



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 20 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DISHON ONGONGA.....CLAIMANT

- Versus -

BOG MASENO HOSPITAL.....RESPONDENT

JUDGMENT

By Memorandum of Claim dated 23rd January 2015 the Claimant avers that he was summarily dismissed by the Respondent unfairly and seeks the following prayers:

- a) Payment of terminal dues in the sum of Kshs. 1,077,513.
- b) Costs of the Cause
- c) Interest on (a) and (b) at court rates.

The Respondent filed Defence and Reply to the Memorandum of Claim on 4th November 2015 in which it denies the averments in the Memorandum of Claim and states that the Claimant was lawfully dismissed due to incitement of workers and creating an antagonising work environment following verbal warnings which he ignored.

At the hearing of the case the claimant testified on his behalf while the Respondent's CEO testified on its behalf.

Claimant's Case

The Claimant's case is that he was employed by the Respondent in November 2000 as a cook at the Respondents School of Nursing. After 5 and a half years he was transferred to the hospital laundry where he worked until he was summarily dismissed. He was a shop steward of Kenya Union of Domestic Hotels, Educational Institutions Hospitals and Allied Workers (KUDHEIHA WORKERS) at the time of his dismissal by letter dated 19th September 2014. The letter of dismissal cites the following grounds for dismissal:

- (i) On 29th June 2005, you were served a letter of desertion of duties when you went missing between 1st June, 2005 until 6th June, 2005.

(ii) On 23rd August, 2006 and 25th May, 2007 you involved yourself by engaging in writing unnecessary letters to the Principal School of Nursing launching ambiguous claims employees of PHIZA Security Firm

(iii) On 14th June, 2007 you were warned against your irresponsible behaviour.

(iii) On 6th March, 2012 you involved yourself in malicious collection of Kshs.1,870/ from employees of PHIZA Security Firm to register them with KUDHEIHA as union members but you didn't.

(v) On 8th August, 2014 you involved yourself in distribution of anonymous letters which were not in the interest of the Hospital.

The letter of dismissal further states that a disciplinary meeting held on 18th September, 2014 found most of the claimant's behaviour over time of a gross misconduct nature and dismissed him with immediate effect thus losing all his benefits.

The claimant testified that the reasons for termination are not correct. He testified that on 29th June 2005 he was served with a letter of absconding duty but the matter was sorted out. He testified that on the second ground he wrote to the Principal to ask for rights of workers and the demands were not unnecessary. He testified that his letters were not responded to. In response to the 3rd ground the Claimant testified that he does not know what the irresponsible behaviour he was accused of in the letter referred. On the ground that he collected money for union dues and failed to register employees of PHIZA Security Firm the Claimant testified that the employees demanded a refund of the money and he refunded the money.

The Claimant testified that the letter of dismissal was without any grounds. He demanded payment as claimed in the Memorandum of Claim.

In the written submissions filed on behalf of the Claimant it is submitted that the Respondent's witness failed to pinpoint any gross misconduct on the part of the Claimant to warrant summary dismissal. It was submitted that even though the Claimant was given a hearing the Respondent failed to comply with section 41 of the Act as the Claimant was not accompanied by an officer of the union even though he was a union member. It is further submitted that the Claimant's right to a fair hearing under Article 50(1) of the Constitution was breached.

Respondent's Case

The Respondent's witness ZACHARIA ODENDI OREM, testified that he joined the respondent around May 2016 as the Chief Executive Officer and one of his duties is human resource management. He testified that all the witnesses in the case had left the Hospital and the Hospital Administrator had since died. He submitted that the Claimant had a series of gross misconduct cases that in his opinion warranted summary dismissal. He further testified that the Claimant was given a fair hearing. He pleaded with the Court to rely on submissions on record.

In the written submissions filed on behalf of the Respondent it is submitted that the Claimant was fairly terminated. That based on the record it was evident that the Claimant's behaviour had become unbearable and unlawful and he did not change his insubordinate behaviour even after being warned severally. It was submitted that the Respondent complied with fair procedure as laid down in section 41 of the Employment Act (the Act) and he was given a fair hearing before termination.

The Respondent relied on the case of JABI V MBALE MUNICIPAL COUNCIL [1975]HCB 191 in which the court held that a dismissal is wrongful if it is made without justifiable cause or in a manner that fails to comply with the requirements of the law. The Respondent further relied on the case of JUSTUS WAMBUA KAVYU V KENYA COMMERCIAL BANK LTD [2016]eKLR.

Determination

I have carefully considered the pleadings, evidence and written submissions. The issues arising for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the remedies sought.

Fair Termination of Employment Contract

Section 41 and 43 provide for the procedure and grounds for termination respectively as follows:

41. Notification and hearing before termination on grounds of misconduct

(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.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 provides prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination.

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(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.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

In present case the Claimant's letter of dismissal does not specify the grounds for dismissal. The letter is reproduced below-

Our Ref. PF NO.5231

Your Ref.

19th September, 2014

Mr. Dishon Ongong'a

P O Box 116

MASENO

Dear Sir

RE: DISMISSAL FROM SERVICES OF ACK MASENO HOSPITAL

You will recall that lately you have been granted three chances to have audience with the Hospital Disciplinary Committee. In our letter dated 8th August, 2014 you were charged with a show cause letter.

On all three occasions you have appeared before the Disciplinary Committee you have decide to give different versions on the charges preferred against you.

Perusal through your file records indicate that you have been involved in the following untoward behaviour.

(1) On 29th June, 2006 you were served a letter on desertion of duties when you went missing between 1st June, 2005 until 6th June, 2005.

(ii) On 23rd August 2006 and 25th May, 2007 you involved yourself by engaging in writing unnecessary letters to the Principal School of Nursing launching ambiguous claims.

(iii) On 14th June, 2007 you were warned against your irresponsible behaviour.

(iv) On 6th March, 2012 you involved yourself in malicious collection of Kshs.1,870/ from employees of Phiza Security Firm to register them with KUDHEIA as Union members but you didn't.

(v) On 8th August, 2014 you involved yourself in distribution of anonymous letters which were not in the interest of the Hospital.

A disciplinary committee meeting which sat on 18th September, 2014 found most of your behaviour over time of a gross misconduct nature and dismissed you with an immediate effect thus losing all your terminal benefits.

Yours faithfully.

Paul Odembo

HOSPITAL ADMINISTRATOR.

The grounds for dismissal date back to June 2005 and include charges that had been conclusively dealt with after the Claimant successfully defended himself as he again did during the hearing of this case.

Warnings are provided for under Rule 16 of the Regulation of Wages and Conditions of Employment (General) Order as follows:

16. An employee whose work or conduct is unsatisfactory or who otherwise commits a misconduct which, in the opinion of the employer, does not warrant instant dismissal shall be warned in writing and the following procedure shall apply -

(a) the first and second warnings shall be entered in the employee's employment record and the shop steward of his union shall be informed accordingly;

(b) the second warning shall be copied to the branch secretary of his union;

(c) if an employee who has already received two warnings commits a third misconduct he shall be liable to summary dismissal:

Provided that where an employee completes two hundred and ninety two working days from the date of the second warning without further misconduct any warning entered in his employment record shall be cancelled.

A warning letter that is more than 292 working days (which is equivalent to one calendar year) cannot be the basis of a dismissal. In the Claimant's case, the warnings had not only lapsed but he had been heard and absolved on the same and the only valid warning letter was the one dated 8th August 2014.

The letter of dismissal further states that the dismissal is on grounds that the Disciplinary Committee found "**most of your behaviour over time of a gross misconduct nature and dismissed you ...**" This is not a ground of dismissal. It is vague and does not specify the nature of the behaviour imputed.

Besides the foregoing the letter inviting the Claimant to appear before the disciplinary committee did not specify the reasons for which he was required to do so such that he was ambushed at the meeting. As already pointed out in the written submissions filed on behalf of the Claimant he was not given an opportunity to prepare for his defence or to be accompanied by a union official yet the Claimant was a union shop steward.

The procedure leading to the dismissal of the Claimant was therefore not in compliance with the Act while there was also no valid reason for the dismissal. The dismissal was thus unfair.

Remedies

Under section 10(3),(6) and (7) as read with section 74 the Respondent is required to keep records sufficient to enable the employee's entitlement on termination to be precisely calculated and where the employer fails to produce such records the burden of proof shifts to the employer. In the present case the Respondent contented itself with denial of the claim but submitted no evidence to controvert the specific monetary claims by the Claimant. I will therefore make the assumption that what has been claimed by the Claimant in terms of statutory benefits are not contested.

The Claimant prayed for pay in lieu on notice which he is entitled to under section 49(1) of the Act and I award him Kshs. 11750. The Claimant also prayed for unpaid salary for 19 days of September 2014 which was not controverted by the Respondent. I award him the same at Kshs. 7442. The Claimant prayed for 145 off days which was also not controverted by the Respondent. I award him the same at Kshs. 56,792.

The Claimant prayed for overtime too. It is the court's view that the same has not been proved on the evidence on record and the prayer is dismissed. The prayer for service pay has also not been proved as the Claimant did not establish that he was not a member of National Social Security Fund which is a statutory Fund and constitutes a statutory deduction.

On the payer for compensation, the court has considered all the circumstances of this case especially the manner in which the Claimant's services were terminated, the fact that he was a union official and the length of his service of 14 years and awards him maximum compensation of 12 months' salary being Kshs. 141,000.

The Respondent shall also pay Claimant's costs and the decretal sum shall attract interest at court rates unless paid within 30 days from the date of judgment.

Dated and signed and delivered this 22nd day of June, 2017

MAUREEN ONYANGO

JUDGE