



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1807 OF 2014

BONVENTURE ASAKWA OFUTSO.....CLAIMANT

- VERSUS -

JUBILEE INSURANCE CO. OF KENYA LTD....DEFENDANT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimant Bonventure Asakwa Ofutso filed the memorandum of claim on 14.10.2014 through Owang & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Damages for wrongful and unfair termination of employment.
- b) Payment in lieu of allowances and salary not paid.
- c) Severance pay.
- d) Reinstatement of employment.
- e) Costs of the suit.
- f) Interest on all pecuniary awards at court rate from the date of filing the suit.
- g) Any other or further relief that the Honourable Court may deem fit and just to grant.

The respondent Jubilee Insurance Company of Kenya Limited filed the statement of response on 28.10.2014 through KTK Advocates. The respondent prayed that the claimant having been summarily dismissed is entitled to any of the reliefs set out or at all.

The claimant was employed by the respondent as a building caretaker in September 2009. The claimant's employment was confirmed on 02.09.2010. The claimant was summarily dismissed on 22.05.2014. The letter addressed to the claimant stated as follows:

“RE: SUMMARY DISMISSAL

Refer to the incidence on Saturday 17th May 2013 where 2 unknown gentlemen were caught cutting electrical cables at the yard area of Jubilee House; it was established that you accompanied the 2 into the building. Subsequently statements from witnesses and the disciplinary hearing held on 20th May at 10am indicate that you conspired with the 2 suspects in the attempted theft of electrical cables. Further the above demonstrates negligence on your part in carrying out your duties hence putting the company at risk of losing property. You personally confirmed having lied in your own written statement which puts your integrity in question.

The above amounts to gross misconduct in accordance with the Employment Act, 2007, Act No. 11 of 2007 and the provisions in the company's Code of Conduct guide which you signed upon joining the organisation. The management has therefore decided to dismiss you with immediate effect and you are required to handover any company property in your possession and get clearance from the Human Resource office.

We shall pay you for the days worked in the month of May and any accrued leave days. Please note that your last date of

service is 22nd May 2014.

We thank you for the period you have worked with us and wish you well in your future endeavours.

Yours faithfully,

Signed

Emily Kamunde

Head of Human Resources

The 1st issue for determination is whether the summary dismissal was unfair.

The claimant's evidence was that on 17.05.2014 was a Saturday and he was on duty. There was construction at the premises and the contractor had his own security service. On that day construction was going on at the yard within the respondent's premises. The claimant testified that he was on his usual patrol and as he passed by the yard with the construction site he saw two persons enter the yard. He proceeded to 4th floor of the building and he received a telephone call from an employee of the contractor reporting that two persons were cutting electrical cables at the construction yard and site. The claimant testified that he informed the security and they went to the site. They found the two persons he had earlier seen enter the yard, they had a hack saw; and they apprehended them and took them to the security office. Later they took them to the police station at the International Life House. The claimant later learned that someone called the police and the two men were released on account that there would be internal reconciliation.

The claimant was then given a letter by the respondent to explain the event. The disciplinary hearing followed on 20.05.2014. The record of the proceedings show that in his written statement the claimant had asked the security to permit him enter the yard with the two men but at the hearing the claimant purported to deny that statement. The claimant admitted that he had lied in his written statement in that regard. The statements by the two men confirmed that the claimant had taken them to the yard. The claimant further confirmed at the hearing that he did not confirm that the two men had left the building as he parted with them. In that view, the claimant confirmed that he had been negligent in the performance of his duties. When asked whether the ground was enough to dismiss him he replied, "**Yes I agree. I fully agree that I made a mistake by allowing 2 people to come to the building. I'm not an angel but anybody can make a mistake. Consider me when you are making your judgment.**"

In cross examination the claimant admitted to have misled the Court that he was employed in September 2009 because the correct date was 08.09.2010. He admitted that as the building caretaker his job included ensuring that the building services were smooth and he was the point of assistance to contractors and overseeing their work as per the job description on record. He admitted that he had received two written warnings about his unsatisfactory performance. He admitted that at the disciplinary hearing he had admitted that he had been negligent.

The Court has considered the material on record and the claimant's own evidence. The evidence is clear that the claimant was accorded a notice and a hearing as per section 41 of the Employment Act, 2007. The evidence is therefore clear that the procedure leading to the summary dismissal was fair as envisaged in section 45 of the Act. There is no reason to doubt the record of the proceedings of the disciplinary hearing. At the disciplinary hearing and in Court the claimant admitted that he had been negligent in his performance of duty. The Court returns that as at termination the respondent had a genuine or valid reason to terminate the claimant's contract of service as per section 43 of the Act. The Court also finds that the reason for termination was not unfair as it related to the claimant's conduct and compatibility as well as the respondent's operational requirements as per the claimant's job description as was envisaged in section 45 of the Act. The claimant's evidence and the respondent's documentary and oral evidence show that the respondent had established the reason for termination as per section 47(5) of the Act and as at or prior to the termination.

Thus, to answer the 1st issue for determination the Court returns that the termination was not unfair on merits or substance as well as in procedure.

To answer the 2nd issue for determination the Court returns that the claimant's remedies as prayed for were premised on a finding that the termination was unfair but the Court has returned that the termination was not unfair. Accordingly, the remedies will be declined as unjustified. It is submitted that the claimant be paid overtime from 02.10.2010 to 22.05.2014 at Kshs. 1, 743.00 for every Saturday worked throughout the employment. The Court returns that the submissions were with respect to special damages which were never pleaded and were never specifically proved as is expected. Further, the terms of the contract were that parties agreed on a salary for the agreed assignments and there was no provision for overtime on Saturdays. The parties covenant on duties read in part, "**You will devote the whole of your time to the business of the Company....**" and the parties were bound accordingly. In any event the claimant has not suggested that throughout the service he had raised a grievance about work on Saturday and pay for overtime in that regard and the submission was misconceived as it was unfounded.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim with costs.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE