



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 261 OF 2017

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS

& HOSPITAL WORKERS (KUDHEIHA).....CLAIMANT

VERSUS

SOCIAL SERVICE LEAGUE M.P SHAH HOSPITAL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant Mr. Barasa Nyongesa for the summary dismissal from employment. The Claimant averred that the Grievant was employed by the Respondent on 1st June 1990 as a general cleaner earning a salary of Kshs. 831/- and a house allowance of Kshs. 360/- per month. The Claimant averred that the Grievant was at the time of dismissal earning Kshs. 19,506.30 and house allowance of Kshs. 5,300/- a month. The Claimant averred that the Grievant was dismissed summarily on 7th May 2015 and with effect from 20th April 2015 on allegations that he entered through the window to the Radiography Department (CT Scan Room) when the radiographer on call was alone taking a nap and waiting for his morning shift after attending to a patient. The Claimant averred that this was a fabricated story to suit the employer as no one saw the Grievant enter and leave through the window and that even the CCTV camera and footage played in the disciplinary meeting did not reflect the same. The Claimant averred that there is no way the Grievant could have entered through the window without a ladder as the window was located high on the wall. The Claimant averred that the Grievant appealed in May 2015 but the appeal was unsuccessful. The Claimant averred that the Respondent violated clause 16 on warning procedure by dismissing the Grievant without issuing him with 3 warning letters. The Claimant averred that it reported the dispute to the Ministry of Labour in accordance with Section 62 of the Labour Relations Act and on 3rd September 2015, the Chief Industrial Relations officer appointed a conciliator. The Claimant averred that the conciliator called several joint meetings but no amicable solution was reached as the Respondent failed to cooperate and the conciliator issued a certificate on 8th December 2015 referring the matter to this Court for arbitration. The Claimant averred that the Grievant did not commit any criminal offense or any other gross misconduct to qualify for summary dismissal under Section 44 of the Employment Act. He thus sought reinstatement with all benefits with effect from date of dismissal and in the alternative order that the Respondent pays the Grievant the terminal benefits made up of 8 months pay in lieu of notice – Kshs. 198,450.40, service gratuity for 24 years in service at a rate of 15 days per each completed year – Kshs. 297, 675.60, 12 months pay as compensation for wrongful dismissal – Kshs. 297,675.60, one month's (April) arrears of house allowance – Kshs. 1,100/-, Long service award for April 2015 – Kshs. 800/-, Leave Travelling allowance – Kshs. 5,000/-, salary for 20 days worked in April 2015 – Kshs. 16,537/-, leave days balance – Kshs. 5,788/- all making a total of Kshs. 823,026.60 as well as costs of the suit.

2. The Respondent filed a response to the claim and averred that the Grievant who according to the duty roster for the month of April 2015 was to be off duty, reported to the Respondent's premises at or about the 18th April 2015 at 6.00am without instructions to report to work. The Respondent averred that the Grievant entered the Respondent's premises through the exit gate and CCTV footage showed the Grievant proceeding towards the radiology section at around 6.03am. The Respondent averred that one of its staff, a radiographer, had undertaken a CT scan on a patient in the early morning hours of 18th April 2015 and decided to take a nap in preparation for his morning shift. The Respondent averred the radiographer was woken up from his nap by a thud inside the CT scan room and once awake, he noticed the thud had come from the Grievant who entered the room through a window and on enquiry as to what the Grievant was doing entering through the window, the Grievant was mute and the radiographer left the room and locked the door from outside and sought witnesses who would observe the unauthorized presence of the Grievant inside the CT scan but upon return with two witnesses the Grievant had left through the same window. The Respondent averred that the radiographer and one of the intended witnesses made a report with the management and they recorded witness statements. The Respondent averred that upon scrutiny of the CCTV footage the Grievant was observed returning from the Radiology Section at 6.09am and given that the Grievant was not supposed to be on duty that day there was sufficient cause to believe that the Grievant had come to work on 18th April 2015 with ulterior ominous motives. The Respondent averred that when the Grievant returned to work on 20th April 2015 and when the changing room assigned to him was opened, a screw driver, a syringe and half used bottle of Gastrografin were discovered. The Respondent averred that the Grievant had no authority to have these items and did not have a justifiable reason of being in possession of medical paraphernalia. The Respondent averred that these reasons coupled with entering the radiology room without authority led to his 7 day suspension with effect from 20th April 2015 and the issuance of a notice to show cause letter requiring him

to explain his acts. The Respondent averred that the Grievant responded to the letter on the 22nd April 2015 and due to the unsatisfactory explanation given, he was invited to a disciplinary hearing on 27th April 2015 vide a letter dated 22nd April 2015. The Respondent averred that the Grievant attended the hearing on 27th April 2015 accompanied by representatives from his union and that in his explanation he gave contradictory testimony from what was evidenced in the footage. The Respondent averred that the disciplinary committee recommended a summary dismissal and that the summary dismissal letter dated 7th May 2015 enumerated the Grievant's terminal benefits. The Respondent averred that the Grievant filed an appeal vide a letter dated 17th May 2015 and was invited for a hearing on 20th May 2015 with a different appeal panel from the one in the disciplinary hearing. The Respondent averred that the Grievant's appeal was dismissed vide a letter dated 2nd June 2015 for being unmerited. The Respondent averred that the Grievant thereafter cleared with the Respondent and was paid for days worked in April 2015, house allowance, long service award for April 2015 and payment in lieu of any outstanding leave days as per his payslip for the month of April 2015. The Respondent averred that it dismissed the Grievant in accordance with Sections 41, 43, and 45 of the Employment Act and that the Grievant is not entitled to any of the reliefs sought and his case should be dismissed with costs.

3. The Grievant testified that on the material day he went to work in the morning, went straight to the changing room and after dressing up he took a detour to wash his face and after that he realized that he was placed on off duty. He stated that they had shifts and the changes were done often. The Grievant testified that he was accused of entering the CT scan room through the window but he said that could have not been possible as the window was 4 feet off the ground and he did not have a ladder. He stated that the CCTV footage showed that he was at the parking when he went to wash his face but not in the scan room. He stated that he was invited to a disciplinary hearing but he was not heard. He said there were union officials present at the meeting and that he was not found to have committed any offence and sought for his reinstatement and prayed for reliefs as set out in the claim. He stated that he was not paid salary for April 2014. In cross-examination he confirmed that the duty roster was on the notice board on the ward department and not at the changing room. He stated that he did not know he was not supposed to be at work that day. He testified that when he was asked to open the locker he told them that he did not have the key. He said that they broke into the locker but the items that were found did not belong to him as the locker was not his. He insisted that where they broke into was where they keep machines. He confirmed that the CBA provides that if one is sacked, the service gratuity is lost.

4. The Respondent called its witness Mr. Falguni Chudasama the Human Resource officer. He testified that he was not at work at the material day but he received a report on Monday 20th April 2015 that the Grievant was found jumping through the window in the radiology room. He stated that he then summoned the Grievant and they went to his locker and when the Grievant was asked to open the locker the Grievant said he did not have the keys. He stated that they then used a spare key to open and found things that did not belong to the Grievant. He confirmed that the Grievant was present when they were opening the locker. He testified that they checked the CCTV footage and confirmed that the Grievant had entered through the exit gate and went behind the radiography department. He stated that the Grievant was invited for a hearing and the CCTV footage was played to him. He said that there were no CCTV cameras inside the room but there was an eye witness who saw the Grievant inside the room. He stated that after the hearing and looking at the evidence there was a recommendation that was approved by the CEO that the Grievant be dismissed and paid his dues. He stated that they had every reason to believe that the Grievant was involved in misconduct as there was a report that things were missing from the radiology department where the Grievant was found climbing into through the window and also because radiology items were found in his locker and yet he was not authorized to hold them. He testified that the Grievant was not entitled to severance pay as he was summarily dismissed but all his other terminal dues were paid. That marked the end of oral testimony and parties were to file submissions.

5. The Claimant submitted that on the material day he arrived at the Respondent's premises at 6.00am through the exit gate and on arrival he went straight to the changing room at the Doctors Plaza. He submitted that he put on the working uniforms and went outside and then proceeded to a water tap, washed his face before going to Kantaria Ward where he checked the duty roaster and confirmed that he was not on duty. He stated that he thereafter returned to the changing room where he removed the uniform and left for home through the exit gate as practical. The Claimant submitted that the statement purported to have been written by the Grievant on 22nd April 2015 is unauthentic as it does not bear the signature of the Grievant. It submitted that had the Grievant known that he was not supposed to be on duty on that date he could not have reported to the Respondent's premises at 6.00am. The Claimant submitted that the Respondent's assertion that the CCTV footage played at the Disciplinary Committee meeting had shown the Grievant proceeding towards the radiology section should not be construed to imply that the Grievant was at the CT Scan room. The Claimant submitted that the radiographer was not new to the Grievant and that contrary to the allegations the Grievant did not see him on that particular day. The Claimant submitted that the Respondent's allegations that they found items in the Grievant's locker was only to mislead the Court and portray that the Grievant as a thief. The Claimant submitted that furthermore, the Grievant has never been trained to use such items and the room was also shared by another person. The Claimant submitted that the Respondent's premises was manned by security personnel throughout the 24 hours and there is no single day the Grievant was caught with any stolen items or goods to conclude that he committed any gross misconduct. The Claimant submitted that the issue of summary dismissal was just mere fabrication and well calculated move by the Respondent to deny the Grievant the service gratuity for the last 24 years he had worked. The Respondent had no proof to show that the Grievant was involved in any gross misconduct or committed any criminal offence to warrant summary dismissal. The Claimant submitted that it was wrongful to dismiss the Grievant without notice in accordance with clause 18(c) of the Collective Bargaining Agreement and Section 44(2) of the Employment Act. The Claimant submitted that the radiographer neither swore an affidavit to support his allegations nor did he appear before the disciplinary committee or before court to give his side of the story and his allegations were mere speculations and hearsay. The Claimant submitted that the Respondent failed to prove their case as they did not produce any CCTV footage to prove their allegations that they had evidence suspecting the Grievant of breaking and entering without lawful cause, burglary, stealing by servant and/or theft. The Claimant submitted that it proved its case on a balance of probabilities and requested the court to grant all the reliefs sought in the memorandum of claim.

6. The Respondent submitted that the duty roster was posted in advance for all employees to confirm when they would be on duty and the fact that the Grievant came to work on a day that he was supposed to be off duty is testament that he had ulterior motives. The Respondent submitted that his contention that he did not know that he was not required to work was a flimsy attempt to justify his presence at work on the fateful date. The Respondent submitted that it is illogical that an employee who works long hours does not know when he will be off duty given the euphoric anticipation and zeal employees approach their work. The Respondent submitted that the fact that the Grievant wore uniforms before confirming if he was supposed to be on duty beats logic. The Respondent submitted that the items that were found in the Grievant's locker and specifically the Gatrografin is a contrast medium used in radiology examinations. The Respondent submitted that this discovery corroborated the fact that it was plausible that the Grievant was stealing radiology materials from the radiology lab where he was not designated to work. The Respondent submitted that the Grievant was not truthful about why he was at work on a day he was supposed to be off duty and that he gave contradictory sequence of events, was found in possession of unauthorized radiology equipment, there was an eye witness who saw him in the radiology room and all these led the Respondent to believe that the Grievant was culpable for gross-

misconduct and after due process he was summarily dismissed in accordance to Section 44(4)(g) of the Employment Act. The Respondent submitted that there was both substantive and procedural fairness in the Grievant's summary dismissal. The Respondent submitted that the Grievant was terminated on grounds that it genuinely believed to exist at the time of termination as per Section 43(2) of the Employment Act. The Respondent submitted that all the Grievant's dues were paid as shown in the payslip of April 2015 which was his last month of work. It submitted that it was thus upon the Grievant to rebut payment through production of evidence that his dues did not reflect in his account which he did not do. The Respondent submitted that the Grievant was paid a full salary for the month of April and yet he only worked for 20 days. The Respondent submitted that the Grievant's claim lacks merit and should be dismissed with costs.

7. There perhaps were good reason for the dismissal of the Grievant from employment. He does not dispute he was not supposed to be at work on the day he was seen to move suspiciously towards the backside of the Radiology room and allegedly fell with a thud disturbing the napping radiographer. It is not controverted that the Grievant was paid dues in April 2017 the month he was dismissed. The law requires under Section 43 and 45 as follows:-

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the Act provides that:

45.(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason -

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure

(underline mine)

8. As seen in the cited provisions of the law, for dismissal to be seen to be fair there have to be reasons and there must be a fair procedure. Whereas there was a hearing as contemplated under Section 41, the Respondent did not make any effort to show the court the evidence that led to its position that the Grievant was a thief. He seeks reinstatement but given the fashion of his termination it would not be a feasible option to order a reinstatement. Instead there will be compensation offered in terms of Section 49(1). The Court awards 2 month's salary as compensation. As all other dues were paid there will be no additional recovery. Costs will be limited to Kshs. 20,000/-.

a. 2 month's salary as compensation – Kshs. 39,012.60

b. Costs limited to Kshs. 20,000/-

It is so ordered.

Dated and delivered at Nyeri this 17th day of February 2020

Nzioki wa Makau

JUDGE