



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2172 OF 2012
GEORGE KATANA ISANYA.....CLAIMANT
VERSUS
AGA KHAN UNIVERSITY HOSPITAL.....1ST RESPONDENT
NADYA SALIM.....2ND RESPONDENT
JUDGMENT

Introduction

1. The Claimant brought this suit on 26.10.2012 alleging that he had been unlawfully and summarily dismissed from service by the respondents after serving diligently for 26 years. He therefore prayed for terminal dues plus compensation totaling to Kshs.2,856,685.
2. The respondents never entered appearance and after many years of delay the matter proceeded by Formal Proof on 12.2.2018. Thereafter the claimant filed written submissions which I have carefully considered herein.

Claimant's Case

3. The claimant testified how he was employed by the first respondent in 1985 as a Laboratory Assistant and worked until 29.1.2011 when he was suspended pending investigation of a key which was left on the unlocked mortuary door. After two weeks he went back to the office to enquire about his fate and he was served with a summary dismissal letter dated 11.2.2011.
4. He denied any thing to do with the key and the door to the mortuary because he was not working at the Mortuary. He further faulted the dismissal because it was done without being accorded any fair hearing. He denied the allegation in the respondents' letter that he was sent to the Manager of Pathology and refused. He was never served with any warning letter during his service and maintained that his service was good.
5. He contended that he never appealed against the dismissal but confirmed that his trade union did. He was given certificate of service after the dismissal, which he produced as exhibit. He prayed for the reliefs sought in the suit. He produced Appointment letter, payslips and the dismissal letter to prove the employment relationship with the respondents and how it was terminated.

Analysis and Determination

6. After careful consideration of the pleadings, evidence and submissions, the following issues arose for determination:

- (a) Whether the summary dismissal of the claimant was unlawful;
- (b) Whether the reliefs sought should be granted.

Unlawful termination

7. Under section 45 (1) of the Employment Act the employer is barred for terminating his employee unfairly. Under subsection (2), termination of employees contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case, the 2 reasons for the dismissal cited in the dismissal letter were that on 29.1.2011, the claimant left the mortuary door open with the keys hanging thereon; and secondly, on 31.1.2011 he failed to report to the Pathology Manager as instructed by the Director and instead absented himself without permission until 2.2.2011 when he reported. The claimant denied the two offences. He contended that he was not working at the mortuary and denied any link with the mortuary keys and the door. He further denied the alleged instructions by the Director to report to the Pathology Manager on 31.1.2011 and contended that by that time he was already away on suspension.

8. The foregoing evidence by the claimant has not been contested by the respondents. Section 43, 45 and 47(5) of the Act put the burden of proving and justifying the reason for dismissal on the employer failure of which the termination is rendered unfair. In this case the respondent has not filed any defence or adduced any evidence to prove and justify the reasons cited for the dismissal of the claimant in the summary dismissal letter dated 11.11.2011.

9. In addition to the foregoing default, the respondents have not adduced any evidence to prove that they followed a fair procedure before dismissing the claimant from service. Under section 41 of the Act, before employer terminates the services of his employee on account of misconduct, poor performance or physical incapacity, he must first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated after which, invite the employee and his chosen companion to air their representations for consideration before the termination is decided.

10. Having found that the respondents have not discharge the burden of proving substantive and procedural fairness as provided under section 41, 43, 45 & 47 of the Act, I proceed to hold that the summary dismissal of the claimant by the respondents vide the letter dated 11.2.2011 was unfair and unlawful.

Reliefs

11. Under section 49 of the Act, I award the claimant Kshs.33,121 being one month salary in lieu of notice plus Kshs.484,500 being 12 months gross pay as compensation for unfair summary dismissal. I award, the maximum compensation after considering the 26 years' service to the hospital.

12. The claim for 42 leave days is not supported by any particulars and evidence. Consequently, it is dismissed. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy.

Disposition

13 For this reason of unfair dismissal, I enter Judgment for the claimant in the sum of Kshs.517,621 plus costs and interest from the date hereof. The award will be subjected to any relevant statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 10th day of May, 2018

ONESMUS MAKAU

JUDGE