



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1812 OF 2015

DARIUS MBELA WAMBUA.....CLAIMANT

- VERSUS -

BOB MORGAN SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2019)

JUDGMENT

The claimant filed the statement of claim on 12.10.2015 in person. He prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's employment was unfair.
- b. Payment of Kshs.508, 231.20 plus interest thereon (being Kshs. 330, 820.80 from the date of suspension to the date of termination 13, 784.20 x 24 months; NSSF from the date of suspension 300.00 x 24 making Kshs.4, 800.00; NHIF payment from the date of suspension Kshs. 7, 200.00; compensation for unfair termination Kshs. 165, 410.00.)
- c. Delivery of a certificate of service per section 51 of the Employment Act, 2007.
- d. Costs of the suit plus interest thereon.
- e. Any other relief as the Court would deem just and expedient to grant.

The respondent filed the response to the claim on 08.12.2017 through Wainaina Ireri & Company Advocates. The respondent pleaded that the certificate of service was available to be collected; the claimant was not entitled to full salary during the period of suspension; NSSF and NHIF were regulated by statute; and the claimant terminated his own employment and therefore was not entitled to the compensation. The respondent prayed that the claimant's suit be dismissed with costs.

The respondent employed the claimant as a security guard and the claimant was arrested together with other guards and charged in criminal case No. 410 of 2012 at the Principal Magistrate's Court at Makueni. They were charged with the offences of stealing contrary to section 275 of the Penal Code and in alternative failing to prevent the commission or completion of a felony contrary to section 392 of the Penal Code. The particulars were that on 11.10.2012 at Wote Location Makueni Gineries Limited jointly with two others not before the Court stole a motorcycle make TVS Registration No. KMCS 046G valued at Kshs. 90, 000.00 being the property of Daniel Mwololo Kisengese. The motorcycle was stolen from the premises the claimant had been deployed to guard.

The claimant was acquitted of the 1st count and convicted of the 2nd count in a judgment delivered on 09.01.2014.

The respondent lifted the suspension by the letter dated 25.10.2013 effective the date the claimant would report on duty and on condition that the claimant forfeit salary and benefits for the period the claimant had been on suspension.

By the letter dated 30.09.2014 the respondent wrote to the claimant that his decline of re-engagement had been accepted subject to his terms and conditions of service. The respondent by that letter asked the claimant to surrender any property in his possession.

To answer the 1st issue for determination the Court returns that the claimant having been convicted on the 2nd charge and having declined to accept the conditions of the lifting of suspension, the termination was not unfair and the claimant is not entitled to payment during the period of suspension. The Court finds that the terms of the lifting of the suspension were proportionate in view of the claimant's subsequent

conviction. The court follows the holding in Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, in which the court stated thus, “**The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.**”

In the present case the claimant was not exculpated on the 2nd count and he declined the terms of the lifting of the suspension. He is therefore not entitled as prayed for. The prayers as based on the suspension, terms of lifting of the suspension, and the alleged unfair termination will therefore fail.

To answer the 2nd **issue** for determination the Court returns that the claimant is entitled to a certificate of service and in that consideration each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the parties with orders:

- a. Each party to bear own costs of the suit.
- b. The respondent to deliver the claimant’s certificate of service in 7 days.

Signed, dated and delivered in court at **Nairobi** this **Friday 5th July, 2019**.

BYRAM ONGAYA

JUDGE