



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1565 OF 2015**

**KENYA NATIONAL PRIVATE**

**SECURITY WORKERS UNION.....CLAIMANT**

**VERSUS**

**SECURITY GUARDS SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant union instituted this suit in September 2015 against the Respondent for the unfair and unlawful dismissal from employment of its member, Stephen Kungu Njau (hereinafter “the grievant”). She later amended the Claim to indicate that it is duly registered as the sole trade union mandated to represent the industrial interests of employees in the private security sector. The claimant prayed for the following reliefs on behalf of the grievant:

- a) A declaration that the Respondent’s action of dismissing the Grievant from employment was illegal, unlawful, unfair and inhumane.***
- b) One month’s salary in lieu of notice at Kshs. 21,445/=***
- c) Gratuity  $Kshs. 21,445 \times 18 \times 22 = Kshs. 326,623/=$***
- d) 12 months’ salary in compensation for unfair dismissal.  $Kshs. 21,445/= \times 12months = Kshs. 257,340/=$***
- e) Certificate of service.***
- f) Costs of the claim plus interest thereon.***

2. The respondent filed defence denying the alleged unfair termination of the grievant’s employment and averred that the termination was fair because the claimant grossly misconducted himself while on duty and he was accorded a fair hearing before the termination. She objected to the suit on ground that the claimant lacks *locus standi* to represent the grievant because there is no Recognition Agreement and Collective Bargaining agreement (CBA) between her and the claimant. Finally, she denied that the claimant is entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

3. The suit was heard on 20.1.2020 when both parties tendered their evidence and thereafter filed written submissions.

**Claimant’s case**

4. The grievant testified as Cw1 and told the court that he was employed by the Respondent as a Security Guard on 1<sup>st</sup> February 1994 on casual basis until 1<sup>st</sup> March 1997 when his employment was confirmed to permanent basis. His salary was paid through the bank and the same was increased to Kshs. 21,222 per month inclusive of house allowance.

5. On 7.7.2015, while on duty, the client he was guarding approached him in the darkness and when he told him to go back, he reported to the respondent that he threatened to beat him at night. In the morning he was called to the office and on arrival, he was ordered to surrender his uniform and he complied. He was not taken through any disciplinary hearing in the presence of a union official but on 10<sup>th</sup> July 2015 he was called to the office and asked to sign an already written warning. He contended that he was not paid his salary for July 2015 and terminal dues, and the Respondent also refused to issue him with a Certificate of Service even after returning his uniform.

6. He further testified that after the dismissal, he reported the matter to the Labour Office but the respondent ignored the move. He contended

that throughout his 22 years' service to the respondent, he never committed any misconduct warranting warning or dismissal. He maintained that his dismissal was unfair and unlawful and his terminal benefits which have not been paid to date. He contended that he has since the dismissal not been able to secure any other job.

7. On cross examination, he admitted that he signed the contract of service which indicated his date of employment as 1.3.1997. He further admitted that he is literate and that he wrote the apology letter. He further admitted that he attended a meeting on 9.7.2015 in the company of Mr. Joseph Kanyoro, a fellow employee, as his witness and a charge of sleeping while on duty was read to him. The charge was about a complaint against him by the client called Anna where he was guarding. However, he denied that he was found sleeping while on duty but admitted that he was served with warning orders on 15.9.2014 and 15.4.2010.

### **Respondent's case**

8. Mr. Earnesto Mawiyoo King'onde, respondent's Operations Manager testified as Rw1. He told the court that, the grievant joined the respondent on 1.3.1997 and he was given Payroll number 623B. He further stated that on 6.7.2015, the client where the grievant was guarding wrote a letter complaining that the grievant was sleeping at work and as a result, the grievant was addressed a letter inviting him to the office for a disciplinary meeting. He contended that the grievant attended the meeting in the company of another employee Mr. Joseph Kanyoro and he was heard on his defence. After the hearing, the grievant apologised but he was dismissed from service but he declined the letter. He further refused to clear with the company and collect his Certificate of Service. He contended that the reason for the termination was sleeping while on duty and assaulting the client.

9. He testified that through his service the grievant was an indisciplined employee who was performing his duties poorly and as such he was served with various warning orders. He denied knowledge of the relationship between the claimant and grievant and contended that there was no Recognition Agreement and CBA between the claimant and the respondent.

10. On cross examination, he maintained that the grievant refused to sign the termination letter dated 28.7.2015. He further stated that the claimant was a poor performer but he was given warnings and chance to improve after he apologised. He admitted that there were no photos taken on the grievant while asleep, but he contended that he received a written complaint from the client and also spoke to her over the phone which confirmed that the grievant was found sleeping while on duty. He maintained that the grievant admitted the offence and apologised. Finally, Rw1 testified that he sat in the disciplinary hearing and minutes were recorded but the grievant declined to sign the same.

### **Issues for determination and analysis**

11. After careful consideration of the pleadings, evidence and the written submissions by the parties, there is no contention that the grievant was employed by the respondent as a security guard until 28.7.2015 when he was summarily dismissed from service. The main issues for determination are:

- a) Whether the claimant lacks *locus standi* to represent the grievant in this suit.
- b) Whether the dismissal of the grievant was unfair and unlawful.
- c) Whether the reliefs sought should be granted.

