



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1625 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th September 2019)

BENSON KITAI MUSYOKA.....CLAIMANT

VERSUS

KENYA UTALII COLLEGERESPONDENT

JUDGMENT

1. The Claimant filed a statement of Claim on 15th August 2018. He avers that the dismissal from employment was actuated by malice and was clear of the breach of the Respondent's duty. He avers that despite his acquittal in Criminal Case No. 3516 of 2013 where he was charged with the offence of stealing, his suspension was never lifted and that he was never notified of disciplinary hearing prior to his dismissal.

2. He seeks the following prayers:-

1. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.

2. A declaration that the Claimant was entitled to a Contract of service.

3. The sum of Kshs. 1,601,965.50

4. Costs of the suit

5. Interest on the amount awarded at Court rates.

3. In response to the Claim, the Respondent filed its Memorandum on 11th July 2018. It denies the averments in the Statement of Claim and avers that the Claimant defrauded it of its property while providing catering services at the Judiciary Training Institute (JTI). It avers that the Claimant's suspension and eventual separation from employment was justified and lawful.

Claimant's Case

4. The Claimant, Cw1, adopted his Witness Statement filed on 15th August 2016 as his evidence in chief. He stated that he was employed by the Respondent as Cook -1 on 1st October 2004 and confirmed to employment with effect from 1st May 2011.

5. He stated that on 26th July 2013 he was to provide outside catering to JTI and that during the training he realised that the expected guest list was 60 however only 40 guests had arrived. Therefore, together with his colleagues they decided to return the excess food to the Respondent's hotel and while leaving it, he was arrested by the Respondent's Chief Security Officer, Peter Nyagah Ndwiga. He testified that he was arrested and taken to Muthaiga Police Station and on 29th July 2013, he was charged with the offence of stealing.

6. He stated that on 30th July 2013, he was issued with a suspension letter by his colleague, which provided that he was to earn half of his basic salary. He stated that he was acquitted but his suspension was never lifted. Further, he was denied entry to the Respondent's premises by the security officers who informed him that he was no longer the Respondent's employee.

7. In cross-examination, the Claimant testified that he never gave his brother any items in a paper bag and that the driver of the van that they

were in on that day was also arrested. He testified that he was suspended after the incident and was paid half-salary but did not know what commuter allowance was for. He testified that he never received any letter informing him of the stoppage of the half-salary.

8. He contended that he was initially employed on short-term basis during which time he was paid gratuity. He averred that though his terms of employment were converted to permanent and pensionable, he was entitled to gratuity. He avers that he is seeking gratuity based on his last salary. He averred that he was paid gratuity in October 2010 as he transitioned to permanent staff.

9. He testified that his criminal case was in Court for 2 years but the Prosecution was never ready to proceed for lack of witnesses and was later acquitted. He stated that he did not know if the Respondent carried out any internal investigations in respect of his case.

Respondent's Case

10. Peter Ndwiga the Respondent's Security Officer testified as Rw1. He adopted his Witness Statement filed on 11th July 2018 as his evidence in chief. He stated that he was informed of the pilferage of food stuff by the catering team assigned to JTI thus they began surveillance of the van ferrying the Claimant who was the cook-in-charge and that at Lamada Lane the van stopped and a stranger, who he later realised was the Claimant's brother was handed a paper bag with some items. He stated that he arrested the Claimant and the driver of the van who were later charged in Court.

11. In cross-examination, RW1 testified that he arrested the Claimant on 26th July 2013 and that they had trailed the van after receiving information that the van was being used to pilferage items from the Respondent. He testified that the Claimant was arrested and that the criminal case was in court for 2 years but it never proceeded. It was his case that the Claimant was not acquitted for lack of evidence.

12. Moses Onyango Nyagudi the Respondent's Acting Human Resource Manager testified as Rw2. He adopted his Witness Statement filed on 11th July 2018 as his evidence in chief. He stated that the Claimant was implicated in a scam aimed at defrauding the Respondent of food stuff and that the Claimant was informed of suspension of salary and that there was a further disciplinary process. He stated that the Claimant met him on 18th March 2015 and after hearing him they agreed to mutually separate given the lapse of time in the commencement and conclusion of the criminal proceedings.

13. He testified that in October 2010 the Claimant transitioned to a permanent and pensionable employee thus he was not entitled to earn a gratuity as he was in a pension scheme. He testified that the Claimant had a pending criminal case for stealing and that his salary was stopped in February 2014 when they learnt that he had absconded bail. He testified that commuter allowance is paid to facilitate attendance of duty and payment of this allowance is halted upon suspension.

14. In cross-examination, he testified that the Claimant's suspension letter indicated that he was paid half-salary in February 2014 after police informed the Respondent that the Claimant had jumped bail. He however testified that there was no document showing that he had jumped bail. He testified that the Claimant was terminated for absconding court. He testified that she did not carry out any investigations and that he did not record the minutes of the meetings held with the Claimant.

