



IN THE HIGH COURT OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 204 OF 2016

NALICHI A K PAULCLAIMANT

-VERSUS-

DHL SUPPLY CHAIN (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was dismissed from employment by the respondent on 18.9.2015 and brought this suit on 15.2.2016 seeking the following relief: -

Special damages

- a. Leave days not taken twenty-five (25) annual leave days amounting to Kshs. 52,900.00/-
- b. September 2015 salary being Kshs. 63,480.00/-
- c. Severance pay of Kshs. 50,255.00/-

General damages

- a. Twelve months' salary being damages for unlawful dismissal amounting to Kshs. 761,760.00/-.
- b. Kshs. 100,000.00 for failing to issue a certificate of service.
- c. An Order for reinstatement to his former position as a security supervisor.
- d. Costs of this suit and interest therein.
- e. Any other orders that this court may deem fit to grant

2. The Respondent filed defence on 16.3.2016 denying the alleged wrongful dismissal and averred that the dismissal was lawfully, procedurally and fairly done on account of lateness and insubordination. She further averred that the claimant was paid all his terminal dues after the dismissal and prayed for the suit to be dismissed with costs.

3. The suit was heard on 8.7.2019 and 1.10.2019 when the claimant testified as CW1 and the respondent one witness. After the hearing both parties filed written submissions.

Claimant's case

4. The Claimant adopted his written statement dated 8.2.2016 as his testimony and produced six (6) documents as exhibits to support his case. In brief he stated that he joined the respondent on 4.2.2014 as a Security Supervisor based at the DHL site at the Kenya Breweries. He was given a written contract and later confirmed to permanent employment on 7.8.2014. His salary was Kshs.63480 per month.

5. On 5.9.2015, he was on the night shift and left in the morning of 6.9.2015, but at 2 p.m. he received a call telling him not to report on duty that evening and instead report on Monday 7.9.2015 at night. However, he reported to work the same day at 6 p.m. but his Supervisor told him that he was late by 1 ½ hours and that he looked intoxicated. Nevertheless, the supervisor assigned him work which he did till morning

and left.

6. On 7.9.2015 he reported to work again but supervisor Mr. John Mekenye told him that he should not have reported to work and confiscated his staff card and company mobile phone. The supervisor also gave him clearance form for handing over and on 8.9.2015, he was served with a show cause letter and he responded after which he was never assigned any work to do and the staff card was never returned to him.

7. Thereafter he reported the matter to the Human Resource M/s. Flash Mburu and she told him that she was unaware of the show said cause letter. On 18.9.2015, he was dismissed from service without being given any hearing. He denied ever attending the alleged disciplinary hearing on 17.9.2018 and further denied ever signing the minutes dated 17.9.2015. He appealed against the dismissal on 21.9.2015 and he was called for a hearing of the appeal.

8. On cross-examination he admitted that he was served with a show cause letter dated 6.9.2015 but denied ever writing an apology letter during his term of service. He further admitted that there is Alcohol Blow testing at the main gate and the respondent's office for testing intoxication. However, he contended that he tested negative at the main gate and he was allowed in. He contended further that his supervisor tested him at the office and it also showed green meaning negative alcohol.

9. He stated that when he went to see M/s. Flash Mburu, he found her with four (4) other normal staff whom he did not know. He denied that the four (4) persons are the ones listed in the minutes filed by the respondent. He contended that his working hours per week were 40 but he used to work extra hours. He further contended that Clause 26(1) and (2) of his contract provided that his terms of service could not be changed without prior sufficient notice. He concluded by reiterating that he was never invited to any hearing to defend himself in the presence of a companion.

Defence Case

10. The Respondent called her Security Officer Mr. John Mekenye as a witness and he testified as RW1. He admitted that the claimant was employed by the respondents as a Security Officer working from 6 p.m. to 6 a.m. He testified that on 6.9.2015, the claimant was to report at work at 6 p.m. and address the parade of outsourced guards but he failed to show up on time.

11. At 7 p.m, he called the claimant and he said that he was held up in traffic jam. The Line Manager also called him and he responded by calling him (RW1) and harshly quarreled him for reporting his lateness to the boss. He contended further that the claimant reported to work at 9 p.m and upon conducting an Alcohol Blow tests, he tested red, meaning he was intoxicated. He contended that upon testing the other staff in the office they all tested green meaning they were not intoxicated.

12. As a result of the foregoing matter, he recorded statements from the claimant and the witness present. On 8.9.2015, he served the claimant with a show cause letter and he responded followed by a disciplinary hearing on 17.9.2015 when the claimant appeared before him (RW1), HR Manager, and Security Head E.A for one hour. Thereafter the claimant was dismissed and he appealed but after the hearing, the appeal was dismissed.

13. RW1 contended that the claimant had committed similar offence of reported to work late in May 2015 and he was served with a show cause letter. He further contended that the claimant apologized for the said offence and he was served with a warning letter.

14. On cross-examination RW1 maintained that the claimant reported to work at 9 p.m on 6.9.2015. He however admitted that the show cause letter indicated that the claimant reported at 7.30 pm He reiterated that the claimant was intoxicated when he reported on 6.9.2015 and contended that he confirmed that by Alcohol Blow testing. He maintained further that the claimant attended both the disciplinary hearing and the appeal hearing as indicated in the minutes filed.

