



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2185 OF 2015

PAUL NYANDIKO NYAKIOGA.....CLAIMANT

VERSUS

TANDU ALARM SYSTEMS LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant brought this suit against the Respondent on 9.12.2015 seeking the following reliefs:

- (a) Declaration that he was unfairly and unlawfully dismissed by the respondent.
- (b) Payment of Kshs. 367,766 being terminal dues plus compensatory damages.
- (c) Costs and interest.

2. The Respondent filed defence on 15.2.2016 admitting that the claimant was her employee and that she dismissed him summarily on ground of failure to perform his duties. She however denied that the dismissal was unfair and that the claimant is entitled to any damages and finally prayed for the suit to be dismissed with costs.

3. Both parties tendered evidence during the hearing and thereafter filed written submissions.

Claimant's case

4. The Claimant testified as CW1. He told the court that he joined the respondent on 20.6.2007 as a Security Guard and worked very well rendering good service.

5. He further testified that on 10.7.2015 he reported back from his annual leave and he was served with a letter dated the same day inviting him for a performance review on 17.7.2015. On the same day he also received another letter dated 11.5.2015 notifying him that his performance review would be done after reporting back from his leave on 10.7.2015.

6. He further testified that when he went for the review on 17.7.2015 he was not given any hearing but was only told to wait for dismissal letter. After a short while, he was given the dismissal letter dated 17.7.015 stating that he was assessed on the 30 days before the review but that was not correct because he was on leave during that period. He contended that the dismissal was unfair and prayed for the reliefs set out in the statement of claim. He admitted that he received the warning letters dated 11.10.2011 and 1.2.2013.

7. On cross-examination, he admitted that he received the letters dated 11.5.2015 and 10.7.2015 on the same day. He reiterated that on 17.7.2015 he was just told to wait outside and after a while he was served with the dismissal letter. He contended that he was not paid his last salary because the master roll was being closed on the 20th day of every month. He further contended that he returned his uniform but he was not refunded the uniform levy equaling to Kshs. 500 for 15 months. Finally, he contended that from 20.6.2007 to 20.6.2008 he never went on his annual leave and he took his first leave after the end of 2009.

Defence case

8. Mr. Martin Haylock, Respondent's Managing Director testified as RW1. He told the court that the claimant joined the respondent on casual basis on 20.6.2007 and worked as such until 8.11.2008 when he was employed on permanent basis. He further testified that the claimant severely breached the company's code of conduct and was served with several warning letters demanding that he should improve or face termination of his employment.

9. He stated that on 24.4.2009, the claimant was given a first warning following a performance review that found his performance unsatisfactory because he had used inciting and insulting language at Panari Sky Centre where he was assigned . Again on 11.10.2011 he was given another warning for breaching the dress code while on duty. Yet again on 3.2.2012, the claimant was served with another warning letter for being intoxicated during working hours.

10. RW1 stated that more complaints were registered against the claimant by clients including Prestige Plaza Management and as a result of such blatant breach of company policy, the company served the claimant with a 30 days performance review notice on 11.5.2015 and instructed him to improve his performance or face termination of his job.

11. RW1 stated that the claimant did not improve his performance and after the 30 days lapsed he was invited to a performance review hearing before his Supervisor, Departmental Manager and the Human Resource Officer. The charges against him were failure to search vehicles, tardiness to report to work, failing to obey orders from his Supervisor and being argumentative towards his Supervisor.

12. He contended that the panel read the charges to the claimant and allowed him an opportunity to explain these actions in defense to the charges. However, the panel found his explanation not satisfactory and the claimant was dismissed the same day. Thereafter the claimant appealed but after considering the same, it was rejected because of the risk the claimant posed to public safety.

13. On Cross examination, RW1 admitted that he never interacted with the claimant on a day to day basis and stated that, that was the work of the supervisor, Operations Manager and Operations Controller. He contended that claimant's misconduct was reported by the Supervisor. He reiterated that the letter dated 11.5.2015 directed the claimant to improve his performance. He admitted that he did not have any performance review report done on 1.6.2015. He further admitted that the claimant was on leave until 10.7.2015.

14. He contended that the letter dated 10.7.2015 invited the claimant to a performance review on 17.7.2015 but admitted that he had no minutes for the review meetings held on 17.7.2015. He further admitted that the appeal by the claimant was asking for an opportunity to defend himself on the allegations cited in the dismissal letter. He contended that he heard the appeal but admitted that there were no minutes for the hearing.

Issues for determination and Analysis

15. I have carefully considered the pleadings, evidence and the submissions presented to both parties. There is no dispute that the parties herein were engaged in employment relationships from 20.6.2007 to 17.7.2015 when the claimant was summarily dismissed for gross misconduct. The issues for determination are:

- (a) Whether the reasons cited for the dismissal were valid and fair.
- (b) Whether fair procedure was followed before the dismissal.
- (c) Whether the claimant is entitled to the reliefs sought.

