



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 376 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

CHARLES GICHIA BORO.....1ST CLAIMANT

JONES KIMUYU NGUNGAH.....2ND CLAIMANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

JUDGMENT

The Claimants herein were both employees of the Respondent. The 1st Claimant (Charles Boro Gichia) employed on 4th February, 1991 in the position of City Askari. The 2nd Claimant (Jones Kimuyu Ngungah) was employed on 25th June, 1987 to the position of Watchman at the Respondent's City Inspectorate Department.

The Claimants contend that they worked for the Respondent diligently and to its satisfaction until 20th May 2013 when a misunderstanding ensued which resulted to their suspension along with six other colleagues who are not parties to this suit.

The Claimants contend that the Respondent subsequently wrongfully dismissed the Claimants vide letters dated 2nd September 2013 citing the reason for their dismissal as gross misconduct.

The Claimants further contend that their dismissal was wrongful as there was no gross misconduct on their part as alleged. It was as a result of the dismissals that the Claimants filed the instant claim seeking the following:

- 1) Reinstatement of the Claimants to their former positions prior to their dismissal.

IN THE ALTERNATIVE

- 2) General Damages for wrongful Dismissal
- 3) Terminal dues as at the date of dismissal
- 4) Costs of this suit
- 5) Interest on (2), (3) and (4) above.

The Respondent admits having engaged the Claimants herein and further state that it placed the Claimants on suspension on account of gross misconduct following an event where the Claimants were captured in the electronic media (K24) beating, mishandling and soliciting bribes from members of public on 20th May, 2013.

The Respondent further contends that it followed the law in dismissing the Claimants and as such they are not entitled to the reliefs sought in their Memorandum of Claim.

The Respondent urged this court to dismiss the instant Claim with costs.

On 17th July, 2018 when the cause was called for hearing there was no appearance for the Respondent, despite proper service having been effected and an affidavit of service filed to that effect. Ms. Kithinji was present on behalf of the Claimants and the cause therefore proceeded for hearing ex-parte with both Claimants giving evidence.

Claimants' Evidence

CW1 CHARLES GICHIA BORO, stated in evidence that he was employed by the Respondent as a County Askari from 1991 to 23rd July, 2013 when his services were terminated.

He testified that the reasons stated for his termination are not valid as he is not guilty of the accusations levelled against him. He further testified that he was never called to give any evidence on what transpired on the said day.

CW1 contends that his dismissal was unfair as no hearing was conducted prior to his termination and further that no warning was issued to him to that effect.

CW1 further stated that his last salary prior to termination was Kshs.38,000 per month. He further testified that he was not paid any terminal dues at the time of separation.

CW1 urged the Court to allow the Claim as drawn.

CW2, JONES KIMUYU NGUNGAH, testified that he was employed by the Respondent from 29th July 1987 to 23rd July, 2013 when he was suspended from duty and was subsequently terminated on 2nd September 2013.

He contends that he was not accorded any hearing prior to his dismissal and was not paid any dues at the time of separation. CW2 stated that his last salary was Kshs.42,000 only.

CW2 urged this Court to allow the Claim as drawn.

The Claimants thereafter put in their written submissions to the Claim. The Respondent on the other hand despite seeking leave to file its submissions failed to file the same.

Submissions

It is submitted on behalf of the Claimants that the termination of their employment was unlawful, wrongful and unfair as it was done contrary to the provisions of Sections 41, 42, 43 (1), 45 and 47 of the Employment Act, 2007.

The Claimants further submitted that they are entitled to the following terminal dues and/or reliefs:

- i. Terminal Notice- the Claimants' submitted that they are entitled to terminal notice by virtue of the provisions of Sections 35 (1) (c) and 36 of the Employment Act
- ii. Unpaid salary for the period both Claimants were under suspension (months of July, August and September)
- iii. 12 months compensation for wrongful dismissal for both Claimants
- iv. Costs and interest of the Claim.

The Claimants for emphasis cited and relied on the Authority of *Paul Muli Katuta Vs Nakumatt Holdings Limited (2018) eKLR*.

Analysis and Determination

There is no dispute that the Claimants were employed by the Respondent with the 1st Claimant employed as a City Askari on 26th March, 1991 and the 2nd Claimant employed as a City Watchman on 25th June 1987 as is evident from their letters of appointment. There is further no dispute that the two Claimants were suspended on 23rd July 2013 and later dismissed on 2nd September 2013 as reflected in

the letters of suspension.

The issues for determination are:

1. Whether the Claimants' termination was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

Under Section 45 (2) of the Employment Act termination of an employee's contract of service is unfair in the event the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employees conduct, capacity and compatibility and that in arriving at the decision to terminate the services of such an employee fair procedure was followed.

