



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1193 OF 2016

PETER ONYIEGO NYAMBATI CLAIMANT

v

KENYA KAZI SERVICES LIMITED RESPONDENT

JUDGMENT

1. This Cause was heard on 3 June 2019. Peter Onyiego Nyambati (Claimant) testified while Kenya Kazi Services Ltd (Respondent) opted to close its case without leading any evidence.
2. The Claimant filed his submissions on 20 June 2019 while the Respondent filed its submissions on 12 July 2019.
3. The Court has considered the pleadings, evidence and submissions.
4. Although the parties had identified 4 Issues as requiring the Court's determination, the same can be condensed into 3.

Whether the summary dismissal of the Claimant was unfair

5. In cases of *summary dismissal*, a written notice of termination of employment as envisaged by section 35(1)(c) of the Employment Act, 2007 is not required.
6. However, by dint of section 41(2) of the Act, a hearing is mandatory. The employer is expected to hear and consider any representations made by the employee.
7. The Claimant was employed by the Respondent as a security guard in 2002. He was dismissed through a letter dated 19 June 2013.
8. On the circumstances of the separation, the Claimant testified that there was no notice, no *show cause* letter or a disciplinary hearing.
9. The Respondent on the other hand contended in its submissions that the Claimant was in lawful custody from 5 May 2013 to 10 June 2013, and that when he reported to work after release from custody was directed to attend a 3 day refresher course but declined, and was thus dismissed for disobeying a lawful command by dint of sections 44(4)(b) & (c) of the Employment Act, 2007 (primary reason for dismissal was failing to obey lawful order).
10. Affording an employee in custody an opportunity to be heard is not expressly provided for in our statutes but the Courts have grappled with the question.
11. In *Lawrence Onyango Oduori v Kenya Commercial Bank Ltd* (2014) eKLR, the Court posited

The fact that an Employee is absent from work on Police arrest and detention for up to 14 days, does not give an Employer the right to dismiss the Employee without observing the procedural guarantees given under Section 41 and 45 of the Employment Act 2007. All that Section 44 of the current Employment Act states is that the specified acts, amount to gross misconduct for which summary dismissal may be justified. Summary dismissal is not dismissal on the spot, without a hearing or in the absence of the Employee. The right to be heard is never discarded.

12. However, in the present case, the principal reason for the dismissal was failure to obey a lawful command to attend a refresher course.

13. If the Claimant was afforded an opportunity to make representations before dismissal on the ground of disobeying a lawful order through the letter of 19 June 2013, the Respondent did not provide any evidence as to who, when, where and how the Claimant was heard. No

minutes were produced. Even the name(s) of the officer who heard the Claimant was not disclosed.

14. On the basis of the evidence on record, the Court finds that the summary dismissal of the Claimant was unfair.

Compensation

15. Considering that the Claimant served the Respondent for about 11 years, the Court would assess compensation equivalent to 12 months' salary (gross salary according to April 2013 pay slip was Kshs 20,184/-).

Pay in lieu of notice

16. Having concluded that the summary dismissal of the Claimant was unfair, the Court will allow the equivalent of 1 month salary in lieu of notice (basic salary was Kshs 9,529/- at time of separation).

Breach of contract/statute

Leave

17. Annual leave is at a minimum a statutory entitlement.

18. The Claimant sought Kshs 9,315/- as *pro rata* leave for 6 months up to separation.

19. The Respondent did not provide any leave records as envisaged by section 10(3) & (7) of the Employment Act, 2007 to rebut the testimony by the Claimant and the Court will allow the head of claim.

Overtime

20. The Claimant pleaded that he worked during public holidays without overtime pay, and he quantified the amount owing as Kshs 13,456/-.

21. However, the Claimant did not disclose the particulars of the public holidays worked.

22. The Court also notes that a copy of pay slip produced by the Claimant indicates that overtime worked was paid.

23. This head of claim was not proved.

Service gratuity

24. The Claimant was contributing towards the *National Social Security Fund* and therefore is not eligible for service pay pursuant to section 35(5) & (6) of the Employment Act, 2007.

25. If there was any other contractual or legal foundation to the claim for service gratuity, the same was not proved.

Certificate of Service

26. A *certificate of service* is a statutory entitlement of an employee, and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

27. The Court finds and declares that the summary dismissal of the Claimant was unfair and awards him

(a) Compensation Kshs 242,208/-

(b) Salary in lieu of notice Kshs 9,529/-

(c) Pro rata leave Kshs 9,315/-

TOTAL Kshs 261,052/-

28. Respondent to issue certificate of service within 15 days.

29. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 19th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Mr. Kamau instructed by Waruhiu, K'owade & Nganga Advocates

Court Assistant Lindsey