



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1619 OF 2014

EZEKIEL OGOLA LUAMBE.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 15.9.2014 contending that he was unlawfully dismissed from employment by the respondent on 3.7.2014 for alleged theft on 30.6.2014 and prayed for the following reliefs.

- (a) A declaration that the termination of the Claimant by the Respondent was unlawful, unprocedural and unfair.
- (b) A declaration that the reasons and/or grounds stated by the Respondent in the letter of termination do not constitute proper grounds for termination.
- (c) Award the claimant the sum of **Kshs.18,342.13/=** being the unpaid salary for the month of June 2014 as pleaded under paragraph 13 herein.
- (d) That the Honourable Court be pleased to award the Claimant the sum of **Kshs.18,342.13/=** being the equivalent of one month's salary in lieu of notice.
- (e) That the Honourable Court be pleased to award the Claimant the sum of **Kshs.220,105.56/=** being 12 month's compensation.
- (f) That the honourable Court be pleased to award the claimant the sum of **Kshs.228,571.00/=** as gratuity/severance at the rate of 18 days for each of the 15 complete years worked
$$\underline{18\text{years} \times 18 \times 18,342.13} = \text{Kshs.228,571.00 26}$$
- (g) That the Honourable Court be pleased to award the claimant the sum of **Kshs.18,342/=** as annual leave for the year 2014.
- (h) That the Honourable Court be pleased to award the Claimant the sum of **Kshs.9,709.00/=** as a refund for salary deductions for the months of May and June 2014.
- (i) Interest on the sums claimed above from the date of filing this cause in court.
- (j) The costs of this cause.
- (k) Such further orders and/or relief as this court may deem just and fit to award.

2. On 17.11.2014 the respondent filed his defence denying the alleged unfair termination and averred that termination was justified because the claimant had grossly misconduct himself contrary to section 44(4) (g) of the Employment Act by committing a criminal offence against the employer's client on 30.6.2014. She further averred that the claimant had committed similar offences on 23.11.2011 when indicators were stolen from a parked motor vehicle and on 14.7.2013 a water pump was stolen while he was on duty. She therefore prayed for the suit to be dismissed with costs because he was paid his rightful dues after termination.

3. The suit was heard on 11.10.2018 when the claimant testified as Cw1 and the respondent called her HR Officer Mr. Denis Micheka Orina as Rw1 thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 testified that the respondent as a Security Guard from 1995 to 2014 when he was dismissed. He further testified that on 3.7.2014 he was on duty when the Alarm Crew Car for the respondent came to his place of assignment, Dinesh Construction carrying a person who was allegedly caught with stolen metals and said he was given the same by him (claimant). The claimant was then arrested and taken to Parklands Police Station after the suspected thief confirmed to know his name as Ogola.

5. At the station, the suspect was released at 11 a.m but he (claimant) remained there until the following day when he was released without any charges and reported back to work. However, he was not allowed back and instead he was served with a dismissal letter dated 3.7.2014 citing the reason as misconduct related to his arrest and detention at Parklands Police Station.

6. He denied the alleged theft or collusion with others to steal. He contended that in April 2014 he was involved in a road accident and was not able to work until 18.6.2014 when he reported back but still on crutches. That during the said period he was on a sick off but the respondent refused to pay his salary and when he continued to demand for the same, the employer framed false allegations of theft against him. He further contended that the procedure followed before dismissing him was unfair and prayed for compensation.

7. He contended that after the dismissal, he was not paid his accrued benefits and he was not given a Certificate of Service until the time he was joining another company. He therefore prayed for his accrued benefits plus compensation for unfair termination.

8. On cross examination, Cw1 admitted that vehicles for worshipers at the St. Andrews Church were vandalized while he and other guards were guarding. He further admitted that in July 2013, a water pump was stolen at Dinesh Construction and he wrote a statement denying the offence and denied ever being served with the warning letter dated 5.5.2014 because that time he was on sick off. He however admitted being served with the letter dated 29.8.2012 referring him for retraining but denied being served with the 3 warning letters mentioned by the said letter. He stated that the reason for the retraining was late reporting from his leave.

9. Cw1 clarified that he was arrested on 30.6.2014 and he was dismissed on 3.7.2014. He maintained that the person who was brought by crew to the site for the alleged theft of metals was a stranger to him and he could not tell how he came to know his name. He however stated that the Alarm Crew knew his name because they had details of the guards on the site.

10. Cw1 further contended that when he went for his certificate of service, he was shown the tabulation of his benefits but he rejected the same because it was little.

Defence case

11. Rw1 testified that the claimant was dismissed for aiding in stealing of metals from a client's site where he was deployed to guard on the night of 29th/30th June 2014. That, as a result, the claimant was arrested by police but he was later released without any charges. Rw1 further testified that the claimant

had a history of related misconduct for which he had been served with warning letters or surcharge.

12. Rw1 further testified that in October 2011 the claimant was guarding St. Andrews Church with another guard called Antony Odongo and when the worshippers came out of the Church service, they found some vehicles vandalized and claimant and his colleague were surcharged Kshs.6,600 each. That again on 14.4.2013 a water pump went missing while under claimant's watch and he admitted in writing on 18.7.2013 that the pump was handed over to him but he could not explain how it disappeared. That before then the claimant had been warned for failing to open the gate for the client at 7.45 a.m.

13. Rw1 further testified that due to the claimant's lapses, he was referred for fresh training vide the letter dated 29.8.2012. That the reasons for the said measure was taken due to the claimant's late reporting from leave and the warning letters which he had previously been served. He however stated that the claimant was dismissed on the basis of the report dated 1.7.2014 by the Branch Manager on the theft of metals on 29th/30th June, 2014, which showed that the person found with the stolen metals positively identified him.

14. Rw1 contended that the dismissal of the claimant was proper because when he was called to the office and shown the said report of him aiding the theft he never disputed the same. Rw1 further contended that the respondent's Senior HR Manager Mr. Ochuku and the Internal Investigator Mr. Kirui explained the offence to the claimant. That thereafter a decision to dismiss him was reached on 3.7.2014 and a dismissal letter was served on the claimant and terminal dues totaling to Kshs.128,928 were paid by him on 13.8.2014.

15. On cross examination, Rw1 contended that the reason for dismissing the claimant was that he was implicated in the aiding of theft of client's property. He however admitted that he had no investigations report of the alleged theft and the claimant was never charged with the said criminal offence. He further admitted that he was not present when the claimant was explained the reason for his intended dismissal and shown the report on the theft of the client's metals.

16. Rw1 further admitted that there was no investigations report on the alleged vehicle vandalism that led to the surcharging of the Kshs.6, 600 from the claimant. Rw1 however maintained that the claimant admitted that a client's water pump disappeared after it was handed over to him. He further contended that after the refresher training in 2012, the claimant's performance deteriorated. That considering the allegation made against the claimant, the respondent found him guilty of gross negligence and dismissed him.

17. Rw1 also contended that the claimant collected the cheque for his dues totaling to Kshs.26,937 on 13.8.2014 signed on the copy of the payment Register and he has since not disputed the signature. Rw1 however admitted that the claimant never signed on the schedule of calculation of the said dues.

Analysis and Determination

18. There is no dispute from the evidence presented that the claimant was employed by the respondent from 1995 to 3.7.2014 when he was summarily dismissed. The issues for determination are:-

- (a) Whether the dismissal was unfair and unlawful.
- (b) Whether the reliefs sought should be granted.

Unfair and unlawful dismissal

19. Under section 45(2) of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that it is grounded on a valid and fair reason and that it was done after following a fair procedure. A valid and fair procedure is one that relates to the employee's conduct, capacity or compatibility or based on the employer's operational requirements. A fair procedure on the other hand is one that accords to equity and justice and it includes affording the employee a hearing

before termination, right of appeal, payment of terminal dues and issuance of a certificate of service.

Reason for termination

20. The reason cited for the summary dismissal was that the claimant colluded with a suspect to steal some metal bars belonging to client, Dinesh Construction at Unga House Westlands where he was assigned duty to guard. That the suspect was arrested by the client's foreman and taken back to the site where he identified the claimant as the person who gave him the materials.

21. The claimant denied the offence stated in his dismissal letter and contended that the offence was framed to dismiss him for demanding his salary arrears for the months he was away on sick off after an accident which rendered him immobile. Under section 43 of the Employment Act, the burden of proving the reason for termination lies with the employer. In this case, the respondent never called the clients foreman who allegedly arrested and brought the thief and the metals to the site to identify the claimant. Likewise, the thief who allegedly identified the claimant was not called to testify herein and the evidence that the two had corresponded by phone before was not produced in court. Finally, the Alarm Crew that was mentioned by the claimant in his pleadings and evidence as the ones who brought the metal thief to the site to identify the claimant and not the foreman also never testified.

22. However, the foregoing lapses in the defence evidence notwithstanding, I find that the claimant has admitted in his evidence that the person found with the stolen metals identified him by name as the person who gave him the metals. In my view the said evidence coupled with the claimant's history of misconduct entitled the respondent to believe that the claimant was guilty of colluding with the suspected thieves to steal from the client he was guarding.

Procedure followed

23. The burden of proving that a fair procedure was followed lies with the respondent. Under section 41 of the Act, before dismissing his employee on account of misconduct, poor performance or physical incapacity, the employer must first explain the reason to the employee in a language he understands and in the presence of another employee of his choice and thereafter accord the two a chance to air their representations for consideration before the dismissal is finally decided. In this case, the said procedure was not followed and the summary dismissal was rendered unfair and therefore unlawful within the meaning of section 45 of the Employment Act.

Reliefs

24. In view of the foregoing finding, I make a declaration that the termination of the claimant's employment was unlawful, unprocedural and unfair and under section 49 of the Employment Act, I award him one month salary in lieu of notice plus 10 months salary compensation for unfair termination. In awarding the said compensation, I have considered the claimant's long service of 18 years.

25. I further award him the salary for June 2014 being Kshs.18,342.13. I also award him gratuity for the 18 years served being $Kshs.18,342.13 \times 18/26 = 228,571$.

26. The claim for leave is dismissed for lack of evidence and particulars. The rest of the claims are dismissed also for lack of particulars and evidence.

Conclusion and Disposition

27. I have found the Respondent is dismissal of the claimant was unfair and unlawful because the procedure followed was unfair. Consequently, I enter judgment for him in the following terms:-

(a) NoticeKshs. 18,342.13

(b) Compensation.....Kshs.183,421,30

(c) Salary for June 2014.....Kshs. 18,342,13

(d) Gratuity.....Kshs,228,571.00

TotalKshs.448,676.56

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The claimant will also have costs and interest from the date hereof but the decreed sum shall be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE