



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 274 OF 2013

(Before Hon. Justice Mathews N. Nduma)

ISAIAH NYAKOE.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE.....RESPONDENT

J U D G M E N T

1. The Claimant seeks re-statement to his job and in the alternative equivalent of twelve (12) months compensation for wrongful and unfair termination of employment.

Facts of this Case

2. The Claimant was employed as a ranger by the Respondent on or about September, 2009. The Claimant worked as a database intelligence officer at the Head Quarters in Nairobi. On 1st October, 2009 the Claimant received a letter of interdiction following loss of two Rhino horns between 18th – 21st September, 2009. The Claimant was placed on ½ pay to allow investigations and was to stay away from office during the period.

3. On 1st March, 2010, the Claimant got a letter removing him from office. The Claimant wrote an Appeal against removal on 6th April, 2011. The Appeal was rejected by a letter dated 4th April, 2011.

4. Upon removal, the Claimant was paid full pay for five (5) months he was under suspension, payment in lieu of leave, one month salary in lieu of notice and got two thirds of the pension contribution.

5. The Claimant denies involvement in the loss of the Rhino Horns which were kept in a strong room and he was not one of the two officers who had custody to the strong room keys.

6. The Claimant states that officers who were in custody of the keys were taken through the KWS (Armed Wing) disciplinary procedure, under disciplinary code 1990.

7. The Claimant was not taken through the court martial because he had no case to answer. He was instead asked to make a statement on the matter, which he did and did not go through any disciplinary hearing only to receive a letter of removal from service. The removal was with effect from 1st March 2010, and the reason given in the letter was –

“On the basis of your association in activities/behavior which the management considers likely to have been prejudicial to good order and discipline of the service that led to loss of two rhino horns from Kifaru Court in September, 2009.”

8. The Claimant was suspected to have been involved in the said loss because one of the custodians of the only two keys to the armoury, a Ms. Wangari made a statement alleging that she may have given the key which had gone missing to the Claimant. The Claimant accepted having taken the keys to the communication office, which was also a rest office for officers to make photocopies. The report made was that the safe was broken into. The only other custodian of the key to the armoury was one Mr. Mwanahamisi.

9. The Claimant testified under oath before court and denied any involvement at all in the theft of the Rhino horns. He told the court that other than a transfer he had received in 2006 from Meru Station to Lamu after a similar incident of loss of Rhino horns in the Armoury he had never faced any disciplinary action. That he had served the Respondent from 8th July 2005 and was confirmed to the service on 19th

May, 2006. That he got a presidential award in recognition of good work on 26th September, 2008 and was given secretarial duties to the company commander in Meru.

10. The Claimant testified in Chief and under cross examination that he was not aware that there were Rhino horns in the Armoury at all until the report of loss was made. The Claimant stated that the trophies were reported to have gotten lost between the 19th and 21st September, 2005 which was a long weekend. That the two officers who had custody of the keys to the safe were court martialled and dismissed. He was called as a witness in those proceedings and he declined to attend.

11. The Claimant prays for compensation in that the Respondent removed him from service without any evidence of wrong doing and on mere suspicion that he may have been associated with persons who stole the Rhino horns.

Response

12. The Respondent filed a statement of response to the claim in which the particulars of employment and removal are admitted.

13. That the Claimant was given opportunity to defend himself and to file an appeal after termination and was invited to attend the hearing of the appeal.

14. That the Claimant argued his appeal on 23rd June, 2010. The Board heard evidence of the investigating officer and upon deliberation the appeal was dismissed.

15. The Respondent admitted having failed to give the Claimant certificate of service stating that he never came for it.

16. The Respondent failed to call any witness in support of its case and only relied on the Memorandum of Defence and the annexures thereto, which were admitted by consent of the parties. The Respondent prays that the suit be dismissed with costs.

Determination

17. The issues to determination are:-

(i) Whether the Claimant's termination was for a valid reason and in terms of a fair procedure.

(ii) Whether the Claimant is entitled to the reliefs sought.

Issue i

18. The Claimant admitted under oath that he had access to the keys to the office where the safe that had Rhino horns between 1 to 2 pm around the time the Rhino horns got lost. The Claimant also admitted that the safe was broken into. That the loss of Rhino horns happened during a long weekend.

19. The two other officers who had access to the safe keys were court martialled and dismissed whereas the Claimant was not court martialled but was taken through the disciplinary procedure of KWS, as per the code.

20. The Claimant admits that he made an exculpatory statement which was considered by the disciplinary committee. The Claimant however was not called to appear before the disciplinary panel. Upon dismissal the Claimant appealed to the Board. The Board gave him opportunity to appear before it and the termination was upheld.

21. In terms of section 47(5) of the Employment Act, the Claimant has the onus of showing a prima facie case of wrongful termination and at that point, the onus shifts to the Respondent to show that it had a justifiable and valid reason to terminate the employment of the Claimant as provided under section 43 of the Act.

22. In the present case, the Claimant denied any wrong doing whatsoever and stated that his employment was terminated on mere suspicion. Indeed the letter of termination bears no specific reason for the termination and merely accuses the claimant of "association" in activities/behavior which management considers prejudicial to the good order and discipline of the service.

23. The Respondent lost opportunity to rebut the evidence by the Claimant, when it failed to call any witness to rebut his testimony. The averments in the Memorandum of Response and annexures thereto do not constitute admissible evidence to rebut the Claimant's testimony under oath.

24. For this reason, the Claimant has proved on a balance of probabilities that the termination was wrongful for lack of a valid reason and that a fair procedure was not followed in removing him especially because, the culprits were identified and court martialled but that did not happen to him, and was denied opportunity even to appear before a disciplinary panel. That appearance before the Appeal Board did not cure that omission since his fate had more or less been sealed at that time.

25. The court finds that the termination was in violation of section 41, 43 and 45 of the Employment Act and the disciplinary code of KWS and was therefore unlawful and unfair.

Issue ii

26. Having found that the termination was unlawful and unfair, the court finds that the Claimant is entitled to compensation in terms of section 49(1)(c) of the employment act as read with section 49 (4).

27. In this regard, the Respondent paid the Claimant all terminal benefits upon termination which is a mitigating factor. The Claimant was paid in lieu of notice and in lieu of leave. The only omission was failure to provide the Claimant with a certificate of service to enable him seek alternative service.

28. The Claimant had served the respondent diligently for a period of six (6) years and had no previous disciplinary record. The court notes a transfer on mere suspicion is not a disciplinary offence unless there is a written warning arising from the incident.

29. The Claimant in the court's view contributed to the suspicion that eventually led to his termination.

30. The Claimant wishes to be reinstated but, the Respondent indicated in the disciplinary process that it no longer trusted him even though this was based on mere suspicion. Loss of Rhino horns is a serious matter in Kenya, and world over but mere suspicion is not sufficient to indict and remove officers from service. The court relies on the case of **Mary Chemweno Kiptui v Kenya Pipeline Co. Ltd (2014) eKLR** in which it awarded the Claimant 10 months' salary in compensation

31. In the circumstances of this case, the court awards the claimant five (5) months' salary, in compensation for the unlawful termination of employment based on the gross salary he earned at the time of termination (16,500 + 5,000 house allowance). Kshs.21,500 in the sum of Kshs.107,500.

32. Judgment is entered in favour of the Claimant against the Respondent as follows –

(i) Kshs.107,500 being equivalent of five (5) months gross salary in compensation for the unlawful termination of employment.

(ii) The award is payable with interest at court rates from date of judgment till payment in full.

(iii) Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 23rd day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of March, 2018

Maureen Onyango

Judge

Appearances

Mr. Kabiru for Claimant

Mr. Kobia for Respondent

Anne Njung'e – Court Clerk