Reason for termination

The reason cited for the termination of the Claimants herein was that they were captured in electronic media (K24) beating, manhandling and soliciting bribes from members of public on 20th May, 2013. The Respondent further contends that the clips captured the Claimants clearly and that they did not dispute their identities in the clips.

It was on that basis that the Respondent terminated the services of the Claimants as in its view the Claimants' conduct amounted to gross misconduct.

In view of the foregoing I find that the Respondent had a valid reason for terminating the Claimants' services as the claimants admitted to being caught on camera by K24 television channel.

Was procedure followed?

Section 41 of the Employment Act requires that prior to the termination of an employee's services for misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of another employee or shop floor the reasons for his/her termination is being contemplated and that they be allowed a fair hearing.

In the instant case, I opine that the Claimants' termination was unfair as no evidence was adduced by the respondent to prove that due process was adhered to as provided by Section 41 of the Employment Act, 2007. Despite the fact that the Respondent contends having accorded the Claimants a hearing no evidence was tendered to support this assertion in terms of minutes of a disciplinary hearing or other valid evidence as required by law.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In Francis Mbugua Boro –Vs- **Smartchip Dynamics Ltd (2017) eKLR** it was held:

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

Similarly, in the case of **David Njoroge Muiru -vs- Elsa Limited (2014) eKLR** it was held that:

“It is obvious that the claimant was not given notice of misconduct or a hearing before the termination. The court finds that the dismissal was unfair under Section 41 of the Employment Act 2007. The reason for removal has not been shown to have been established to exist at the time of termination.”

In the list of documents filed by the respondent and in the witness statement, it is stated that the claimants were subjected to a disciplinary hearing and reference is made to minutes of the Human Resource Management Advisory Committee dated 22nd June 2013. However the witness TOM NYATIKA who prepared and signed the witness statement did not testify as the respondent was absent during the hearing. The respondent thus did not prove that the claimants were subjected to a fair hearing as envisaged under Section 41 of the Act. The letters of dismissal do not refer to the hearing or the reason for termination. I thus find on the evidence before the court that the dismissals were procedurally unfair.

Remedies

1. Having found that the Claimants' termination was unfair, the claimants are entitled to one month's salary in lieu of notice as follows –

- a). 1st Claimant (Charles Boro Gichia)..... Kshs.37,115
- b). 2nd Claimant (Jones Kimuyu Ngungah)..... Kshs.34,165

2. Salary during suspension

Under this head the Claimants both in evidence and submissions averred that during the period of Suspension the Respondent did not pay their dues.

The letter dated 23rd July 2013 (Exhibit 2) in the Claimants' Memorandum of Claim clearly reads as follows:

“Meanwhile it has been decided that you be and are hereby suspended from the discharge of your official duties with immediate effect. During the said period of suspension you shall receive no salary. This is in accordance with clause 30 (a) of the Collective Bargaining Agreement which provides for suspension without pay to an officer who has been found guilty of an act or omission incompatible with the due and faithful discharge of his duties.”

The claimants were on suspension from 23rd July 2013 to 2nd September 2013 when they were dismissed from service.

Having found the dismissals unfair, they are entitled to salary withheld during suspension as follows –

- a)... 1st Claimant (Charles Boro Gichia).....Kshs.51,390
- b).. 2nd Claimant (Jones Kimuyu Ngungah)..... Kshs.47,305.40

The same is salary for 7 days of July and salary for August and 3 days of September 2013.

3. The claimants prayed for general damages for wrongful dismissal. Having found that the Claimants’ termination was unfair and taking into consideration the length of Service offered by the Claimants as well as the reasons for dismissal, I am of the view that compensation equivalent to 10 months’ salary is reasonable in the circumstances.

In conclusion, Judgment may be entered as follows:

1. One month’s salary in lieu of notice

- a) 1st Claimant (Charles Boro Gichia).....Kshs.37,115
- b) 2nd Claimant (Jones Kimuyu Ngungah).....Kshs.34,165

2. Withheld salary

- a) 1st Claimant (Charles Boro Gichia)..... Kshs.51,390
- b) 2nd Claimant (Jones Kimuyu Ngungah).....Kshs.47,305.40

3 General damages for wrongful dismissal (10 months’ salary)

- a) 1st Claimant (Charles Boro Gichia)..... Kshs.371,150
- b) 2nd Claimant (Jones Kimuyu Ngungah)..... Kshs.341,650

Total

- a) 1st Claimant (Charles Boro Gichia)..... Kshs.459,655.00**
- b) 2nd Claimant (Jones Kimuyu Ngungah)..... Kshs. 423,120.40**

The Claimants are also entitled to costs of the suit and interest.

The decretal sum shall attract interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE