino left respondent's employment, He stated that he was conversant with procedures for termination and that he was not aware if the Claimant was issued with a show cause letter. He however stated that the Claimant was verbally invited for a disciplinary hearing. He was informed by Mr. Omimo but stated he was never part of the disciplinary committee but was informed by Mr. Omimo that he attended the disciplinary hearing. No minutes for the meeting were however taken. Regarding reporting to work late and drunk, he stated that he did not have anything in Court to show the Claimant reported to work late and drunk but he observed that he was drunk and was also disorderly. Regarding leave he stated that he was not aware if the Claimant ever went on leave but that leave records were with the Human Resource department.

Under section 47(3) of the Employment Act, for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.

This section assigns the burden of proof on the protagonists in a claim for unfair termination or wrongful dismissal. The burden on each party is exclusive of the other such that a failure or neglect by one to discharge the burden cast on them by law does not lessen the responsibility of the other to discharge the burden cast upon them by law.

The Claimant herein in his pleadings averred that the respondent terminated his service without any lawful reason or justification. According to the Claimant, the allegation that he was on the material day drunk and disorderly while on duty and caused bodily harm to his superior was false. Further no investigations were conducted and he was not furnished with the evidence of allegations against him. He also averred that prior to dismissal the respondent never accorded him a hearing to defend himself.

According to the Claimant, on the material day, upon being accused of being drunk and assaulting his superior the respondent simply caused him to be bundled into a police station where he was held overnight. The next day he was released on the instruction of the respondent and

asked to report to the office the following day. When he did so, he was issued with a letter of termination.

The respondent on the other hand maintained that the Claimant on the material day reported to work drunk and assaulted his superior Mr. Richard Omino in the process. He was then apprehended and escorted to Central Police station where he was taken into custody overnight. The following day when Mr. Omino came to pursue assault charges, the Claimant pleaded with him not to do so and that he should be released in order for them to pursue internal disciplinary process, a request Mr. Omino agreed to and the Claimant was consequently released.

According to Mr. Cortina , who gave evidence before the Court, the Claimant was verbally invited to a disciplinary hearing and he attended and defended himself at the conclusion of which the Claimant was terminated.

As observed earlier in the judgement, the burden of proof assigned by section 47(5) is exclusive to each protagonist in a claim for unfair termination or wrongful dismissal. The standard of proof is as in all civil claims set on a balance of probabilities. That is to say at the conclusion of the trial, the Court ought to be persuaded that what either party is alleging is more probable than not.

In this particular case, the Claimant denied that on the material day he reported to work drunk and disorderly and that while in that state assaulted his superior. He however concedes that he was apprehended and locked overnight at Central Police station. The question which begs to be answered is, why would the respondent cause the Claimant's incarceration for no reason at all? In his evidence in chief the Claimant stated that prior to the incident, he had no problem at all with Mr. Omino who claimed he assaulted him. So why was he arrested and locked in custody? The cloud of doubt on the Claimant's account of events renders his evidence short of the standard of proof set by law. The respondent's account of events therefore remains a more probable rendition of the events of the material day than the Claimant's

The respondent stated that upon the Claimant's release he was verbally summoned for disciplinary hearing at the conclusion of which he was issued with a dismissal letter. Mr. Cortina who gave evidence on behalf of the respondent however stated that he had no minutes of the disciplinary proceedings in question. The question again one is to bound to ask, is why would the respondent conduct such a serious process verbally only to give a written verdict terminating the Claimant's service?

Termination of employment would be found unfair on two points. First the reasons termination are invalid or unjustifiable and second the procedure followed was not a fair procedure as provided in the Employment Act.

Section 41(1) of the Employment Act provides that an employer shall before terminating the employment of an employee on grounds of misconduct poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during the explanation. The respondent through its witnesses and documents did not come clear if the provisions of this section was complied with. In fact Mr. Cortina informed the Court that he was not aware if the Claimant was issued with a notice to show cause letter and further that he did not attend the alleged disciplinary hearing where the claimant's dismissal was considered.

An employer may have a valid reason for terminating the service of an employee however such termination can still be found unfair if it was carried out through an unfair procedure. To this extent the Court finds and holds that whereas the respondent could have been justified in terminating the Claimant's service for the reasons proffered, such termination was unfair as no fair procedure as contemplated under section 45 of the Act was followed.

The Claimant made a claim for house allowance. This was not contested by the respondent besides the pay slip filed with the claim showed no house allowance factor. Concerning leave and overtime, these though alleged, no sufficient evidence was led to prove them. For instance, the Claimant did not particularize the details of the leave not taken or overtime worked. Those heads of claim will therefore be disallowed.

In conclusion and from observation made earlier in the judgment, Court awards the Claimant as followed: -

KSHS

One month salary in lieu of notice 8,473

6 months salary for unfair termination of employment. 50,858

(c) House allowance (15% basic monthly Salary for the period worked (8 years 6 months) 112,730

172,041

(d) Costs of the suit.

(e) Items (a) (b) and (c) shall be subject to taxes and Statutory deductions.

It is so ordered.

DATED AT ELDORET THIS 11TH DAY OF JUNE, 2021

DELIVERED THIS 11TH DAY OF JUNE, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA