



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1110 OF 2015

JOSPHAT LOLMEWETI.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED....RESPONDENT

JUDGMENT

1. By an order recorded on 9th June, 2021, the parties agreed Cause No. 1110 of 2015, to proceed as a test suit in respect of Cause No. 1109 of 2015/1738/2015 and 1736 of 2015.

2. C.W.1 Josphat Lolmeweti the claimant in Cause No. 1110 of 2015 testified in support of the Statement of Claim filed on 29th June, 2015. The issues in dispute in the suit are set out as follows:

(a) Non-payment of employee's dues.

(b) Wrongful and unlawful dismissal and

(c) Breach of the fundamental rights of the claimant as entrenched in the Constitution.

3. The reliefs sought in the suit are:-

a. A declaration that the termination of the claimant from employment was wrongful and unfair.

b. Payment of salary for November and December, 2014 in the sum of Kshs.35,134 and in lieu of leave days Kshs.17,567.00 totaling Kshs.52,701.00.

c. Payment in lieu of one month notice – Kshs. 17,567.00

d. Equivalent of 12 months' salary compensation for wrongful and unfair termination of employment.

e. Aggravated damages for breach of the claimant's constitutional rights.

f. Costs and interest.

3. C.W.1 testified by adopting a witness statement filed on 13th April 2021, as his evidence in Chief. He also produced a list of documents in support of his case marked 'bundle '1' and a supporting list of documents filed on 1st April, 2021 marked bundle 'II'.

4. C.W.1 testified that he was employed by the respondent as a crew commander in the year 2012 and worked continuously until the year 2014. That initially he was paid Kshs. 17,567 per month but it had been increased to Kshs 27,705 as at the time of termination.

5. That the claimant and three other claimants in the other suits were all summarily dismissed following an incident in which they were accused of stealing alcohol. That following the accusation, a disciplinary hearing was held by the respondent and the disciplinary committee exonerated the four (4) claimants from any liability. That subsequently, the claimants were surprised to receive letters of termination whilst they went about their work.

6. C.W.1 testified that he was an alarm response driver and had a written contract with attached regulations to follow in the cause of duty. That one of the regulations prohibited response crew to accept food or drinks in the course of duty.
7. That C.W.1 and 3 others were informed that a client of the respondent had complained that C.W.1 and 3 others had visited the premises of the claimant where a party was taking place and had taken and consumed food and alcohol being served at the party. C.W.1 stated that on the material day, his colleagues had entered the compound of the claimant following an alarm. That C.W.1 remained in the car outside the gate while his colleagues responded to the alarm. That after some time, his colleagues came back and reported that it was a false alarm. That his colleagues did not bring to the car any food, juice or alcohol as alleged in a report from one Mukenyi, which was not shown to them.
8. That the crew recorded an Occurrence Book (O.B) about the incident. That C.W.1 and the three (3) others were suspended from work by a letter dated 9th October, 2015 following the alleged incident on October, 2015. C.W.1 and three others were subsequently given a notice dated 16th October, 2014 to attend a disciplinary hearing on 21st October, 2014 conducted by the Branch Manager.
9. That by a letter dated 23rd October, 2014, the suspension of the claimants was lifted. The letter stated that following the reported incident while deployed at Loresho Zulu 20, the suspension of the claimants had been lifted pending further investigations.
10. That by a letter dated 28th November, 2014, the claimants were again suspended from duty for a period of seven (7) days pending further investigations as directed by the Managing Director.
11. The claimants were directed to surrender company property and were to report to the Human Resource office on 8th December, 2014 at 8.00 am.
12. C.W.1 testified that upon reporting to work as directed on 4th December, 2014, they were each served with a letter of dismissal dated the even date. C.W.1 admitted that they attended a disciplinary hearing on 8th December, 2014 before the summary dismissal letters were given to them. C.W.1 said that the first disciplinary hearing had exonerated them and they were supposed to be subjected to a second disciplinary hearing and then summarily dismissed.
13. C.W.1 stated that they were not paid terminal benefits upon dismissal including arrear salary, payment in lieu of leave days not taken, payment in lieu of notice and were not compensated. C.W.1 testified that their human rights were violated by being subjected to false accusations and being tried twice on the same offence.
14. C.W.1 stated that they wrote demand letters to the respondent upon dismissal which demand was not heeded by the respondent.
15. C.W.1 admitted that the respondent paid statutory benefits for them including National Social Security Fund (NSSF).
16. C.W.1 prays that the suit be allowed in respect of himself and the colleagues and they be awarded accordingly.
17. The respondent filed a reply to the memorandum of claim on 7th August, 2015 which the respondent traversed and denied all the particulars of claim. R.W.1 Wilber Mumoko testified as R.W.1. That he was a senior Human Resource Officer of the Respondent. That the claimant was employed by the respondent as a driver.
18. That the position of the claimant required utmost trust and responsibility but he was summarily dismissed for gross misconduct due to engaging in unprofessional activities together with his crew whilst responding to an alarm at Loresho Zulu 20 along Thogoto Road on 4th October, 2014.
19. That it was reported that upon arriving at Loresho Zulu 20, the claimant stayed in the work motor vehicle while the rest of the crew members went into the compound to speak to the assigned night shift officer, an employee of the respondent. That after a few minutes the crew members went back to the respondent's motor vehicle with unopened bottles of alcohol and juice which they proceeded to hide in the car parked outside the gate.
20. That the claimant aided in hiding the loot and actually drunk the alcohol brought by the crew members from the respondent's client's party while he was on duty.
21. That the claimants were subjected to a disciplinary hearing following investigations and were found guilty of misconduct and unprofessional misconduct which was detrimental to the Respondent and the incident had led to the client calling the main office of the respondent to complain.
22. That the claimant and the crew members were suspended on 9th October, 2014 and were invited to a disciplinary hearing on the 21st October, 2014. That the claimant and crew members attended a disciplinary hearing which was held on 21st October, 2014 whereupon his suspension was lifted pending further investigations.
23. The claimant was subsequently, lawfully and justifiably summarily dismissed after investigations revealed his gross misconduct and unprofessionalism.
24. That the suit has no basis and it be dismissed with costs.
25. Under cross-examination by Mr. Waiganjo, advocate for the claimant, R.W.1 stated that the four (4) claimants had visited the client's

premises during the day and they knew there was to be a party later on in the evening. That the claimant and the crew went back to the premises in the evening. That the client complained in writing of the unprofessional conduct by the claimants by an email dated 27th November, 2014.

26. R.W.1 denied that the crew were cleared of the offences when the suspension was lifted. That the suspension was lifted pending further investigations. That upon the suspension being lifted, a dispatch note was issued to them to resume work in the meantime. R.W.1 admitted that the dispatch note was written "cleared after disciplinary action." R.W.1 stated that the four were later on subjected to disciplinary hearing upon completion of investigations. R.W.1 stated that he had no report of the 2nd investigation. That the report was made before the 1st disciplinary action was conducted. R.W.1 stated that there was no incident on 5th November, 2014 leading to the second suspension. R.W.1 stated that he had no charges preferred against the claimants before Court. R.W.1 testified that he had no minutes of the disciplinary hearing. R.W.1 also stated that he had no recommendations from the 2nd disciplinary panel. R.W.1 stated that though the respondent had a Human Resource Manual, he did not have one before the Court.

27. R.W.1 stated that the letter of dismissal did not invite the claimants to come back and clear so that they be paid benefits. Under re-examination, R.W.1 stated the 2nd investigation was pursuant to the 1st incident.

28. R.W.1 prays that the suit be dismissed with costs.

Determination

29. The parties filed written submissions and list of authorities dated 17th July, 2021 and 2nd November, 2021 respectively, which the Court has carefully considered together with the testimony before Court.

30. **The issues for determination are:-**

(a) Whether the respondent had a valid reason to summarily dismiss the claimant from employment?

(b) Whether the respondent followed a fair procedure in determining the guilt of the claimant.

(c) Whether the claimant is entitled to the reliefs sought.

31. In answer to issues (a) and (b) above, the Court finds that the facts of this case are quite straight forward that on 4th October, 2014, the claimant who was a driver of a security response team responded to an alarm at the premises of a client of the respondent at Loresho Zulu, 20 along Thogoto Road. That the response was in the evening and the claimant remained at the gate of the premises in the security car whilst his colleagues entered the client's compound to respond to the call. That at the time, a colleague of the team was guarding the premises.

32. It is not in dispute that there was a party going on at the client's premises that evening. The testimony by the claimant is that after a while his teammates came back and reported that the alarm was false and the team proceeded back to their offices where they recorded an occurrence Book report. The claimant denies as was testified by R.W.1 that the crew had brought juices and alcohol to the respondent's car which the claimant and the crew proceeded to consume.

33. It is not in dispute that the respondent wrote a letter of suspension to the claimant and his crew dated 9th October, 2014 in respect of an incident on 5th October, 2014, at Unit 0952.

34. Pursuant to this letter the claimant and his colleagues were suspended from work.

35. It is also not in dispute that the claimant received a notice to attend a disciplinary hearing dated 16th October, 2014 on 21st October, 2014.

36. It is also not contested that the claimant was subjected to a disciplinary hearing together with his crew members and by a letter dated 23rd October, 2014, the claimant's suspension was lifted and the claimant received a dispatch letter written "cleared after disciplinary action" and directed to resume work. The letter lifting the suspension however, stated:-

"We refer to the suspension letter dated 9th October, 2014 in regard to an incident while deployed at Loresho Zulu 20 which you were well aware of.

This is to inform you that the suspension has been lifted pending further investigations into the matter."

37. This is the crux of the dispute before Court. C.W.1 insisting that the disciplinary committee cleared him and his crew of any misconduct and they were dispatched back to work upon clearance, whereas R.W.1 insisted that the disciplinary committee did not clear the claimant, whilst adopting that the suspension was lifted upon conclusion of the disciplinary hearing. The respondent which is the custodian of employment records did not produce the minutes of the disciplinary hearing which R.W. 1 states took place, a fact admitted by the claimant.

38. It is not in dispute also that the respondent suspended the claimant for a second time by a letter dated 28th November, 2014, with regard to the same incident the subject of the first disciplinary action.

39. The claimant was called to attend a 2nd disciplinary hearing on 8/12/2014 to which the claimant attended, defended himself and was

summarily dismissed by a letter dated 4th December, 2014.

40. The letter of dismissal explains that the dismissal arises from the incident at Unit No. 0952 on Thogoto Road. The respondent states that the explanation given by the claimant in his letter of response dated 8th October, 2014 was found unsatisfactory by the subsequent disciplinary panel hearing on 2nd December, 2014.

41. In terms of the said letter, the panel found the claimant guilty of gross misconduct and was summarily dismissed in terms of Section 44(4) of the Employment Act, 2007.

42. The claimant was in terms of the letter to receive salary up to 4th December, 2014, payment in lieu of leave days not taken and part of the claimant's contribution to the pension scheme.

43. The Court has carefully considered the sequence of events in this matter and is satisfied that following the report of the incident at Loresho on 5th October, 2014, investigations were conducted and the claimant made a written explanation in a letter dated 8th October, 2014. That the claimant was placed on suspension by a letter dated 9th October, 2014, and the claimant was subjected to a disciplinary hearing on 21st October, 2014 following which the claimant was exonerated from any wrong doing as seen in a dispatch notice given to the claimant to resume work on 23rd October, 2014.

44. The dispatch note was contradicted by a further letter dated 23rd October, 2014 which lifted the suspension of the claimant pending further investigations into the matter.

45. The procedure by the respondent was fundamentally flawed in that the respondent subjected the claimant to a full disciplinary process, which culminated in his exoneration from blame and dispatched back to work.

46. The respondent did not produce before Court any investigation reports; any disciplinary hearing minutes of 21st October, 2014 and 2nd December, 2014. The respondent was in the circumstances unable to controvert the clear and viable testimony by the claimant that he was accused of misconduct, he explained himself in writing and at a disciplinary hearing held on 21st October, 2014 and was cleared of any charges levelled against him and dispatched back to work with a note reading "**cleared after disciplinary action.**". Any subsequent action by the respondent which purports to contradict this position is a farce which amounts to double jeopardy of the claimant and his colleagues. Failure by R.W.1 to produce any reports and minutes affirms the Court's view that an arbitrary decision was taken by unknown persons to reverse a decision of the respondent's disciplinary committee.

47. The claimant having been exonerated of any misconduct, the respondent has no valid reason to summarily dismiss him from employment. The conduct by the respondent violated Sections 36, 41, 43, and 45 of the Employment Act, 2007. The reversal of a decision arrived at upon a proper hearing conducted by the respondent violated the claimant's right to a fair hearing as provided under Section 41 of the Act, and amounted to unfair labour practice in violation of Article 41 of the Constitution of Kenya, 2010.

48. The Court relies on the decision by Radido J. in **Patrick Abuya –vs- Institute of Certified Public Accounts (ICPAK) and Another (2015) eKLR** where it was held:-

“Section 41 of the Employment Act, 2007 has now made procedural fairness part of employment contract in Kenya.

49. Indeed Section 45 puts the issue of a fair hearing beyond any speculation by expressly providing:-

“45(1) No employer shall terminate the employment of an employee unfairly.”

50. Section 45(2) goes further to provide:-

“ A termination of employment is unfair if the employer fails to prove:-

(a) That the reason for the termination is valid;”

51. In the present case, the employer has fallen foul of the aforesaid provisions, by failing to prove it had any valid reasons of summarily dismissing the claimant who had been validly exonerated of any misconduct by a disciplinary committee constituted by the respondent.

52. Accordingly, the Court finds that the summary dismissal of the claimant was unlawful and unfair and he is entitled to compensation in terms of Section 49(1) (c) and (4) of the Act. Furthermore, the claimant was not paid the terminal benefits sets out in the statement of claim and the Court awards the claimant all the terminal benefits set out herein before in this judgment.

53. With regard to compensation, the Court finds that the claimant had served the respondent for a period of about two (2) years. The claimant served diligently as a crew commander until the 4th December, 2014 when he was dismissed without notice, notice pay and without payment of any terminal benefits. The dispatch note dated 24th October, 2014, which returned the claimant back to work upon being cleared by a disciplinary panel, is clear evidence that the claimant did not contribute to his dismissal. The claimant wished to continue working but his career was cut in the bud by the wrongful dismissal. The claimant was now employed as a casual worker and had suffered loss and damage. The claimant was not compensated for his loss and suffering.

54. The Court relies on its decision in **Industrial Case No. 174 of 2011 – John Mwanza Mbithuka –vs- Mr. Mukesh Malde (Managing Director) & and Another (2014) eKLR – Case No. 174 of 2011** as a guide in the award of compensation in this suit.

55. The claimant herein had served a relatively shorter period of two (2) years than the claimant in the cited case who had served 6 years. The Court finds that an award of compensation in this matter should cater for the violation of the right to a fair hearing and fair laour practice violated by the respondent.

56. The Court has also considered the Supreme court decision in **Kenfreight (E.A.) Limited –vs- Benson K. Nguti [2019] eKLR** in which the Supreme Court found that Employment and Labour Relations Court has the mandate to award compensation in terms of Section 49 of the Employment Act, where it finds that the termination of employment was unlawful and fair. The claimant in this suit has not proved that he is entitled to aggravated and/or punitive damages in respect of the unlawful and unfair dismissal. An award of compensation in terms of Section 49 of the Employment Act, will suffice.

57. Accordingly, the Court awards the claimant the equivalent of six (6) months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.(17,567 x 6) 105,402.

58. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:-

(a) Kshs 105,402 in compensation

(b) Kshs 17,657 in lieu of one month notice.

(c) Kshs 52,701 in lieu of untaken leave days.

Total award Kshs 175,670

(d) Interest at Court rates from date of judgment till payment in full.

(e) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 16TH DAY OF DECEMBER, 2021.

MATHEWS N. NDUMA

JUDGE

Appearance:

Mr. Waiganjo for claimant

Mr. Kamau for Respondent

Ekale – Court Assistant