### **Locus standi**

12. The Blacks Law Dictionary, 9<sup>th</sup> Edition at page 1026 defines *locus standi* as "***the right to bring an action or to be heard in given forum***". In ***Alfred Njau & 5others v City Council of Nairobi [1983] e KLR*** the Court of Appeal expressed itself as follows:

***"The term locus standi means a right to appear in court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."***

13. The Respondent contended that the Claimant union herein has no *locus standi* in this suit because there is no recognition agreement and CBA with her and the claimant has not contested that preliminary objection either in the pleadings or evidence. In ***Kenya Shoe & Workers Union v Modern Soap Factory Ltd [2017] eKLR*** this court faced with a similar issue held that:

***"I agree with Mbaru J's opinion in the communication workers union case, that without recognition by an employer, a trade union, even where it is registered to represent workers in a sector, remains a by-stander to the disputes between the workers and their employers. However, if the workers are members of the union, the union can only assist them in disputes just as a lawyer does without substituting the litigants' names from the pleadings. The time has come when the Trade Unions should differentiate between representing their members in collective disputes and assisting them in their personal disputes. In the first instance, the union can sue in its name but in the second scenario, the member must sue in his or her own name."***

14. The situation has since changed with the decision by the Court of Appeal on 7.2.2020 in ***Modern Soap Factory v Kenya Shoe and Leather workers Union Civil Appeal No.37 of 2019*** where the court held that :

***"In our judgment we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court...A recognition Agreement is ... a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in***

*court. As correctly stated by the learned Judge, the two roles are distinct.”*

15. In view of the foregoing binding precedent, I abandon my earlier decision in **Kenya Shoe & Workers Union v Modern Soap Factory Ltd [2017] eKLR** and return that the claimant union has *locus standi* to bring this suit notwithstanding the fact that she has no Recognition Agreement with the respondent.

### **Unfair termination**

16. Section 45 (1) of the Employment Act prohibits unfair termination of an employee. Subsection (2), provides that termination of an employee’s employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related the employee’s conduct, capacity or compatibility or is based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure. Fair procedure includes but is not limited to fair hearing as envisaged under section 41 of the Act.

### **The reason for the dismissal**

17. **Clause 7 of the Respondent’s Code of Conduct** which formed part of the employment contract which the grievant signed by the grievant provides that sleeping at work detracts one from performing his duties, and it amounts to gross misconduct warranting the disciplinary action. In addition **Section 44(4) (c) of the Employment Act** entitles employer to summarily dismiss his employee for gross misconduct, if:

*“(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.”*

18. In this case the reason for the dismissal was that the grievant was found sleeping while on duty by the client he was guarding. The client lodged a written complaint with the management and which was followed by a phone call. The respondent believed the report by the client and fired the grievant. Thereafter the grievant admitted to the offence and apologised vide the letter dated 22.7.2015. That was a repeat of many other earlier instances where he misconducted himself, apologised and served with a warning order. However, this time round the employer did not give him another chance. Considering the foregoing matters, I return that the respondent has proved on a balance of probability that the reason for the dismissal of the grievant was valid and fair.

19. In the case of **Mary Chemweno Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR** Mbaru J held:

*“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical Incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow (or an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”*

### **The procedure followed**

20. Section 41 of the Employment Act provides that: -

*(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the 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 a shop floor union representative of his choice present during this explanation.”*

*(2) Notwithstanding any other provision on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make.”*

21. In this case, the grievant admitted that he was invited to a disciplinary hearing and he attended with a fellow employee of his choice, the charge of sleeping while on duty was read to him and he defended himself before he was dismissed. Applying the provisions of section 41 above, to the foregoing facts, I find and hold that the respondent has proved on a balance of probability that a fair procedure was followed before dismissing the grievant.

22. On the foregoing view, I gather support **Industrial Cause No. 146 of 2012-Alphonse Maghanga Mwachanya vs. Operation 680 Limited** where Radido J states;

*“.....in order for an employer to meet the legal requirements of procedural fairness section 41 of the employment act, it should meet or show as a matter of factual evidence that it did the following;*

- i. Explained to the employee in a language the employee understood the reason why it was considering the termination.*
- ii. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reason.*

*iii. Heard and considered any explanation by employee or his representative*

*iv. ..."*

23. Having found that the respondent has proved that the dismissal was grounded on valid ground and that fair procedure was followed, I return that the dismissal was not unfair within the meaning of section 45 of the Act.

**Reliefs**

24. Considering the finding herein above that the dismissal was fairly done, the claim for salary in lieu of notice and compensation for unfair termination under section 49 of the Employment Act is dismissed.

25. The claim for gratuity also fails because the claimant did not prove that it was provided for in his contract of service. Secondly, under **Regulation 17 (2)** of the **Regulation of Wgaes (Protective Security Services) Order**, an employee who is summarily dismissed for a lawful cause loses his right to gratuity.

26. The claim for Certificate of Service was not opposed and it therefore allowed.

27. In the end, save for the claim for certificate of Service, the suit is dismissed with no order as to costs.

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of July, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**