



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1158 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 31st October, 2019)

PETERSON KARIANJAH.....1ST CLAIMANT

PAUL NDAI MAINA.....2ND CLAIMANT

-VERSUS-

NAIROBI CITY COUNTY.....RESPONDENT

JUDGEMENT

1. The Claimants herein were employed by the Respondent herein with the 1st Claimant (Peterson Karianjahi) employed in the year 1996 in the position of City Guard and the 2nd Claimant (Paul Ndai Maina) employed in the year 1997 to the position of Watchman at the Respondent's City Inspectorate Department.

2. The Claimants contend that they worked for the Respondent diligently and to its satisfaction until 20th May, 2013 when a misunderstanding captured by K24 TV Station resulted to their suspension along with six other colleagues though not parties to the suit.

3. The Claimants contend that the Respondent subsequently unfairly suspended and thereafter summarily dismissed them citing the reason for their dismissal as gross misconduct vide the Respondent's letter dated 2nd September, 2013.

4. The Claimants further contend that their dismissal was wrongful as there was no gross misconduct on their part as alleged. It was on that basis that the Claimants filed the instant Claim seeking the following:-

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

IN THE ALTERNATIVE

b) General Damages for wrongful Dismissal

c) Terminal dues as at the date of dismissal

d) Costs of this suit

Interest on (b), (c) and (d) above.

5. The Respondent in its Response to the Memorandum of Claim filed in Court on 12th March, 2019, admits having engaged the Claimants herein and further states that the dismissal of the Claimants was both procedurally and substantively fair.

6. The Respondent further contended that the Claimants were fairly suspended and that they were properly dismissed for gross misconduct following an event where the Claimants were captured in the electronic media (K24) beating, mishandling and soliciting bribes from the members of public on 20th May, 2013.

7. The Respondent further averred that it did invite the Claimants for a meeting held on 22/7/2013 and that during the meeting it did share video footage of the Claimants harassing members of public and the two were given an opportunity to defend themselves. The Claimants did

deny soliciting and receiving money in order to release suspects.

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

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

10. The matter proceeded for hearing on 10/7/2019 with both Claimants testifying on their own behalf and the Respondent calling one witness to testify on its behalf.

Evidence

11. CW1, Peterson Karianjahi testified that he was employed by the Respondent as a city guard in the year 1996. He further testified that he was suspended from employment on 23/5/2013 on allegation of a video clip which indicated that he (in the company of other employees of the Respondent) were mishandling members of public.

12. CW1 stated that he was issued with a suspension letter dated 23/5/2013 and that the allegations levelled against him were not true. He further stated that he was not accorded fair hearing as he was not subjected to any disciplinary proceedings by the Respondent.

13. CW1 further averred that he was thereafter dismissed on 2/9/2013. He further insisted that he was not served with any notice prior to his termination and his salary from 23/5/2013 to 2/9/2013 was also not paid.

14. CW1 contended that the letter of dismissal did not indicate the reason for his termination. He further contended that he has never been charged in any criminal court over the alleged misconduct as highlighted in the suspension letter.

15. CW1 stated that he did appeal against the dismissal vide the letter dated 7/10/2013 however the same was declined. He further stated that he did appeal the matter further to PSC but the appeal was equally disallowed.

16. CW1 insisted that his termination was unfair and unlawful and urged this Honourable Court to compensate him in terms of the prayers sought in the Memorandum of Claim.

17. On cross-examination, CW1 confirmed having been on duty on the night of 20/5/2013 and that he was not aware of any complaints made by the members of public on his conduct.

18. On re-examination, CW1 stated that the suspension letter did not indicate that he was unlawfully on duty on the night on 20/5/2013. He further stated that he had never been shown the alleged video clip of the alleged harassment prior to his termination.

19. CW2, Paul Ndai Maina adopted his Witness Statement filed in Court on 6th July, 2015 as his evidence in chief. In the statement, CW2 avers that he was employed by the Respondent in the year 1997 and that during the subsistence of his employment with the Respondent he did not have any disciplinary issues until 23/5/2013.

20. CW2 also confirmed having been on duty on the night of 20/5/2013 and that the allegations of mishandling and/or solicitation of bribes from members of public was not true.

21. CW2 further averred that the events of the night of 20/5/2013 was a joint operation between police officers from Central Police Station under the command of the OCS and that he acted in a most restrained manner in the circumstances.

22. CW2 further contended that his dismissal was unfair as he was not accorded a fair hearing. He urged this Honourable Court to allow his Claim as prayed.

23. On cross-examination, CW2 confirmed having been on duty on the night of 20/5/2013 and that he was allocated duties by his supervisor.

24. CW2 further confirmed that he did not hear of any complaint against him on the events of 20/5/2013.

25. On further cross-examination, CW2 stated that he was not issued with a show cause letter prior to his termination and further that he was not accorded any hearing prior to his termination.

26. On re-examination, CW2 stated that he was not taken through any disciplinary process prior to his termination. He further confirmed having not been charged in any criminal court and therefore urged the Court to allow his Claim as prayed.

27. The Respondent on the other called one witness RW1, Esther Njoki Kinyanjui, the Department Section Head Employee Relations. She adopted her witness statement dated 5/3/2019 and filed in Court on 12/3/2019 as her evidence in chief, in which she reiterated the averments made in the Respondent's response to the Memorandum of Claim.

28. She further averred that the Claimants' services were rightfully terminated following them being captured in electronic media (K24) in an expose where they were seen beating, manhandling and soliciting bribes from members of public on the night on 20/5/2013.

29. She further averred that this conduct of the Claimants amounted to gross violation of the Respondent's standing orders, service regulations as well as the laws of Kenya. A result of which the Claimants were suspended vide the letters dated 23/5/2013 and 23/7/2013 for the 1st and 2nd Claimant respectively.

30. She contended that the Human Resource Management Advisory Committee held a meeting on 22/6/2013 where it found the actions of the Claimants amounted to gross misconduct and recommended for their dismissal on account of gross misconduct vide the Respondent's termination letter dated 2/9/2013.

31. She further contended that Claimants were allowed their right to appeal which appeal was dismissed by the County Public Service Board. She therefore urged this Honourable Court to find that the Claimants termination was for a valid reason and that due process was followed.

32. RW1 further urged this Honourable Court to dismiss the instant Claim as prayed with costs to the Respondent.

33. On cross-examination RW1 stated that the Claimants were issued with Notice to Show Cause letters however, she admitted that the same were not produced as evidence in this matter.

34. She further stated that in the meeting held on 22/6/2013 the Claimants were questioned on what transpired on 20/5/2013. She also pointed out that the names of the Claimants were not included in the list of the members present for the said meeting.

35. On further cross-examination, RW1 confirmed that there were no criminal charges preferred against the Claimants herein.

Submissions by the Parties

36. It is submitted on behalf of the Claimants that their termination from employment was wrongful and unlawful as the provisions of Section 41 of the Employment Act were not adhered to as the Claimants were not accorded a fair hearing prior to their termination.

37. The Claimants further submitted that his dismissal was procedurally and substantively flawed and that the same was unfair and contrary to the provisions of **Section 43 and 45 of the Employment Act, 2007.**

38. The Claimants contended that their termination having been unfair, they are entitled to the reliefs as sought in their Memorandum of Claim and therefore urged this Honourable Court to allow the same as prayed.

39. On the issue of termination notice, the Claimants submitted that they were both dismissed on 2/9/2013 without notice and that by dint of Section 35 (1) (c) and 36 of the Employment Act, 2007 they are entitled to payment of one month's salary in lieu of notice.

40. With regards to payment of unpaid salary the Claimants contended that they are entitled to the same having suspended and subsequently dismissed without pay. They further submitted that they are entitled to unpaid salary during the period of their suspension and subsequent termination of their employment.

41. On the issue of General damages, the Claimants submitted that they are entitled to maximum compensation of 12 months' compensation for wrongful/unfair dismissal as provided under Section 49 of the Employment Act. To buttress this argument the Claimants relied on the Authority of **Paul Muli Katuta Vs Nakumatt Holdings Limited (2018) eKLR** where it was held:-

“Having found the termination unfair, I award the Claimant 12 months' salary as compensation taking into account his length of service and the manner in which his employment was terminated...”

42. In conclusion, the Claimants urged this Honourable Court to allow their Claim as prayed.

Respondent's Submissions

43. The Respondent on the other hand submitted that the Claimants termination was valid both procedurally and substantively. The Respondent contended that the reason cited for their termination was that they were captured in electronic media (K24) beating, manhandling and soliciting for bribes from members of public on the night of 20/5/2013.

44. The Respondent further contended that the clips captured the Claimants clearly and that they did not dispute their identities in the clips. It is on this basis that the Respondent averred that it had a valid reason to terminate the Claimants services. The Respondent urged this Honourable Court to refer to the findings in the case of **Charles Gichia Boro & Another Vs Nairobi City County (2019) eKLR** for emphasis.

45. On the issue of procedural fairness the Respondent contended that it did comply with the provisions of Section 41 of the Employment Act and that it did accord the Claimants a hearing as they were both invited for a disciplinary hearing on 22/7/2013 as evidenced by the minutes produced in evidence by the Respondent.

46. The Respondent further contended that even if the Claimants did not attend to the disciplinary hearing as they alleged, the respondent contended failure by the Claimants to put in responses to the notice to show cause amounted to a waiver of their right to be heard. For emphasis the Respondent cited the cases of **R Vs Immigration Appeal Tribunal ex-parte Jones (1988) 1 WLR 477, 481** and **Kenya Revenue Authority Vs Menginya Salim Murgani (2009) eKLR.**

47. The Respondent further submitted that the Claimants are not entitled to the reliefs as sought in their Memorandum of Claim. Specifically it is submitted that the Claimants are not entitled to an order of reinstatement as 3 years have since lapsed from the time the Claimants were terminated. The Respondent relied on the provisions of Section 12 (3) (vii) of the Employment and Labour Relations Court Act.

48. The Respondent further submitted that General damages for wrongful dismissal cannot be awarded to the Claimants having shown that it had a valid reason to terminate the Claimants services and that procedure was followed.

49. The Respondent contends that the Claimants are not entitled to payment of salary while on suspension as their suspension letter clearly indicated ***that during suspension, the officer shall not be entitled to receive any pay...***

50. The Respondent further contended that it is entitled to costs and sought to rely on the case of **Attorney General Vs Halal Meat Products Limited (2016) eKLR** for emphasis.

51. In conclusion, the Respondent urged this Honourable Court to uphold the termination of the Claimants by the Respondent thus dismissing the Claim as drawn.

52. I have examined all the evidence and submissions of both Parties. The Claimants were initially suspended on 23/5/2013 as per the letters of even date, which indicates that they were captured in the electronic media (K24) bearing, mishandling and soliciting for bribes from members of the public on 20/5/2013.

53. They were expected to respond to this accusation within 7 days. It is not clear whether the Claimants responded to issues raised in the show cause letters or not as no response is annexed to these proceedings.

54. Vide a letter dated 2nd September 2013, the Claimants were dismissed from service with effect from 20/5/2013 on account of gross misconduct. The details or reasons attached to the gross misconduct are also not stated.

55. The Claimants appealed this decision but the appeal was also dismissed.

56. The Respondent have stated that they subjected the Claimants to due process before the dismissal and sought to rely on the minutes of the Human Resource Management Advisory Committee (HRMAC) held on 22/6/2013. These minutes however do not indicate that the Claimants were present during the meeting. There is no letter also inviting the Claimants to the said meeting.

57. What these omissions point out is that the Claimants were not informed of the reasons for their dismissal for gross misconduct.

58. Section 43 of Employment Act states as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

59. It is also apparent that the Claimants were not subjected to any disciplinary process as envisioned under Section 41 of Employment Act 2007 which also states as follows:-

1) "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

60. In view of these omissions, it is my finding that the Claimants' termination was unfair and unjustified as provided for 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”.

61. Given the unfair termination, I find for the Claimants accordingly and I award them as follows:-

1st Claimant – Peterson Karianjahi

1. 1 months' salary in lieu of notice = 33,040/=

2. Unpaid salary for 23-5-2013

to 2.9.2013 = 3 months 7 days = 106,829/=

3. 8 months' salary as compensation

for the unfair termination = $33,040 \times 8 = 264,320/=$

TOTAL = 404,189/=

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

2ND Claimant – Paul Ndai Maina

1. 1 months' salary in lieu of notice = 31,900/=

2. Unpaid salary for 23-5-2013

to 2.9.2013 = 3 months 7 days = 103,143=

3. 8 months' salary as compensation

for the unfair termination = $8 \times 31,900 = 255,200/=$

TOTAL = 390,243/=

All less statutory deductions

4. *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 31st day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Githinji for the Claimants – Present

Mokua for Respondent – Present