



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1719 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 18th June, 2018)

PATRICK LUBEMBE.....CLAIMANT

VERSUS

SOCIAL SERVICE LEAGUE MP SHAH HOSPITAL.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 24th October 2013 through the firm of Mang'erere J. & Co. advocates claiming damages for unlawful dismissal from employment and non-payment of terminal dues. He avers that on or about 1st April 1990 he was employed by the Respondent having worked as a Housekeeper with due diligence to the satisfaction of the Respondent. His salary was computed at Kshs. 41,742 per month.
2. He avers that on 12th November 2012, he received a notification for disciplinary hearing from the Respondent alleging that he had participated in an unfortunate incident where one of the senior managers by the name Chinwedu Achebe was assaulted and hospital property destroyed. The Claimant was given time off till the date of the said hearing.
3. He avers that the Respondent held a disciplinary meeting on 23rd November 2012 whose proceedings were minuted and in the said minutes, nothing was mentioned involving the Respondent's allegations against the Claimant. He states that on 27th November 2012, he wrote a letter to the Respondent requesting them to update him on the outcome of the foresaid disciplinary hearing and the Respondent responded on 5th December 2012 inviting him for another disciplinary hearing and stating that the Claimant's response and presentations in a previous disciplinary hearing was unsatisfactory.
4. He further avers that on 10th December 2012, he received a letter of termination accusing him of inciting junior employees to eject a senior member of staff from the office and on 24th December 2012, he received another letter from the Respondent informing him that his payment was ready and requesting him to collect the said from the HR Department. He proceeded to find out about the payment only to be physically harassed and barred from entering the Respondent's premises by the security guards, prompting him to report to the police station vide OB 37/25/1/2013.
5. He further avers that as a result of the unfair, wrongful and unlawful termination from his employment he has suffered loss of income, trauma and inability to meet his obligations and thus claims for maximum compensation.
6. The Respondent filed their Memorandum of Defence where they denied all the allegations and averments contained in the Claimant's Memorandum of Claim. They state that on or about 5th November 2012, the Claimant in the company of other employees participated in an illegal strike and physical attack of a Senior Manager of the Respondent by the name of Chinwedu Achebe.
7. They aver that the Senior Manager arrived at work in the morning only to find the Claimant and his colleagues claiming to be on strike and carrying on their duty. She proceeded to her office and due to the chaos she locked her office door but it was broken into by the employees in the company of the Claimant who urged the striking employees to forcefully eject her from the office. The Senior Manager was dragged from her office to the administrative block while being beaten and the Respondent property was destroyed in the process.
8. They further aver that the matter was reported to the police who came and quelled the incident which had run out of hand. The Respondent informed the union of the pending disciplinary action to be taken against the employees in the incident. Several disciplinary hearing meetings were held where the Claimant was constantly mentioned as being one of the ringleaders in the unfortunate incident and illegal strike.
9. On 7th December 2012 a disciplinary hearing was conducted where the Claimant's conduct on 5th November 2012 was discussed and he was mentioned repeatedly to have urged the striking employees to forcefully eject the Senior Manager out of her office while spewing insults at her.

10. The panel presiding over the hearing made their observations on the evidence adduced against the Claimant which implicated him. Upon conclusion of the disciplinary hearing process, the information obtained was re-evaluated by the committee and recommendations were made after an exhaustive process of fact finding into the matter. The Respondent opted to terminate the services of the Claimant.

11. They also opted to pay his terminal dues on termination which comprised of his salary up to and including 10th December 2012 together with the dues stipulated in the then CBA of 2011-2013 Clause 18.

12. They further aver that on 11th December 2012, they received a demand letter from the Claimant's Advocate agitating for his reinstatement failure of which legal action was threatened against them. The Respondent replied to the letter on 18th December 2012 and reiterated the fact that the Claimant participated in an illegal strike which led to disruption of business and destruction of Respondent's property.

13. That on 24th December 2012, the Respondent informed the Claimant that a cheque for payment of his terminal dues was ready and he should pick the same from the Human Resource Department during official working hours. However, he failed to pick the cheque. They also aver that that is not the first time that the Claimant had been in disciplinary meeting over his conduct as he had been issued with warning letters before and advised to change his behavior.

Submissions

14. The Claimant filed his submissions where he submits that he did not participate in any way in the incident which took place on 5th November 2012 and in the contrary he is the one who informed the management about the standoff hence the process of disciplinary hearing was not fair as it came out clearly that no witness mentioned his name as having participated in the said incident. He avers that he did not assault the senior manger nor did he incite the employees to remove her from her office.

15. He avers that he went to the Respondent premises to collect his cheque but instead he was denied entry and harassed by the security guards of the Respondent who turned him away and he proceeded to report the incident to the police station under OB37/25/1/2013.

16. I have examined all evidence from both parties plus submissions filed accordingly. The issues for determination accordingly are as following:-

1. Whether there were valid reasons to warrant termination of the Claimant.

2. Whether due process was followed before termination of the Respondent.

3. What remedies are available in the circumstances?

17. On the first issue, the Claimant told Court the circumstances leading to his termination. The Claimant was initially called for a disciplinary hearing on 12/11/2012 vide a letter dated 12/11/2012. The letter indicated that on 5/11/2012 at the Respondent's premises, he participated in an incident where Chinwendu Achebe was physically assaulted in her office and hospital property destroyed.

18. After this hearing, he was invited to a further hearing on 7/12/2012 at 9.30 am. The same letter of 5.12.2012 asked him to show cause why disciplinary action should not be taken against him for his involvement in committing the offence of inciting other employees to assault a senior member of management staff.

19. From these two letters, the Claimant was being accused of inciting staff to assault one Chinwendu. The letter of termination served on the Claimant dated 10/12/2012 refer to the incident of 5.11.2012 and states that they had found the Claimant's actions irresponsible in that he had incited junior staff to eject a senior staff member from office. The Claimant was thus terminated vide a letter dated 10.12.2012.

20. The proceedings of the disciplinary hearing have been annexed to the Respondents documents as Appendix 8. From these proceedings, it is indicated he was involved in the fracas that occurred at the Respondent's premises in that he was "urging the mob to take Chi out and continued to spew hate when everything was calmed down and she was out".

21. The Claimant on his part as per the proceedings told the panel that he was not part of what happened. He indicated that witnesses did not mention him. He indicated that he saw Achebe in the parking lot. That he tried to talk to Reyaz and asked him to call the Chairman. The Chairman was called and the staff went back to their duties. The claimant also denied ever being near the corridor of Administration office where Chinwendu was and that he only saw her at the parking at around 8.30 am.

22. RW1 gave evidence in Court and stated what he was told had happened. He however in cross-examination indicated that the statements of 2 witnesses did not mention the Claimant.

23. From the analogy of the evidence from the Respondents and from statements given by the witnesses, there was some remote reason for termination the Claimant. However, there was no conclusive proof that these reasons did exist.

24. The Respondents produced the minutes of the disciplinary hearing, which minutes does not indicate who was being addressed. The minutes are written in prose form making it difficult to understand what question was asked and by who and what the response is.

25. The witnesses who recorded their statements failed to give evidence in Court and therefore their statements remained as such as per the decision of the Court of Appeal in **CA No. 140/2008 at Nairobi** where JJA Visram, Mwilu (as she then was) and Otieno Odek rendered

themselves as follows:-

“In Dev Raj Sharma vs Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCAN 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of evidence...”

26. It is my finding that there were no sufficient reasons to warrant dismissal of Claimant as envisaged under Section 43 of Employment Act 2007 which 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.

27. On issue of due process, the Claimant was duly subjected to a disciplinary process. The claimant was invited and asked to defend himself. The Claimant has complained that the disciplinary process was not fair as the accusers were also the investigators and the judges. I do not believe this is true because the committee comprised of 3 people – Toseef Din – Head of Finance, Timothy Onyuma and Reyaz Shariff – Director of Operations.

28. This committee proceeded to hear the disciplinary case and rendered its decision. It is clear that the Claimant appeared and was able to hear evidence and also present his case. It is my finding that the Claimant was subjected to a fair disciplinary hearing.

29. On issue of remedies, having found that there were no valid reasons to dismiss the Claimant but having found there was a fair disciplinary process, I find the whole process of terminating the Claimant unfair. I will instead order that the claimant be subjected to a normal termination with full benefits as follows:-

1. 8 months salary in lieu of notice as per the CBA clause 18 = 8 x 41,742 = 333,936/=.

2. Service pay at 15 days for each year worked = 15 x 1/2 x 41,742x23 = 480,033/=.

3. Compensation of 6 months salary as damages for unfair termination = 250,452/=.

Total = 1,064,421/=.

4. The Respondent will also pay costs of this suit and interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 18th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Masese holding brief for Kanyiri for Respondent

Claimant – Absent