



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 140 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 10th July, 2019)

DICKSON ONYANGO.....1ST CLAIMANT

PATRICK INZEYI MAKABILA.....2ND CLAIMANT

VERSUS

DEFENCE FORCES CANTEEN ORGANIZATION.....RESPONDENT

JUDGMENT

1. The Claimants instituted this claim vide the Memorandum filed on 5th February 2015 challenging their dismissal from employment and failure by the Respondent to pay their terminal dues. They seek the following reliefs:

1. Joint total dues of KShs. 2,145,750.00 computed as follows:

a. Service gratuity of KShs. 714,000.00.

(KShs. 351,750.00 + KShs. 362,250.00)

b. Payment in lieu of notice of KShs. 204,000.00.

(KShs. 100,500.00 + KShs. 103,500.00)

c. Compensation for unlawful termination of KShs. 816,000.00.

(KShs. 414,000.00 + KShs. 402,000.00)

d. Unpaid salary of KShs. 340,000.00.

(KShs. 167,500.00 + KShs. 172,500.00)

e. Unpaid due annual leave

(KShs. 23,450.00 + KShs. 48,300.00)

2. Certificate of service.

3. Costs of the claim and interest thereon.

2. On 1st July 2013, the Respondent dismissed the Claimants from their employment, contrary to the Disciplinary Board's Recommendations and failed to pay the Claimants their terminal dues.

3. It is their position that they were subjected to orderly room proceedings which lacked fairness because the Disciplinary Board sat as the

witness and judge thus creating a conflict of interest which contradicted the rules of natural justice.

4. CW1 and the 1st Claimant in this case, testified that he was employed as a store man and that his salary at the time of termination was KShs. 34,000.00. It was his testimony that Boniface Mukwaya was in charge of the fuel store and the 2nd Claimant in charge of the Wine and Spirits store.

5. It was also his testimony that in June 2012 there was a deficit in fuel variance at DoD. They were heard on account of the same and the Board recommended that they pay an 1/8 of the total amount being KShs. 153,996.10, and go back to work. However, their services were terminated before they could pay the amount.

6. Upon cross examination, he testified that he was in charge of grocery but admitted that he had sold petrol albeit for just a day. He denied there being loss of 1380 litres on 27th January 2012. It was his testimony that he received fuel on 14th March 2012 from a DEFECO truck and recorded the details of the transaction including the name of the driver and insisted that there was no loss that day.

7. He also admitted to there being a loss of KShs. 4,500.00 but explained that it was due to a technical hitch and which amount was paid the next day. He did not appeal the Board's decision. He signed a discharge certificate but contended that he was only paid half of his pension benefits.

8. CW2 and the 2nd Claimant in this case testified that he was employed as a store keeper to deal with all goods that DEFECO deals with. In June 2012 while he was on leave, he was summoned back to work and informed that he was to appear before the Board.

9. It was his testimony that before he could pay the 1/8 that was required of him, the manager was dismissed. In November 2012, he went to enquire about the state of his case and learnt that he had been dismissed in October 2012. He stated that he went on unpaid suspension and maintained that he was not subjected to any disciplinary process.

10. On cross-examination, he admitted that on certain occasions he would be called upon to receive fuel. It was his testimony that fuel could shrink due to temperature. He contended that the disciplinary proceedings were incorrect and denied that he had admitted receiving fuel worth KShs. 1,500,000.00.

11. He confirmed that he had been paid KShs. 570,000.00 at the time of dismissal and signed a discharge. Upon re-examination, he stated that he signed the discharge under duress and contended that the handwriting attributed to him was not his.

12. The Respondent filed their Response on 30th March 2015 contending that in January and April 2012, the 1st and 2nd Claimants failed to account for 14,499.7 litres of petrol which came into their possession, occasioning them a loss of KShs. 1,507,971.14 and 1,597,971.14 respectively.

13. Further, on 4th February 2013, 1st Claimant deliberately failed to account for KShs. 4,500.00. As a result, the Claimants were suspended from duty and were required to show cause why they should not be dismissed from employment.

14. The Claimants were invited to appear before the Disciplinary Board, the charges leveled against them were availed to each of them, they appeared before the Board on diverse dates, given the opportunity to present their case but in the end they were found culpable and were terminated in accordance with the Respondent's Terms and Conditions of Service. On termination, the 1st and 2nd Claimants who were members of the Respondent's Retirement Scheme were paid scheme benefits of KShs. 493,877.00 and KShs. 524,629.00 respectively.

15. It is their position that the Claimants were afforded a fair hearing and that the termination was done in accordance with the provisions of the law. They urged the Court to dismiss the claim.

16. RW1, Jane Asagoli Okumu, testified that the 1st Claimant left the Respondent's employ in July 2012 after he was charged with loss of fuel. It was her position that the Claimants were heard. According to her, the 1st Claimant was paid his pension benefits and 17 days leave. She contended that the 1st Claimant was not entitled to gratuity as he was not employed on contract.

17. She further contended that the 1st Claimant was not entitled to any notice pay as his employment was not terminated unlawfully. She testified that the 2nd Claimant was paid his final pension as he had attained 50 years.

18. On cross-examination, she admitted that the Claimants were civilian employees and that their appointment letters did not indicate that they would be subjected to military proceedings. She conceded that civilians had their rules of operations and were answerable to the Managing Director. However, she denied that the Claimants had been subjected to orderly room proceedings.

19. It was her testimony that the Claimants were not supposed to sell oil. She concurred with the Claimant's testimony that the Board had resolved that they pay the loss amount and be given warning letters. However, the warning letters were not issued and 9 people were charged after an internal audit was conducted and 4 dismissed. She admitted that the Claimants were suspended for 1 month without pay, in accordance with their rules.

20. During re-examination, she testified that the 1st Claimant was pardoned for the 4,500.00 which had initially been unaccounted for but later paid by the customer.

Submissions by the Parties

21. In their submissions filed on 3rd May 2019, the Claimants reiterated the averments in their pleadings together with their testimonies and urged this Honourable Court to grant them the reliefs sought.

22. The Respondent submitted vide their written submissions filed on 22nd May 2019. They submitted that it was difficult to isolate the claims so as to ascertain the claim of each Claimant. Further, the Claimants did not give any details or basis for their claims.

23. It is their submissions that subject to section 35 (6) (a) of the Employment Act, no gratuity can be claimed as the Claimants were on pension. The Respondent further submitted that the Claimants were summarily dismissed for lawful cause pursuant to section 44 (4) of the Employment Act, hence they cannot claim for unlawful termination.

24. It is also their submission that the suspension without pay was in accordance with Clause 73 of the Respondent's Terms and Conditions. Their position is that the 1st Claimant was paid for the 17 days untaken leave and that the 2nd Claimant had taken leave at the time of the disciplinary proceedings.

25. I have examined all evidence and submissions of the Parties. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of Claimants' services.

2. Whether the Claimants were accorded due process.

3. What remedies to grant in the circumstances.

26. On the 1st issue the Claimants were dismissed from letter dated 6/11/2012 which indicated that the dismissal was with effect from 11.7.2012 for gross misconduct. The details of the gross misconduct were not indicated.

27. Before this dismissal, the Claimants had been subjected to a disciplinary hearing. The 1st Claimant Dickson Onyango who was a Store Man was heard on 13.6.2012 as per the Minutes dated 30.10.2012 Appendix 6. The charges facing the Claimant were that on 14.2.2012 he conducted himself contrary to good order and discipline and failed to account for 4500/= realized from the sale of petrol. He faced another charge that on 15th January and 14th April 2012, he lost 14,499.7 litres of super petrol worth 1,507,971.14 which could not be account for.

28. He was heard by a Panel of 6 members who recommended that he be asked to pay 1/8th of the total loss of 1,507,971.14 which is Kshs.153,996.10. He was then to be served with a warning letter.

29. However, the Managing Director decided that the Claimant should be terminated forthwith.

30. The 2nd Claimant was also subjected to a disciplinary hearing on 6.7.2012 and heard by the same Panel as per Minutes Appendix 7.

31. The charges facing him were that between 15th January and 14th April 2012, he performed his duties negligently and failed to ensure fuel was received into its tanks according to the laid down fuel receiving procedures, thoroughly check the condition and quantities received and report deficiencies noted as required of him. That this failure led to the loss of 14,499.7 litres of super fuel worth 1,507,971.14/=.

32. The Committee also recommended that the 2nd Claimant should pay 1/8 of the total loss of Kshs.1,507,971.14 which is Kshs.153,996.10 and be served with a warning letter.

33. The Managing Director however determined that the Claimant should be terminated immediately.

34. From the Minutes of the disciplinary hearing, the issue was fuel loss which Claimants explained was due to the pump over dispensing. The Disciplinary Committee also confirmed that the pump was over dispensing although in negligible quantities. It therefore follows that the fact of the pump over dispensing even in negligible quantities could have led to some fuel losses.

35. The Claimants received fuel but they did not sell it. It is not clear whether the fuel loss was at the receipt stage or sell stage given that the loss was basically over a period of 3 to 4 months when the 2 claimants were not the only ones who dispensed fuel at the pump.

36. This fact leads to a doubt that the Claimants may not be the ones fully responsible for the loss. Infact the board recommended a surcharge but the Managing Director reversed this decision. It is my finding that there were no valid reasons for dismissal of the Claimants though they were subjected to due process.

37. In the circumstances, I find the decision to dismiss the Claimants harsh and unjustified and I convert it to a normal termination of employment.

38. In terms of remedies, I award the Claimants as follows:-

1. 1 months salary in lieu of notice

- 1st Claimant = 33,500/=

- 2nd Claimant = 34,500/=

2. Unpaid annual leave

- 1st Claimant = 23,450/= as prayed

- 2nd Claimant = 48,300/= as prayed

3. Compensation for unjustified dismissal = 9 months' salary

- 1st Claimant = 9 x 33,500/= 301,500/=

- 2nd Claimant = 9 x 34,500/= 310,500/=

TOTALS

- 1st Claimant = 358,450/=

- 2nd Claimant = 393,400/=

4. Issuance of certificate of serviced

5. Claim for Gratuity not payable as the Claimants were members of a pension scheme.

6. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 10th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Dola for the Claimants – Present

Amuliota holding brief for Keyonzo for Respondent – Present