Claimant's submission

15. The Claimant submitted that on 6.9.2015 he reported to work at 6.30 p.m, being 30 minutes late because of heavy traffic jam which he had earlier on notified his immediate supervisor. He denied the alleged intoxication and contended that the respondent did not produce any evidence in court. He thereafter submitted that the reason for termination was not substantiated by evidence.

16. As regards the procedure followed, the claimant contended that he was not subjected to any disciplinary hearing on 17.9.2015 as alleged by the respondent. He contended that the minutes were signed on 20.9.2015, the signature against his name is strange to him and it does not resemble the signature in all his other documents.

17. He therefore contended that his dismissal was unfair and prayed for the reliefs sought herein. For emphasis he relied on **Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another (2015) eKLR** where Radido J held that before dismissing an employee for a cause, the employer must observe the dictates of procedural fairness which includes informing the employee of the reason for which termination is being considered and then accord the employee a chance to defend himself.

Respondent's submissions

18. The Respondent submitted that the claimant admitted in evidence that the misconduct on 6.9.2015 and in May 2015 she further submitted that under section 44 (4)(a) (b) (c) and (d) of the Employment Act, entitles employer to dismiss the employee summarily. The offences in the said provision includes, absence from work; being incapable of performing work due to intoxication: willfully neglects to perform work or carelessly and improperly performing work; and failing or refusing to obey a lawful and proper command from employer or a person placed in authority by the employer. It is therefore the defence case that its reasons for dismissing the claimant were valid.

19. As regards the procedure followed, the respondent submitted that the claimant was served with a show cause letter and he responded in writing. She further contended that the claimant was heard orally by disciplinary committee and thereafter on appeal by another committee. She therefore maintained that the procedure followed was fair.

Issues for determination

20. There is no dispute that the claimant was employed by the respondent until 18.9.2015 when he was dismissed. The issues for determination are:

- a. Whether the reasons for the dismissal were valid and fair.
- b. Whether a fair procedure was followed
- c. Whether the reliefs sought should be granted.

Reasons for the dismissal

21. The reasons cited for the dismissal were:

- a. reporting to work late at 19.30 hours instead of 18000 hours
- b. Ignoring or refusing to obey lawful command by his supervisor to report to his office
- c. Reporting to work intoxicated and unable to perform duties as a security supervisor.

22. There is no dispute that on 6.9.2015 the claimant reported to work late after the required time, that is, 18 hours. The Respondent contended in the show cause letter dated 8.9.2015 that he reported at 19.30 hours but he contended that he reported at 18.57 hours.

23. In my view the foregoing admission is sufficient reason for summary dismissal under section 44 (4) of the Act which provides that the following conduct constitutes justifiable or lawful ground for summary dismissal:

“(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”

Procedure followed

24. Under section 41 of the Employment Act, before terminating an employee for misconduct, poor performance or physical incapacity, the employer must explain the reasons to the employee in a language he understands and in presence of another employee of his choice. Thereafter the employee and his companion are entitled to air their representations which must be considered before the termination is decided. In **Patrick Abuga vs ICPAK, supra Radido J** held that:

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

The ingredients of procedural fairness as I understand is within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee . . .

Secondly, it would follow naturally that if the employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard . . . in person, writing or through a representative or shop floor union representative.

Thirdly if it is a case of summary dismissal there is an obligation on the employer to consider any representations by the employee before making the decision to dismiss or give other sanction.”

24. In this case the claimant was served with a show cause letter and he made a lengthy response in writing. Thereafter he was called for disciplinary hearing and presented his defence. Finally, he appealed and he was accorded a hearing. Although he disowned the signature in the proceedings, he did not report any forgery to the police. Consequently, I hold that the respondent has proved on a balance of probability that she followed a fair hearing.

Reliefs

25. In view of the finding above that the dismissal of the claimant was for a valid reason and that a fair procedure was followed, I am satisfied that the dismissal was fair and lawful. He is therefore not entitled to reinstatement to his employment or payment of damages for unfair termination under section 49 of the Employment Act.

26. The claim for Kshs. 100,000.00 for failure to issue a certificate is dismissed for lack of legal basis. As far as I know, the law provides for a fine against the employer and not damages in favour of the employee.

27. The termination letter offered to pay the claimant terminal dues and in the defence, the respondent alleged she paid the same to the claimant. No evidence of such payment was produced and as such I proceed to award the claimant the prayer for twenty five (25) leave days and salary for the eighteen (18) days worked in September, 2015. The claim for severance pay fails because the termination was not through redundancy. Consequently, I enter judgment for the claimant as follows:

a. leaveKshs. 52,900.00

b. Salary 18 daysKshs. 43,947.70

TOTALKshs. 96,847.70

The said sum will be subject to statutory deductions but in addition to costs and interest at court rates from the date of filing suit.

Dated, Signed and delivered in open court at Nairobi this 29th day of April 2020.

ONESMUS N. MAKAU

JUDGE