



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1327 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 6th December, 2018)

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

VERSUS

KENYA KAZI SECURITY SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 19/8/2013 claiming unfair termination of the grievants Joshua Mwanza Kisilu and Joseph Mukavi.
2. The Claimants' case is that both grievants were employed by the Respondent as security guards on 28th September 2002 at an initial salary of Kshs.10,400/=. The 2 guards were assigned guard duties at Shanzu Gardens which was a residential premises for Embassy employees used by various people.
3. The Claimant avers that the 1st grievant was on his annual leave when the Respondent suspected an incident of theft (loss of cushions) between the month of July and September 2012. 1st grievant was summoned to the office to record a statement. On arrival, he was suspended on 1st November 2012 pending investigations.
4. He avers that the house where cushions were alleged to have been lost is a client's house that had no restriction as to access. He avers that the incident had not been reported to the police. He stated they used to be 4 guards but only 2 of them were suspected.
5. He reported the matter to his union the Claimant but the Claimants were not allowed to come in and discuss the matter. He was then dismissed. The matter was reported to the labour office. The Conciliator recommended he be paid his terminal dues and 1 months' salary which was never paid.
6. The 1st grievant gave oral evidence in Court and on cross-examination he stated that he was on a 5 year renewable contract and had served only 1 year.
7. In relation to the theft, he stated that he did not know when it occurred between July and September 2012. He stated that his gross salary was 22,160/= gross and he was a member of NSSF and NHIF.
8. 2nd grievant on his part said he was employed on similar terms as 1st grievant and also dismissed for no reasons under similar circumstances. He avers that they were not accorded any hearing.
9. The Respondent on their part filed their Memorandum of Response on 7/2/2014 through the firm of Waruhiu K'Owade & Ng'ang'a Advocates. They aver that according to investigations carried out by the Respondents, the conduct of 1st and 2nd grievant herein was found wanting, as they could not account for the lost cushions amongst other items in their designated work area.
10. They deny that the grievants were on leave when the events occurred. They aver that the grievants were fairly dismissed and so their claim is not warranted and should be dismissed accordingly.
11. The Respondents also called one witness who works for Respondent as guard force commander on behalf of USA Embassy Project. She avers that the grievants were guarding a compound where 6 Americans were staying. In the course of working, a swimming pool attendant came and told their supervisor that he had been told by Irene Linnet that she wanted to remove cushions that had been given to her by the

grievants.

12. She confirmed that the cushions had been removed in a room and boxes were empty. The supervisor then reported to the Respondent. Their client the USA Embassy then told the Respondent that they had no confidence on the said grievants. They were then suspended but the hearing processes did not go on as the union representatives did not turn up.

13. She avers that the grievants were paid their terminal dues. In cross-examination, the RW1 stated that she did not report the incident to the police. She also admitted that one of the grievants was on leave at the time. She averred that number of cushions stolen was unspecified. She also denied that she attended any report at the Ministry of Labour.

14. The Parties wherein filed their respective submissions.

15. I have considered the evidence and submissions of the parties. It is not in dispute that the grievants were employees of the Respondents.

16. The termination letter addressed to the grievants state that the Respondent had lost confidence and trust in them and so had terminated their service in accordance with Section 44(4) of the Employment Act. The letter in part referred to an incident where cushions were removed from the residence without authority of the client which is theft. No report of this theft is reported anywhere even to the police. The number of cushions lost or an inventory of the same is not exhibited before this Court.

17. RW1 admitted that one of the grievants was on leave when the incident occurred. The RW1 also indicated that the incident was reported to her by a swimming attendant who was never called as a witness. The Respondent therefore failed to prove that they had valid reasons to terminate the services of the grievant.

18. The Respondent also never accorded the grievants any hearing. The Respondent indicated that no hearing took place because the Claimant's/Respondent failed to attend.

19. There is no indication that the grievants themselves were invited for a disciplinary hearing and heard as envisaged under Section 41 of Employment Act 2007 which states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

20. Given that there were also no valid reasons as envisaged under Section 43 of Employment Act, it is my finding that the termination of the grievants was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..”.

21. In terms of remedies, I find for the grievants as prayed and award each grievant as follows:-

1. 1 month salary in lieu of notice 22,160/=.

2. 7 days worked for November 2012 = $7/30 \times 22,160 = 5170.7/=$.

3. 8 months' salary as compensation for unlawful termination = $8 \times 22160 = 177,280/=$.

Total = 204,610.7/=

4. Issuance of a Certificate of Service.

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **6th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Onyancha for Claimant – Present

Kamau for Respondent – Present