



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 757 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JAMES WANJOHI NGARI.....CLAIMANT

-Versus-

RIFT VALLEY RAILWAYS (K) LIMITED.....RESPONDENT

JUDGMENT

Vide memorandum dated 21st May 2013 and filed on 23rd May 2013 the claimant alleges that his services were terminated by the respondent on 28th May 2012 for no reason at all. He alleges that despite demanding his dues and damages, the respondent has ignored, refused or failed to pay compelling him to file this suit.

The respondent filed a statement of response on 23rd June 2018 denying the averments in the claimant's memorandum. The respondent stated that the employment of the claimant was terminated on account of neglect of duty amounting to gross misconduct as set out in the claimant's letter of dismissal. The respondent stated that the claimant was given a hearing as evidenced by a copy of the minutes of the disciplinary hearing (appendix RVR) and the termination was therefore fair and lawful.

The case was heard on 9th July 2015 when the claimant's testimony was taken. The respondent however closed its case on 4th December 2017 without calling any witness. The parties thereafter took directions for filing of submissions. The claimant filed submissions on 29th January 2018 but no submissions were filed for the respondent.

Claimant's Case

The claimant testified that he joined employment of the respondent on 1st November 2006 at a salary of Kshs.42,000. He was a Permanent Way Inspector and his work involved manning the railway tracks. He worked until 25th May 2012. His last salary was Kshs.64,130 gross.

His employment was terminated on 28th May 2012. He was accused of theft of permanent way materials and absenteeism. What was stolen was 894 sleepers of 50 pounds and 149 rails of 50 pounds. He was charged in Kibera Resident Magistrate's Court and was later acquitted for lack of evidence under Section 210 of the Criminal Procedure Code. He was dismissed before his acquittal.

The claimant testified that he was on two days' leave on 5th and 6th August 2010 and the theft of the materials took place while he was away.

The claimant testified that he seeks one month's salary in lieu of notice Kshs.64,130, severance pay, prorata leave and compensation. He testified that he was 42 years old at the time of termination and retirement age was 60. He testified he was owed 20 days annual leave and lost 18 years of prospective service. He testified he was a member of NSSF.

Under cross-examination, the claimant stated he had supervisory role over different categories of employees. That it was his mandate to establish what was lost and report to his seniors. That he inspected the site of theft and made a report to his seniors.

The claimant stated that on 3rd August 2010 he applied for leave for 5th and 6th August 2010 but did not get back a copy of the leave approval.

The claimant testified that he was under provident fund and collected his benefits. He testified that he had no capacity to allow his Deputy to proceed on leave. He stated he was entitled to 9 days leave for 2012 and not 20 days as claimed.

In the submissions filed on behalf of the claimant it is submitted that the claimant was dismissed before judgment was delivered in the criminal case and that the termination was without any reasonable or justifiable cause. It is submitted that the claimant never committed any offence to warrant termination, that the termination was in total disregard of the laid down employment procedures.

It is submitted that the claimant was never accorded a hearing contrary to Section 41 of the Employment Act.

The claimant relied on the case of **GEORGE ONYANGO AKUTI -V- G4S SECURITY SERVICES** in which the court stated that the statutory burden lies upon the person complaining of unfair termination of employment or wrongful dismissal as provided in Section 47(5) of the Employment Act which provides that –

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

It is further submitted that Section 45(1)(a) and (b) of the Act require an employer to prove that reasons for termination were fair and valid.

The claimant further relied on the case of **JOHN WAFULA SIMIYU -V- THE STAR PUBLICATIONS LIMITED** in which the court held that Section 45(2) requires an employer to prove valid and fair reasons and that termination was in accordance with fair procedure.

The claimant submitted that his employment having been terminated without compliance with Section 41, 45, 31(1)(b) and (c) and Section 46, he is entitled to remedies under Section 49(3) of the Employment Act and a certificate of service.

Determination

I have considered the pleadings, the evidence on record and the submissions of the claimant. The issues for determination is whether the termination of the claimant's employment was fair and if he is entitled to the remedies sought.

Fair Termination

The law relating to fair termination is contained in Section 41, 43 and 45 of the Employment Act. The requirements for fair termination or dismissal were considered in the case of **GEORGE ONYANGO AKUTI -V- G4S SECURITY SERVICES LIMITED** which the claimant has cited. The court in the said case stated as follows –

“An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer.”

In this case the claimant was first issued with a letter dated 30th March 2012 requiring him to show cause why disciplinary action should not be taken against him. The letter set out the following charges against him –

1. After theft of 894 no. sleepers of 50 pounds and 149 rails of 50 pounds during the weekend before August 9, 2001 at Kibwezi After theft of 894 no. sleepers of 50 pounds and 149 rails of 50 pounds during the weekend before August 9, 2010 at Kibwezi ballast siding, you failed to inspect the area where the theft occurred and obtain statements from all concerned hence no internal investigations were carried out into the enormous theft of permanent way materials in your area of jurisdiction.
2. After the same occurrence, you allowed your assistant to proceed on the 18 days leave, which you had approved on July 26, 2010 to commence on August 9, 2010, hence forestalled possibilities of internal investigations into the matter.
3. While by August 10, 2010 you were privy to lead information of possible culprits into the massive theft of company materials, you withheld the information hence failed to protect the interests of the company.
4. Records maintained both in Eastern Region HR Office as well as Headquarters indicate that you v/ere absent from duty for two days from August 5th to 6th 2010 without any lawful cause.

The claimant responded on 3rd April 2012 with a long explanation, which he has annexed at appendix F of his bundle of documents.

Prior to the show cause letter the claimant was by letter dated 2nd October 2010 issued with another show cause letter dated 2nd September 2010 requiring to show cause why he had absented himself from work. The letter stated that the claimant was arrested on 12th August 2010 and arraigned in court on 13th August 2010, that he was released on bail on 23rd August 2010 but had failed to report on duty up to 2nd September 2010 when the letter was written. The claimant appeared before a disciplinary committee on 26th March 2012e where he made representations to the committee.

After the disciplinary hearing, fresh charges were made against the claimant following recommendations by the disciplinary committee to the effect that the charges against the claimant be withdraw and fresh charges preferred against him. This was done through the letter dated 30th March 2012. The claimant was not taken through a fresh hearing with respect to the fresh charges.

I have considered the claimant's response to the fresh charges and note that he admitted withholding crucial information that would have assisted in the investigations. He further admitted that he did not personally investigate the theft of the materials which occurred in his area of jurisdiction and further he was unable to produce leave forms to prove that he had taken leave on 5th and 6th August 2010 when the theft of the materials occurred.

From the foregoing, I find that there was valid reason for termination of the claimant's employment, but the procedure was flawed as the charges against him for which he was subjected to a disciplinary hearing were withdrawn and fresh charges preferred against him which he responded to in writing and not in a disciplinary hearing as anticipated under Section 41 of the Employment Act.

I however find that the claimant was not prejudiced as he had been taken through a hearing on the same facts before the fresh charges were preferred against him as recommended by the disciplinary committee and he admitted the charges in his response.

Remedies

The claimant prayed for one month's salary in lieu of notice. Having found that the procedure for the termination was flawed, I reduce the dismissal of the claimant to a normal termination and award him pay in lieu of notice in the sum of Kshs.64,130.

The claimant further prayed for full benefits, severance pay, prorata leave and compensation.

The claimant has not stated what the full terminal benefits he seeks compose of. The prayer is dismissed for being vague and not proved.

The claimant further prayed for severance pay which he is not entitled to as he was not declared redundant. The prayer for leave is granted for 9 days as stated by the claimant in his testimony in court.

The prayer for compensation is granted as the termination of claimant's employment was for valid reason but flawed in procedure, which as I have stated above did not prejudice him. Taking this into account and taking into account all the circumstances of the case I award the claimant two months' salary as compensation.

Conclusion

Based on the foregoing I enter judgment for the claimant as follows –

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| 1. One month's salary in lieu of notice | Kshs.64,130.00 |
| 2. 9 days' leave (<u>64,130</u> x 9) | Kshs.22,198.85 |
| 26 | |
| 3. Compensation (2 months' salary) | <u>Kshs.128,260.00</u> |
| TOTAL | <u>KSHS.214,588.85</u> |
| 4. Costs | |
| 5. Interest at court rates from date of judgment till payment in full. | |

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE