



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO. 56 OF 2015

GEORGE OCHARO.....CLAIMANT

VERSUS

NINE ONE ONE SECURITY GROUP LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in January, 2005 as a security guard until the year 2014 when his employment was terminated by summary dismissal.

The claim is that the summary dismissal was unlawful for the reasons that there was no notice issued or a hearing conducted pursuant to the provisions of section 41 of the Employment Act and the purported disciplinary hearing was biased and no defence at all.

By letter dated 13th November, 2014 the respondent unlawfully terminated the claimant in his employment.

The claimant was underpaid and claims ksh.128,095.60 which he claims as compensation for unfair termination of employment and costs.

The claimant testified that on 28th October, 2014 he was called by his supervisor to go to the head office for a disciplinary hearing from Nakuru to Nairobi.

The claimant also testified that he was allocated work at Merika Hotel his station being the CCTV office and in charge of the guards as a supervisor. He had 5 guards in total. He was responsible of the room and in case of an emergency it was his duty to attend and monitor the camera. He kept the CCTV room key.

Upon invitation for the disciplinary hearing he attended where the respondent alleged that he had a spare key to the CCTV room and since this was his station he kept keys.

On 13th November, 2014 the claimant was dismissed from his employment on allegations that he had attended the disciplinary hearing on 29th October, 2014 yet he had not attended such a date. The respondent made a deposit of Ksh.66,000 in his account which was not enough terminal dues. there was underpayment of wages.

The defence is that the claimant as an employee of the respondent as a guard and was allocated work at various stations but on 13th December, 2014 he was dismissed from his employment for breach of trust.

The defence is also that between 21st to 25th October, 2014 the claimant was assigned duties at Merika hotel in Nakuru and while on night duty he tried to open the CCTV room without following procedure. While trying to open the CCTV room the key broke and the claimant produced a duplicate key which was in his possession without the knowledge of the client or the respondent contrary to standing procedures with regard to standing regulations of keeping client's vital documents like the key to critical places like the CCTV room.

The claimant was issued with a notice to show cause why disciplinary action can be taken against him and on 25th October, 2014 he replied that when he was going to charge his radio the key jammed and he raised maintenance who tried to open the door and the key broke and he went for another key which he only where it was.

The claimant was invited for a disciplinary hearing on 29th October, 2014 which he attended. The hearing was held on 6th November, 2014 and present were two shop stewards and on the allegations made the claimant had no satisfactory defence. His rights under section 41 were guaranteed. There was no unfair termination of employment and the claimant was taken through the due process. The claims made should be dismissed.

In evidence Rose Chepkemboi testified that she is the human resource office of the respondent and the claimant was found to have kept a spare key to a client's premises and this had not been recorded in the occurrence book. He was not supposed to keep a spare key and in this basis he was issued with a show cause notice and upon his response it was not found satisfactory and a disciplinary hearing was conducted. Present were two shop stewards and the claimant was allowed.

Ms Chepkemboi also testified that the claimant was paid his terminal dues of days worked;

- a) Overtime due;
- b) Leave;
- c) Notice pay;
- d) Uniform refund;
- e) Special allowances; and
- f) Gratuity.

The nature of offence committed by the claimant was gross and summary dismissal was the sanction. He did not appeal and the claims made should be dismissed.

At the close of the hearing both parties filed written submissions.

For termination of employment to be fair there must be both substantive justification and procedural fairness. in the case of **Walter Ogal Anure versus Teachers Service Commission** the court held that substantial justice refers to establishment of a valid reason for termination of employment while procedural fairness refers to the procedure adopted by the employer in effecting the termination. Section 41 of the Employment Act, 2007 (the Act) requires the employer to give a hearing to the Claimant before termination or summary dismissal while Section 45 requires proof of valid reason and fair procedure. In this case, the Court held that;

... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.

The claimant was issued with a show cause notice dated 28th October, 2014 on the basis that;

...the management would like to invite you for a disciplinary hearing on Wednesday 29th October 2014 from 12.00 (noon) ...

This followed a charge that the claimant was keeping a spare key to a client CCTV room contrary to the rules and this was without due process to which the claimant replied that;

.....when I went to open the door the issued key jammed and I raised maintenance and he came. He tried and it failed. So the key broke and we had to take the other key which only me knew where the key was. It was at the rear gate security desk. I went and took the key from there after taking rear gate key from Omwenga the back gate guard. ...

The source of the spare key is thus explained. Upon the claimant breaking his key, *he got the other key which only me knew where the key was. It was at the rear gate security desk. I went and took the key from there after taking the rear gate key from Omwenga the back gate guard. I left Omwenga and Nyambane at front door but he followed me behind later.*

Where indeed the claimant had kept a spare key for what was claimed to be criminal activity, the key he secured from Omwenga and in the presence of Nyambane ought to have been caused their interrogation which was not the case here.

....I returned the key to Omwenga and proceeded to the CCTV and ... there to charge and took another one.

I stayed at the main entrance with Nyambane thereafter. ...

This is a reasonable explanation as to why the claimant obtained another key after his broke down. This does not reflect criminal conduct at all.

The claimant was then invited to attend disciplinary hearing at Nairobi vide letter dated 1st November, 2014 for the 6th November, 2014. There are minutes to confirm the claimant attended at the hearing together with shop stewards.

To the charges made as to why the claimant kept a duplicate key for a client premises he replied that Nyamete kept an old key used to unlock the door and he was the only one who knew the whereabouts of that key since all the other staff were all new. This response thus reinforced what the claimant had responded to upon the show cause notice.

The minutes filed by the respondent are not in full. only a page thereof. It is not possible for the court to ascertain the fullness and completeness of the disciplinary hearing from the filed record and the outcome of the charges made against the claimant.

Even where there was due process in hearing the claimant's case pursuant to the provisions of section 41 of the Employment Act, 2007 due regard should be the provisions of section 43 of the Act where the employer is required to have genuine and valid reasons leading to termination of employment. It is not sufficient that the employee is paid in lieu of notice, far from it, there must exist reasons for termination of employment and which reasons must be genuine and valid as held in the case of **Paul Wachiuri Ndonga versus Keroche Breweries Limited [2018] eKLR** that;

Section 43 and 45 of the Employment Act, 2007 provisions are therefore clear to the extent that;

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.

On the evidence before court, I find no valid reasons existed to justify the termination of employment. The respondent has since paid terminal dues without delay and instantly. The respondent is in good standing and in accordance with section 45 (5(a) and (c) of the Employment Act, 2007 and compensation is thus awarded at one (1) months gross wage at ksh.12,011.

On the claims for underpayment, the claimant was a guard and the wage paid at ksh.12,011 for work at Nakuru in the year 2014 was in tandem with the applicable wage orders. There is thus no basis set out for the claims for underpayment.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of compensation at ksh.12,011 and each party to pay own costs.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of: