



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 233 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

HENRY OKWACH INZECHELE.....CLAIMANT

-Versus-

KENYA KAZI SECURITY LTD.....RESPONDENT

J U D G E M E N T

The Claimant filed the Claim herein on 9th September 2014 alleging that his employment was unlawfully terminated by the Respondent, a security company. He prayed for the following remedies:

1. Compensation for loss of employment
2. Compensation for causing him illness
3. Salary for August 2011
4. Payment in lieu of notice
5. Payment of service for years worked
6. Costs and interest
7. Any other relief the Court deems fit to grant

The Respondent filed a defence through Waruhiu, Kowade & Ng'ang'a Advocates on 24th September 2014 in which it states that the employment of the Claimant was lawfully terminated due to loss of business. It is stated in the defence that the Claimant was working at a site in Eldoret when the client requested for replacement of 2 guards with 2 supervisors. The employment of the Claimant who was a guard was terminated to give room for the supervisor as requested by the Client. The Respondent denied that the Claimant's employment was terminated on grounds of his ill-health and further denied that the Claimant's ill health was caused by his work. The Respondent prayed that the suit be dismissed with costs.

The case was heard on 1st March 2017 in the absence of the Respondent after the court was satisfied that the Respondent was properly served with hearing notice through registered post.

It is worth noting that just before the date of judgement which was scheduled for 6th July 2017, but was postponed to 20th July due to the Judges colloquium which was held between 3rd and 7th July 2017, the Respondent filed an application by way of a motion under certificate of urgency seeking orders to set

aside the proceedings of 1st March 2017 and all subsequent proceedings. The application was heard on 19th July but was however defective as the supporting affidavit was dated 21st July 2017 while the motion was dated 12th July 2017 and filed on 17th July 2017. When I pointed this out to counsel prosecuting the application he withdrew the application. The Respondent did not pursue the setting aside of the ex parte proceedings thereafter.

Claimants Case

The Claimant who was unrepresented testified that he was employed by the Respondent on 21st March 2009 as a security guard. He testified that he was posted to Elburgon, Molo to undertake duties as a security officer at Timsales Factory, a company that deals with timber and timber related products. He testified that since there was smoke and chemicals emitted from the factory he was supposed to be provided with protective gear such as helmets, gumboots, gloves and masks but these were not provided as he was only issued with a shirt, trousers, boots and a cape.

The Claimant testified that on 2nd October 2009 he started feeling pain in his chest and could not breathe. He was given a sick sheet and was treated at Molo District Hospital where he was diagnosed with a chest problem. He produced medical treatment records as proof of the same. He testified that this marked the beginning of his journeys in and out of hospitals. He testified that his doctor, Dr. Kevogo A k, a chest specialist at Kitale District Hospital wrote to the Respondent several letters to transfer him out of Molo due to a chronic wheezing bronchitis that was occasioned by the conditions under which he was working but the Respondent did not comply. On 28th December 2009 he was given one month sick leave by Dr. Kevogo. It was then that he was issued with a letter of relocation to Eldoret Branch but was not given transport or transfer allowance by the Respondent on grounds that he was the one who requested for the transfer.

The Claimant testified that he reported to Eldoret on 1st January 2010 and was posted to Corn Products CPC Factory in Eldoret. He testified that since he still did not have protective gear his condition got worse. He was in hospital almost every week and was granted many sick offs throughout 2010. This caused him to be granted annual leave in February 2010 before he qualified for the same.

The Claimant testified that on 5th May 2010 he wrote a letter to Human Resource Manager complaining. He testified that the Respondent guaranteed a bank loan for his medical treatment around June 2011. He testified that in July 2011 the Eldoret Branch Manager sent him to AAR Health Services Nairobi with a letter asking AAR to carry out a medical examination of the Claimant and he was examined on 19th July 2011 but the results were never disclosed to him. He avers that this was a violation of his right to privacy under Article 31 of the Constitution. He testified that he later learned that the medical report revealed that he was suffering from asthma.

The Claimant testified that after he reported back to work the Respondent started harassing him because it knew he was sick and that he wrote a letter to the Respondent's CEO on 10th August 2010 complaining about his harassment by Eldoret Branch management. He testified that at the end of August 2011 he found that Kshs.3800 had been deducted from his salary. When he asked why he was informed it was for the treatment in Nairobi.

The Claimant testified that he went to his lawyer who wrote a letter complaining about the deduction on 2nd September 2011 while he was on sick off. About 10 days later he received a phone call from his manager informing him that he had been sacked on grounds that the Respondent had lost business and his services were no longer required. He was asked to hand over everything to the Manager in charge at Eldoret Branch office. When he went to hand over he was issued with the letter of termination and told he would be paid terminal dues but to date of filing suit he had not been paid.

