



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 2610 OF 2016

SOSPETER BANGOYA OYANGE.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 21.12.2016 claiming terminal benefits and compensation for unfair termination of his contract of service by the respondent on 13.1.2014 on medical grounds. It is claimant's case that he was dismissed without being served with any prior notice or being accorded a chance to defend himself. He therefore prayed basically for reinstatement to his job plus General damages for unfair termination of his employment, costs and interest.

2. The respondent never filed defence despite entering appearance on 29.5.2018. Consequently, the suit proceeded by way of formal proof on 30.5.2018 when the claimant testified as Cw1 and thereafter counsel for the two parties filed written submission.

Claimant's Case

3. Cw1 testified that he was employed by the respondent on 11.10.2011 as a Security Guard and his salary was Kshs.18,910 per month. He was assigned at the Jomo Kenyatta International Airport Cargo Centre and his duty included counting of cargo as it came in and went out. In August 2013, he was standing on the DOLL counting cargo when he slipped and fell down and suffered a fractured leg. He was rushed to hospital and after discharge, he reported back to work but he was told that his employment was over and he was served with a dismissal letter on medical grounds. The said letter was served without being accorded any hearing or alternative job like sweeping or record keeping which was available. He was not given any right of appeal against the termination and as such, he brought this suit. He prayed for the reliefs sought in the suit and contended that he was not paid his terminal dues and he was also not issued with certificate of service.

4. On cross examination Cw1 admitted that his monthly pay was Kshs.18,910 inclusive of a standard overtime of Kshs.6,329. He further admitted that from August 2013 to January 2014 he was out of work due to the injury suffered but he was on full pay upto December 2013. He further admitted, that, the respondent's letter dated 29.5.2014 in response to his demand letter stated that he was welcome for reinstatement once his doctor certified him fit. He however stated that he does not wish to resume work and prayed for his terminal dues.

Analysis and Determination

5. There is no dispute that the claimant was employed by the respondent as a Security Guard until 13.1.2014 when he was discharged by the respondent on medical grounds. The issues for determination are:

(a) Whether the termination of the claimant was unfair;

(b) Whether he is entitled to any remedy.

Unfair termination

6. Under section 45(2) of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for termination was cited as medical grounds after the claimant was incapacitated for more than 100 days. The claimant has not disputed that he was incapacitated for over 100 days.

7. After careful consideration of the claimant's letter of appointment, it is clear that the medical ground cited for the termination of the

claimant's services was valid and fair. Clause 8(iv) of the said letter stated that the claimant's employment was terminable without prior notice if he was prevented from performing his duties by reason of ill health, incapacity, accident or otherwise for more than 75 consecutive days or an aggregate of more than 60 days within the same year.

8. However, the procedure followed to terminate the contract was in breach of section 41 and 45 2(c) of the Employment Act because the claimant was not accorded a chance to defend himself in the presence of another employee or union representative of his choice. Although the letter of appointment provided for no prior notice when terminating the claimant's employment on medical grounds, that stipulation of the contract cannot be used to oust a mandatory and express statutory provision in section 41 of the said Act. Consequently, the failure to follow fair procedure rendered the termination of the claimant's services on medical grounds unfair within the meaning of section 45 of the Act.

Reliefs

9. In view of the foregoing finding, I make declaration that the termination of the claimant's contract of serviced was unfair and that it infringed his rights and the Employment Act and the constitution by the respondent.

10. The claim for restatement is declined because the claimant testified that he does not wish to be restated and instead urged for his dues. Under section 49(4) (a) of the Act, the Court is bound to consider the employee's wish before awarding any damages or reinstatement.

11. The claimant has however prayed for General damages for loss of employment before retirement, illegal, unprocedural and unfair termination and mental anguish and psychological torture. Section 49(1) of the Act provides only for salary in lieu of notice and maximum 12 months salary as compensation from unfair termination. I therefore grant the claimant one month salary lieu of notice plus 12 months salary compensation for the unfair termination totally to Kshs.245,840.40. In granting the said award, I have considered the fact that the claimant was not likely to secure another employment within the said period of 12 months after termination. I have also considered the fact that he never contributed to his termination through misconduct.

Conclusion and Disposition

12. For the reasons that the claimant was unfairly terminated, I enter judgment for him in the sum of Kshs.245,840.40 plus costs and interest at Court rate from the date hereof. The award will be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE