



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 398 OF 2011

HARRISON K. NGURE.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 17.3.2011 alleging that his services was unfairly and unlawfully terminated by the respondent on 14.9.2010. He amended it on 14.12.2017 to pray for:

- (a) Lost salary from May 2009 till the date of judgment. (b) Reinstatement with full benefits
- (c) In the alternative he be re-engaged in a comparable job of equal salary to the previous one
- (d) Compensation for unfair termination. (e) Pension for 2/6 months.
- (f) Costs
- (g) Any other reliefs that the court may deem fit to grant.

2. The respondent filed defence on 10.5.2011 denying the alleged unfair and unlawful dismissal of the claimant. She averred that the claimant was fairly dismissed for gross negligence in performance of his duty and after being taken through disciplinary proceedings. She further contended that the suit is premature because it was brought before determination of the claimant's appeal, which is still pending before the Director of the Respondent. She therefore prayed for the suit to be dismissed with costs contending that the claimant's benefits can only be paid after clearance and handing over of the 1st respondent's properly.

3. The suit was heard on 17.10.2017, 10.5.2018 and 20.9.2018 when the claimant testified alone and the respondent called Mr. George Osuri, Elema Wairo Saru and Wilson Mulwa as the defence witnesses respectively. Thereafter parties were given opportunity to file submissions but he defaulted.

Claimant's Case

4. The claimant testified that he was employed by the 1st respondent in 1993 as Ranger Grade 14. He worked in various stations including Amboseli National Park Headquarters which was his last station and his salary was Kshs.21,350. On 9.5.2009, he was on night Sentry duties with a colleague who was at the Radio Room. He reported at 6 pm and worked upto 6 am when he left. There was no day sentry to take over from on 9.5.2009 when he reported or to handover on 10.5.2009 when he left for the day.

5. He further testified that while at home, he was called by the Deputy Warden and informed that a motor vehicle had been stole. He and all the other staff members were therefore called to record statement after which they were arrested and taken to Oloitok Police Station. After one week, he was charged in Kajiado Law Courts with theft.

6. He further testified that after some time, the charges were withdrawn and instead he was charged in Orderly Room proceedings whereby,

the Presiding Officer found him guilty and surcharged him in addition to a fine but on 14.8.2010, he was summoned to the first Respondent's Headquarters and his sentence was enhanced to summary dismissal. He appealed on the same day but never got any response. Instead, on 10.9.2010, he received a dismissal letter. He therefore served a demand letter through his lawyer but the 1st respondent responded on 21.12.2010 stating that his appeal was still pending.

7. He contended that he was never paid salary since May 2009 and that as at the time of his testimony he was 47 years old. He therefore prayed for the reliefs set out in his amended claim.

8. On cross examination, the claimant stated that he served for 16 years. He admitted that on 9.5.2009 he was the night sentry guarding the office and workshop area with his colleague Mr. Onesmus Muasya. He contended that the compound had a fence round and a gate. He maintained that no vehicle left the compound that night and that he only learned in the following morning, 10.5.2009 that a vehicle was missing. He admitted that during the Orderly room proceedings he said that he heard the sound of a vehicle but it was from other premises nearby. He denied seeing the lights from the vehicle and stated that he was behind a bus and not at the gate, while his colleague was at the Radio Room.

9. The claimant further admitted that he appeared before the Orderly Room proceedings and he was given an opportunity to defend himself after which he was fined and surcharged. He further admitted that later he was invited before another officer who enhanced the sentence to summary dismissal. He however maintained that when he reported to work, there was no one to take over from nor was there any Register at the gate to register vehicles coming in or leaving the compound. He further stated that there were hotels nearby. He concluded by stating that he was not guarding the gate but the compound.

Defence Case

10. Mr. George Osuri testified as Rw1. He is Assistant Director of the 1st Respondent but in May 2009 he was the Senior Warden Amboseli. He told the Court that on 10.5.2009 in the morning he was informed of a missing vehicle by another officer by phone call. He testified that the driver of the vehicle still had the key but the spare key at the workshop was missing.

11. He further stated that the claimant was the one guarding the office, the parking areas and the equipment workshop on the material night. He therefore contended that the claimant was duty bound to protect the property and vehicles at the compound.

12. Rw1 further testified that the claimant was charged in orderly Room proceedings with the offence of failure to prevent a felony and after the hearing he was convicted and surcharged but due to the gravity of the offence of loss of a new Land Cruiser worth Kshs.4 million, he was asked by the Director to review the sentence. He therefore enhanced the sentence to summary dismissal and notified the claimant of his right of appeal. That he appealed but due to this suit, the appeal was never heard. He prayed for the suit to be dismissed because the claimant failed to discharge his duties as expected.

13. On cross examination Rw1 admitted that he never saw the vehicle before it disappeared. He further admitted that there was no evidence to prove that the vehicle was parked there on 9.5.2009 before 6 p.m. He admitted that the spare key for the vehicle was in the workshop and only the workshop staff had access to the same. He admitted that the claimant was not a workshop staff and he had key to the place. He further admitted that the workshop was not broken into.

14. He admitted that there is a canteen nearby the compound that closes at 9.30 p.m. and also hotels 200 meters away. He also admitted that the claimant was charged in court but the case was withdrawn in favour of disciplinary process. He contended that he enhanced the claimant's sentence because he admitted that he heard a vehicle going out and did nothing to ascertain whether it was not theft.

15. Mr. Elema Wario Saru testified as Rw2. He is also Assistant Director. He stated that he testified against the claimant during the orderly Room proceedings and the claimant cross examined him.

16. On cross examination, Rw1 stated that the vehicle was parked at the parking yard by the driver Mr. Stephen Maiyo between 3 p.m and 4 p.m. He admitted further that there is a fence round the offices and the parking and a manned gate. He however admitted that there was no Register to record incoming and outgoing vehicles.

17. Mr. Wilson Mulwa, 1st respondent's Human Capital Officer, testified as Rw3. He stated that the claimant was employed on 15.3.1993. He further stated that on 9.5.2009 motor vehicle No. KBB 369S Toyota Land Cruiser belonging to the 1st Respondent was stolen while the claimant was on duty as the night sentry at the Amboseli National Park. That on 27.5.2009, the claimant was suspended and later taken through Orderly Room proceedings, found guilty and dismissed from service.

18. He further stated that after the dismissal, the claimant was entitled to his pension contribution upon returning the employers property and getting cleared. He however stated that the claimant has not yet done his clearance. He further denied the claim for reinstatement and compensation, contending that the dismissal of the claimant was done procedurally.

19. On cross examination, Rw3 maintained that the claimant was procedurally terminated. He further contended that the suspension letter to the claimant froze salary payment from May 2009 pending completion of his case. He further stated that the claimant appealed against the dismissal but contended that the appeal will only be heard after the completion of this suit. He concluded by stating that dues will be paid after the clearance by the claimant.

Analysis and determination

20. There is no dispute that the claimant was employed by the respondent as a Ranger from 1993 till 14.9.2010 when he was summarily

dismissed. The issues for determination herein are

- a) Whether the dismissal was unfair and unlawful.
- b) Whether the reliefs sought should be granted.

Unfair and unlawful dismissal

21. Under section 45(2) of the Employment Act, termination of 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. A valid and fair reason is one, which relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand relates to hearing the employee in accordance with justice and equity before termination.

Reason for dismissal herein

22. The reasons cited for the summary dismissal of the claimant in the dismissal letter dated 14.9.2010 was failure to prevent theft of service vehicle Registration KBB 396s contrary to Regulation 5 paragraph (k) of Kenya Wildlife Service (Armed Wing) (Disciplinary) Code 1990. The respondent's case is that the claimant was the duty sentry on the night when the vehicle was stolen between 6 pm 9.5.2009 and 6 a.m. 10.5.2009. The main reason why she holds the claimant culpable is that during the investigations, the claimant admitted that he heard a vehicle being driven off and he saw lights but he never bothered to verify whether it was okay.

23. The claimant has however denied that the vehicle was stolen from the parking yard during his watch. He contended that there was no evidence to prove that the vehicle was parked at the compound before he reported as the night sentry. He contended that there was no vehicle movement register at the gate and the gate was not being locked. He further contended that the spare key for the car which was kept in the workshop was missing and the office was not broken into. He further contended that there were hotels nearby and many vehicles were passing by and as such that night he heard vehicles passing by. He however denied that any vehicle was driven from the compound he was guarding. He also contended that he was charged with criminal case, which was later withdrawn.

24. The question that must be answered is whether the vehicle was stolen while under the custody of the claimant between 9.5.2009, 6 p.m and 6 a.m 10.5.2009. The burden of proof was upon the respondent to prove that indeed the vehicle was placed under the watch of the claimant when he reported to work on the said period but he failed to prevent its theft wilfully or through negligence.

25. After careful consideration of the evidence tendered it is clear that the respondent has failed to prove that the said vehicle was ever placed under the custody and watch of the claimant. First, there was no evidence to prove that a day sentry received the vehicle back to the parking yard on 9.5.2009 afternoon. Secondly, there is no evidence to prove that when the claimant reported to work at 6 p.m on the same day the vehicle was parked at the compound and that it was handed over to him by a day sentry or any other person.

26. Even if the driver Mr. Maiyo was to be believed, that he returned the vehicle to the compound and went with key, that in my view, does not rule out the possibility of the workshop personnel stealing the vehicle using the spare key, before the claimant reported to work at 6 p.m.

27. The foregoing notwithstanding, I still hold the view that the vehicle may not have been returned to the parking compound by the driver after all, considering the blatant lies he gave at the Orderly Room Proceedings. He lied that he returned from his eralds at 12.35 p.m and the day sentry Ranger George Silale opened the date for him and he parked the vehicle under a shade. The said evidence sharply contradicted with the evidence of his boss superintented Robert Okuku who stated that his driver returned from his eralds at 2 pm and parked at his place until 3 p.m when he instructed him to drive it to the parking compound. The driver's evidence also contradicted with that of the Duty Corporal who testified and produced Duty Roaster before the Orderly Room Proceedings to prove that there was no day sentry on 9.5.2009 and that Ranger Silale was in fact off duty from 7.5.2009 to 20.5.2009.

28. The foregoing loopholes in the respondent's evidence point to the fact that there was no sufficient evidence to link the theft of the said vehicle and the claimant's negligence. There was no control of vehicle movements going in and out of the 1st Respondent's gate and as such there was no prove that the vehicle was placed under the custody and watch of the claimant between 9.5.2009 6 p.m and 10.5.2009 at 6 a.m.

29. I don't think that, the claimant's statement that he heard the sound of a vehicle being driven away meant that he admitted that it was stolen from the compound. He denied that any vehicle was stolen from the compound and maintained that he heard vehicles being driven about because there were hotels nearby. The respondent admitted that there were hotels and a canteen nearby which could operate beyond 9.30 p.m. if there were events taking place.

30. It is interesting to note from the Orderly Room Proceeding that the Presiding Officer in his judgement held that the prosecution evidence had loopholes which gives the claimant the benefit of doubt including lack of day sentries, lack of control of vehicle movements into and out of the compound without involving sentries, contradiction between the evidence by the driver on the one hand and his boss, and the Duty Corporal on the other hand about the time he alleged to have driven back to park the vehicle and the person who opened the gate for him.

31. On the basis of the said loopholes, the Presiding Officer returned that there was no evidence connecting the claim with the stolen vehicle except the sound and the lights he saw around 1.00 a.m. and meted a light sentence of surcharge and a fine against. Thereafter however the sentence was enhanced to dismissal upon review by a Senior Officer.

32. With due respect to opinion by the reviewing officer, I must return that on preponderance of the evidence, there was no valid and fair reason for dismissing the claimant. There was no evidence before him that placed the stolen vehicle under the custody and watch of the

claimant. The time between when the vehicle was allegedly parked at the compound and when the claimant reported to work and also between 6 a.m and 8 a.m when the theft was discovered was never explained. The foregoing and the other loophole analysed above must have been the reasons why the criminal charges were withdrawn after 3 key prosecution's witnesses had testified.

Procedure followed

33. The second limb to prove is fair procedure. In this case, there is no dispute that the claimant was taken through Orderly Room proceedings where he defended himself. He was also given a right of appeal and he lodged his appeal. The appeal is allegedly still pending. I therefore return that the procedure for terminating the claimant was in accordance with justice and equity as required under section 41 of the Employment Act.

34. However, in view of the finding herein above that there was no valid and fair reason for the terminating the claimant's employment, his summary dismissal was unfair under section 45 of the Act. Under section 43 of the Employment Act, the failure by the employer to prove a valid reason in proceeding like this one, renders the termination unfair within the provisions of section 45 of the Act.

Reliefs

35. The claimant prayed for reinstatement but I declined to grant that relief because under section 12(3) (viii) of the ELRC Act the court is barred from doing so after the lapse of 3 years from the date of separation. I will also not order re-engagement of the claimant in a comparable job because I do not know whether there are any vacancies in existence.

36. However, I award the claimant compensatory damages for unfair termination under section 49 and 50 of the Employment Act. He will get one month salary in lieu of notice plus 12 months salary compensation for the unfair termination. In awarding the said compensation I have considered the claimants long service of 16 years and the fact that he never contributed to the dismissal through misconduct.

37. I also award him the salary for period he was on suspension between May 2009 and September 2010 when he was dismissed being 16 ½ months. Hence $16 \frac{1}{2} \times 21,350 = \text{Kshs.}352,275$

38. The claim for pension is allowed subject to the relevant Pension Scheme Rules and the Law.

Conclusion and Disposition

39. I have found that the dismissal of the claimant was done after following a fair procedure. I have however found that dismissal was unfair because it was not grounded on a valid and fair reason. Consequently I enter judgment in the following terms:

- (a) Notice.....Kshs. 21,350
- Compensation.....Kshs.256,200
- Salary arrears.....Kshs.352,275

Kshs.629,825

- (b) Pension under the pension scheme rules
- (c) Costs and interest at court rates
- (d) The decreed sum is subject to statutory deductions

Dated, Signed and Delivered in Open Court at Nairobi this 19th day of December, 2018

ONESMUS N. MAKAU JUDGE