



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 288 OF 2014

AUGUSTUS MASYUKI MBALUKA.....CLAIMANT

VS

KENYA KAZI SECURITY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Augustus Masyuki Mbaluka and Kenya Kazi Security Limited. Mbaluka's claim is by way of a Memorandum of Claim dated 24th June 2014 and amended on 15th September 2015. The Respondent filed a Memorandum of Defence on 29th September 2014.

2. At the trial, the Claimant testified on his own behalf and the Respondent called Dalmas Baraka Mataza. Only the Respondent filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 28th February 2001. He was confirmed in his appointment on 19th January 2002 and on 31st January 2003, he was appointed as a Dog Handler.

4. On 11th September 2013, the Claimant suffered an injury as a result of an attack while at work. He claims that the Respondent did not facilitate medical treatment for him but instead terminated his employment.

5. By letter dated 12th September 2013, the Claimant was suspended from duty and on 17th September 2013, his employment was terminated. He states that his appeal by letter dated 23rd September 2013 did not elicit any response from the Respondent.

6. The Claimant's case is that the termination of his employment was unlawful and unfair. He states that the allegations contained in the letter of dismissal were never presented to him for response.

7. The Claimant tabulates his claim is as follows:

- a. Gratuity for 152 months.....565,581.36
- b. Unpaid salary for 12 days worked in September 2013.....9,676.80
- c. 1 month's salary in lieu of notice.....24,192.00
- d. Severance pay for 152 months.....2,696,632.00
- e. Costs plus interest

The Respondent's Case

8. In its Memorandum of Defence dated 26th September 2014 and filed in court on 29th September 2014, the Respondent admits that the Claimant was its employee. The Respondent states that at termination, the Claimant earned a monthly salary of Kshs. 12,003 plus a house allowance of Kshs. 1,800 and cleaning allowance of Kshs. 80.

9. The Respondent's case is that the Claimant was summarily dismissed for gross negligence in performance of duty on 10th September 2013, while assigned to guard Manuchar Yard in Changamwe, Mombasa.

10. The Respondent avers that on the material day, thugs invaded the premises that the Claimant was guarding attacked the Claimant's colleague and vandalised several vehicles, without the Claimant raising any alarm thus aiding the attackers' mission, that took over 1 hour until the Respondent's team on routine patrol arrived at the site.

11. Regarding the disciplinary procedure prior to the dismissal, the Respondent states that on 12th September 2013, the Claimant was suspended from duty and notified of the charges against him. He was advised to attend a disciplinary meeting on 17th September 2013.

12. The Respondent states that the Claimant attended the disciplinary hearing on 17th September 2013, where he was accorded an opportunity to defend himself against the charges of underperformance, negligent performance of duty and insubordination.

13. The Respondent avers that the Claimant failed to exonerate himself and failed to show any remorse. The Respondent therefore made a decision to summarily dismiss the Claimant.

14. The Respondent further avers that on 13th May 2014, it received a letter dated 10th May 2014, from the Claimant's Union appealing for reinstatement on behalf of the Claimant. Attached to the letter from the Union was the Claimant's own letter of appeal dated 23rd September 2013, which the Respondent claims not have seen before.

15. The Respondent states that although time for appeal had lapsed, it nevertheless convened an appeal hearing which the Union and the Claimant attended. The Respondent avers that during the hearing, the Claimant admitted the charges upon which he was told to reduce his admission in writing for the Respondent's consideration but he declined.

16. The Respondent goes on to state that it offered to pay the Claimant for the days worked but the Claimant refused to accept payment. The Respondent however contests the factor of tabulation of pay for days worked presented by the Claimant. The Respondent maintains that the Claimant has refused to clear to pave way for processing of his benefits, if any.

17. The Respondent adds that it caused the Claimant to be treated for the injuries sustained as required under the law.

Findings and Determination

18. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

19. The Claimant was dismissed by letter dated 17th September 2013 stating thus:

“Dear Augustus,

RE: TERMINATION OF SERVICE

Reference is made to the above subject and further to today's disciplinary hearing regarding your duty performance on 10th September 2013 when and while assigned at Manuchar Yard-Changamwe.

It is on record that on that particular day, some thugs invaded the yard, captured your colleague and for around one full hour, managed to vandalize five vehicles parked within the yard all without your knowledge. Further investigations have revealed that you un procedurally assigned your colleague to come and press the Guard Monitor switch situated at your site thus leaving his site unguarded. It is also your testimony that at some point, you failed to unleash the dog even when you were under attack regardless of the fact that your colleagues were under attack. Your supposed failure to notice, or use the supplied equipment or even summon assistance through the alarm system left the committee believing that you were either not alert or you intentionally failed to respond as per company expectation.

Although investigations are underway relating to the circumstances surrounding the whole incident, the committee has found it unacceptable that you could fail to notice activities of such magnitude occurring within a yard you are jointly assigned to guard. Your failure to respond to such intrusion in the manner expected has severely eroded the trust bestowed on you by the company and by extension, the trust bestowed on the company by the client.

As advocated to you during the said meeting, your performance (sic) in this regard, contrary to company procedure, its Regulations, and code of conduct. This is a serious contravention of your work (sic) standing orders which cannot be taken lightly. It is now clear that your duty performance is below company expectation.

Accordingly, and in accordance with the Employment Act, 2007 Section 44(4) (c, & e) the management thus hereby terminates your services with immediate effect.

You will be paid all your final dues (if any), which are subject to deduction on any outstanding bills.

Ensure you return (within fourteen days) all company property in your possession for clearance purpose for us to facilitate timely payment of your dues (if any). However, this does not preclude (as per Company procedures) your right to appeal to the Branch Manager (within seven working days) against the decision.

Yours sincerely,

(signed)

Richard M. Makori

Human Resources Officer”

20. Prior to dismissal, the Claimant had been suspended from duty by letter dated 12th September 2013. The suspension letter states *inter alia*:

“Note that on the said dates [night shift of 10th September] you performed your duties negligently and this led to an incident whereby five trucks were vandalized under unclear circumstances.

This letter therefore serves to advise you that you have been suspended from duty from the date thereof to allow further investigations. You are to report to the operations Manager on 17th September 2013 at 0800 when your case will be heard and determined.”

21. A reading of the suspension and dismissal letters disclose the reason for the Claimant’s dismissal as negligence of duty, thus exposing life and property to danger. The facts of the relevant incident are not in dispute. The question before the Court is whether the Claimant acted diligently and responsibly in the circumstances.

22. The Claimant told the Court that he was overwhelmed by the number of attackers. He added that according to standard operating procedures, he could not release the dog in the circumstances as this would have exposed both the dog and himself to danger. From the evidence on record, it is evident that both the Claimant and his colleague suffered injuries as a result of the attack.

23. In the dismissal letter, the Respondent expressly declares that as at the time the decision to dismiss the Claimant was made, investigations relating to the incident were still underway. This begs the question as to how the Claimant’s culpability was determined without the benefit of the full outcome of investigations.

24. It seems to me that the Respondent rushed to the conclusion that the Claimant was guilty of negligence and complicity without solid basis and for this reason, I make a finding that the ensuing dismissal was wrongful and unfair.

25. But that is all I will do on this limb because the Claimant made no prayer for compensation, despite having been allowed an opportunity to amend his claim.

Other Remedies

26. In light of the finding that the Claimant’s dismissal was wrongful and unfair, I will allow the prayer for one (1) month’s salary in lieu of notice.

27. The claim for salary for days worked in September 2013 is admitted and payable.

28. No basis was laid for the claims for gratuity and severance pay which therefore fail and are dismissed.

29. In the end, I enter judgment in favour of the Claimant as follows:

a. 1 month’s salary in lieu of notice.....Kshs. 13,803

b. Salary for 17 days in September 2013 (13,803/30x17).....7,821

Total.....21,624

30. This amount will attract interest at court rates from the date of judgment until payment in full.

31. The Claimant will have the costs of the case.

32. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Amadi h/b Mr. Kadima for the Claimant

Miss Opolo for the Respondent