Valid and fair reasons

16. The reasons cited in the dismissal letter were:

- (a) Not carrying out vehicle search which was his duty to do.
- (b) Reporting to work late and overstaying during lunch break.
- (c) Failure to follow instructions given by his supervisor and being argumentative.

17. The letter stated that the said misconduct justified summary dismissal under section 44 (f) (c) of the Employment Act but the claimant stated that it was not true because he was on leave.

18. RW1 admitted that the claimant was on leave during the 30 days period given for improvement before the performance review. He further admitted that he personally did not deal with the claimant on a day to day basis and confirmed that, such was the work of the Supervisor and Operations Managers.

19. He did not produce any warning letter served on the claimant after the warning letter dated 1.2.2013 to prove that the claimant had persisted in his improper performance of duty. He further did not produce any written complaint from the clients against the claimant.

Finally, the Supervisor and Operations Manager and Controller did not adduce evidence to prove that the claimant had indeed failed to search vehicles, was reporting to work late, and that he failed to follow instructions for them. Without such evidence, the court is of the view that evidence by the RW1 was hearsay as far as the offences cited in the dismissal letter were concerned.

20. Accordingly, I return that the respondent has failed to prove on a balance of probability that the claimant committed the gross misconduct

particularized in the dismissal letter as required by section 43 and 45 (2) (a) & (b) of the Act. The said section provides that termination of employment of an employee is unfair if employer fails to prove that it was grounded on a valid and fair reason related to the employees' conduct capacity and compatibility or based on the employer's operational requirements. On the other hand section 43 of the Act provides that any legal proceedings challenging termination of employment, the burden of proving the reasons is on the employer and in default, the termination is deemed unfair within the meaning of section 45 of the Act.

Procedure followed

21. Section 41 of the Act provides that before an employer terminates the employee's contract of service, he must explain to him in the presence of another employee of his choice the reasons upon which termination is being considered and thereafter accord the employee and his companion a chance to air their representations which must be considered before the termination is decided. In this case the claimant contends that he was invited for a performance review but he was not accorded any hearing.

22. Rw1 stated that the claimant was heard by the Human Resource Officer, Supervising Officer and Departmental Manager on 17.7.2015. However, neither of the said members of the panel tendered evidence herein nor were the minutes of the proceedings produced and as such the evidence by RW1 on the alleged hearing is hearsay. Consequently, I return that the respondent has failed to prove on a balance of probability that a fair procedure was followed before dismissing the claimant.

23. In my view, a performance review is not the same thing as a disciplinary hearing as RW1 wanted the court to believe. Performance review in my opinion is a scientific method of measuring or appraising an employee's performance in relation to mutually agreed and set targets using some key indicators. In this case the RW1 did not produce any evidence to prove that there were mutually agreed targets set between the claimant and his supervisor. He also did not produce any performance appraisal report for the claimant dated 17.7.2015 or at all. It follows therefore that the Rw1 was misconceived about what he called performance review hearing.

Reliefs

24. Having found that the respondent has failed to prove a valid and fair reason for dismissing the claimant and that fair procedure was followed, I make a declaration that the summary dismissal of the claimant was unfair and unlawful and that he is entitled to compensatory damages under section 49 of the Employment Act. Therefore, I award him one month salary in lieu of notice plus 6 months salary compensation for the unfair dismissal. In awarding the said compensation I have considered the fact that the claimant served the respondent for about 8 years.

25. The claimant is further awarded salary for 17 days worked in July 2015 equaling to Kshs. 12489. I further award him the claim for refund of uniform deposit of Kshs. 7000/- as prayed.

26. I declined to award overtime for June 2007 to November 2008 because the claimant is time barred because it was based on seasonal contracts which were distinct from the contract signed on 8.11.2008. The said contracts lapsed before the permanent contract was entered into and as such considering the period of time from 2008 to 2015 when the suit was filed, it is obvious that it exceeds the limitation period of 3 years provided under section 90 of the Employment Act.

27. For the foregoing reasons, the claim for leave for 2007 is also dismissed. The claim for leave for 2010 is declined because the claimant produced leave application for 12.1.2011 – 11.2.2011 showing that the leave was approved.

Conclusion and disposition.

28. I have found that the dismissal for the claimant was unfair and unlawful and that he is entitled to terminal benefits plus compensatory damages. Consequently, I enter judgment for him as follows:-

Notice.....	Kshs. 22,039.00
Compensation.....	Kshs. 132,234.00
17 days salary.....	Kshs. 12,489.00
Uniform deposit.....	Kshs. 7,000.00
Total.....	Kshs. 173,762.00

The award is less statutory deductions but in addition to costs and interest from the date hereon.

Dated, signed, and delivered in Nairobi this 9th day of July, 2020.

ONESMUS N.MAKAU

JUDGE