15. In re-examination, he stated that investigations were carried out by their security officer.

Claimant's submissions

16. In his written submissions, the Claimant averred that there was never any termination letter issued to him and that he was acquitted in Criminal Case No. 3516 of 2017. He relied on the decision in **David Gichana Omuya v Mombasa Maize Millers Ltd [2014] eKLR** and submitted that the Respondent did not have any valid reason for dismissing him.

17. He submitted that the Respondent must prove that the dismissal was procedurally fair however the Claimant was never accorded a disciplinary hearing. It was his submission that the Respondent does not dispute that it did not carry out any disciplinary hearing and argues that the termination was by mutual consent.

18. He submitted that the stoppage of his outstanding salary was malicious thus he is entitled to payment of outstanding salary for the period between February 2014 to April 2015 for the sum of Kshs. 395,182.50. He argued that he is entitled to commuter allowance.

19. In respect of gratuity, he submitted that he is entitled to gratuity as provided under clause 6 of the Renewal Contract. Further, the Respondent never rescinded any of the letters issued to him which provided for payment of gratuity and that the argument that he was no longer entitled to gratuity as he was a permanent and pensionable employee has no basis.

20. He submitted that he is entitled to 12 months salary compensation for unfair termination as a result of the Respondent's action and is further entitled to costs of the suit. In conclusion, he submitted that he had discharged the burden required of him thus he is entitled to the prayers sought in the Statement of Claim.

Respondent's submissions

21. The Respondent submitted that the Respondent had a justifiable reason to place the Claimant on suspension leading to separation from the Company. It submitted that the Claimant was neither dismissed nor terminated and that as stated in RW2's testimony the separation between the parties was mutual.

22. The Respondent submitted that the Claimant is not entitled to outstanding salary comprising salary and house allowance for reason that

he was undergoing a criminal process and as such he is not entitled to the claim as provided under Regulation G. 32 of the Public Service Code of Regulations. It submitted that upon suspension the Claimant never reported for duty thus he is not entitled to commuter allowance.

23. In respect of gratuity, it submitted that the letter appointing the Claimant on permanent and pensionable terms does not provide for gratuity. Further, gratuity is only paid to contractual staff and not those on permanent an pensionable terms. It relied on the cases of **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another [2001] eKLR** and **Paul Billy Nyagilo v East African Portland & Cement Limited [2018] eKLR** and submitted that the role of courts is to interpret contracts between the parties and not to rewrite them.

24. It submitted that the 12 months salary compensation is only payable under section 49 (1) of the Employment Act and is discretionary. Further, given that the circumstances leading to the separation the Court should disallow this prayer.

25. It submitted that the claimant submitted various fixed terms contracts thus the prayer for a declaration that he was entitled to contract of service is moot. It further submitted that the Claimant has failed to prove that he is entitled to the reliefs sought on a balance of probabilities hence this the Court should disallow the claim for costs and interests as prayed. In conclusion, it urged the Court to dismiss the claim.

26. I have examined all the evidence and submissions of both Parties. From the evidence before me the issues for determination are as follows:-

1. Whether there were valid reasons to terminate the Claimant from his services.

2. Whether due process was followed before Claimant was terminated.

3. Whether Claimant is entitled to remedies sought.

27. On the first issue, the Claimant was suspended from duty vide a letter dated 26th July 2013 with immediate effect on allegations of theft. The suspension was dependent upon completion of investigations.

28. The Claimant was thereafter charged in Court with the offence of stealing.

29. On 16/3/2015, he was acquitted under Section 202 of Civil Procedure Code. There was no communication from the Respondent as to the findings of their investigations on the theft if at all as had been indicated in the suspension letter. There was also no further communication from the Respondent that they had completed their investigations and what the position of the Claimant who stood suspended was.

30. The Respondent had indicated in the suspension letter that they would pay ½ Claimant's salary during suspension but they stopped paying this half salary without recourse to any disciplinary hearing.

31. From the communication above, the Respondents did not indicate reasons for stoppage of salary midway thus technically constructively terminating the Claimant's services.

32. Section 43 of Employment Act envisages that the employer can terminate services of an employee after establishing they have valid reasons. In this case, the valid reasons were not established, as the investigations were never completed. I therefore find that the Respondents have not established that they had valid reasons to the terminate the services of the Claimant.

33. On the 2nd issue, the Claimant was also terminated without due process. No disciplinary hearing was ever conducted. Section 41 of Employment Act 2007 envisages a full disciplinary hearing after giving an employee notice of the same and allowing the employee to cross-examine witnesses called against him and also allowing him to call his witnesses to rebut the case against him before a competent and fair tribunal or panel. This was never done in respect of the Claimant and I therefore find that he was terminated without any disciplinary hearing.

34. I find the Claimant was dismissed unfair and unjustly as provided under Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

35. In view of the above finding, I find for the Claimant and I award him as follows:-

1. Back pay with effect from the date of suspension to dismissal i.e from 26th July 2013 to 3rd March 2014 = 26,347/= x 7 = 184,429/= .

2. 12 months salary as compensation for unlawful termination = 12 x 26,347/= 316,164/=

TOTAL = 500,593/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 26th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbeche holding brief Bonyo for Respondent – Present

Andiwo holding brief Gomba for Claimant – Present