The Claimant testified that he went back to his lawyer who sent a demand letter to the Respondent. In the Response to the demand letter the Respondent stated that the Claimant had been paid everything due to him which was not true. A certificate of service was sent to his lawyer together with the response to the demand letter.

Determination

I have carefully considered the pleadings and the testimony of the Claimant. I have also considered the Response on record. The issues arising for determination are the following:

1. Whether there was valid reason for termination of Claimants' employment;
2. Whether there was procedural fairness in the process leading to termination;
3. Whether the Claimant is entitled to the prayers sought.

Reasons for Termination

Section 43 of the Employment Act (hereinafter referred to as 'the Act') provides that an employer must prove the reasons for which it intends to terminate the employment of an employee and that the reasons must be valid. The section provides as follows-

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.

The reasons for termination of the Claimant's employment as given in the relevant part of his letter of termination are the following-

"This letter serves to inform you that your services with the company will not be required with effect from 16th September 2011. We regret to advise that the company has lost business hence the need to take the above decision.

In view of the above this letter serves to inform you that your services with this company have been terminated with effect from 16th September 2011."

These reasons would constitute redundancy as defined in section 2 of the Act as follows-

"... the loss of employment, occupation, job or career

by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;"

The procedure for redundancy as provided for in section 40 of the Act is that the employer must notify both the employee and the local labour office about the reasons and extent of the redundancy at least one month before the redundancy is carried out and the payment of terminal dues including severance pay must be made before the employee is released from work.

In the Reply to the Memorandum of Claim the Respondent has pleaded at paragraphs (b) and (c) under the heading **Facts and Background** that-

(b) The Respondent's client requested that site supervisors be incorporated in the premises, which called for the replacement of two guards with the said site supervisors.

(c) The Respondent, upon noting an apparent loss of business, lawfully terminated the Claimant's employment services.

The Respondent did not explain how replacement of a guard by a supervisor would constitute loss of business. It did not explain if the supervisors were recruited afresh or selected from among existing employees.

The court finds and holds that replacement of a guard with a supervisor is not loss of business and therefore not a valid reason to declare an employee redundant. The termination was therefore unfair for want of valid reason.

Procedural Fairness

Section 41 provides for procedure before termination 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.

In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR***, Radido J summarised the legal fairness requirements set out in Section 41 of the Employment Act, 2007 as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

For the present case the respondent did not take the employee through any process before his employment was terminated. As explained in his testimony he was called while on sick leave and informed that his services were no longer required and that he should go to the office to hand over. When he went to the office to hand over he was issued with the letter of termination.

Section 45(2) of the Employment Act provides that termination of employment 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.

Having failed to take the Claimant through either the process in section 40 or 41 of the Act, the termination was procedurally unfair whether considered in terms of redundancy under section 40 or termination under section 41. I find and declare the termination unfair accordingly.

Remedies

The Claimants prayed for pay in lieu of notice, wages for August, 2011, service and compensation for both loss of employment and sickness.

The Claimant having been unfairly terminated is entitled to salary in lieu of notice of one month which I award him. He is also entitled to salary for August 2011 which the employer did not provide any proof that it paid. The Claimant is further entitled to compensation for unfair termination, which I will assess at 6 months' salary taking into account that the termination was not only unfair but also constituted an unfair redundancy.

I however do not find any evidence to support the prayer for compensation for sickness. The protective gear for a security guard do not include helmets, gumboots, gloves and masks as the Claimant urged the court to find. In any event the medical report from AAR which the Claimant attached as part of his bundle of documents indicates that he had been suffering from asthma. The report attributes this to have been a finding of the Claimant's own doctor and not AAR. This means that the Claimant was already suffering from the medical condition before being employed by the Respondent.

The calculation of the terminal benefits of the Claimant will be based on the gross pay in his pay slip for July 2011 at page 16 of his bundle of documents at Kshs.11,945. The Claimant is not entitled to service pay under section 35(5) of the Act as he was a member of NSSF. He is further not entitled to gratuity under the Regulation of Wages (Protective Security Services) Order as he had not worked for the qualifying period of 5 years' service.

For the foregoing reasons I award the Claimant the following:

1. Pay in lieu of notice Kshs.11,945
2. Pay for August 2011 Kshs.11,945
3. Compensation at 6 months' gross salary Kshs.71670

Total Kshs.95,560.

I further award the Claimant an additional Kshs.25,000 to cover his reasonable expenses and disbursements, making a total of Kshs.120,560. Should the payment not be made within 30 days it will attract interest at court rates from date of judgment.

Orders accordingly.

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

MAUREEN ONYANGO

JUDGE