



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 100 OF 2014

1. CHARO KONDE

2. ARNEST SONJE.....CLAIMANT

VERSUS

JOLAURABI PRIMARY SCHOOL.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 27/4/2011. The claim for the third claimant was struck out on 24/6/2014 leaving only the first and second claimants' claims for termination. The respondent has denied the alleged unfair termination of the claimants' employment contracts and averred that the termination was lawfully done for gross misconduct and after being served with prior warning. The suit was disposed of the adopting the pleading, witness statements and documentary evidence and filing of written submissions by both parties. The issues for determination herein revolve around fairness in the termination of the contract of service and the remedies for any violation of the law.

CLAIMANTS' CASE

2. The first claimant Mr. Charo Konde Bojo stated in his written testimony that he was employed by the respondent on 8/1/2007 as a security guard earning ksh.7206 per month. His working time was from 7am to 6pm and there was no off day or annual leave. He worked as such until 8/5/2011 when he received a termination letter from his employer. In his view the termination was unfair because it was done without any prior warning notice or even hearing and has left him without any other source of livelihood. He therefore prayed for judgment against the respondent.

3. The second claimant Mr. Ernest Sonje Mwatsuma stated in his written testimony that he was employed as security guard by the respondent on 24/1/2003. He stated his shift from 7am and ended at 6pm and likewise he was not given any off days or annual leave. He worked as such until 8/5/2011 when he received a termination letter from the respondent. He contended that the sudden termination was wrongful because it was not preceded by any warning, notice or fair hearing and has left him without source of livelihood to support his family. He also prayed for the reliefs sought in the suit.

4. Mr. Redon Sikava Muyela is the Landlord for the respondent where the claimants were employed. He confirmed in his written testimony that he saw the claimants were working for the respondent. He stated

that the claimants were working through out even on public holidays and Sundays and they never went for their annual leave. He further stated the claimants objected to mismanagement of the school by the sponsor and how the children were being sent out to fundraise instead of remaining in class to learn. That the respondent was not pleased by the claimants and dismissed them on false allegation that the claimants were attending work under the influence of alcohol. He contended that the termination of their services was unfair because the claimants did their work seriously for years but they were terminated for no valid reason and without payment of their terminal dues.

DEFENCE CASE

5. Mr. Nashon Ngao is the chairman of the respondent's school committee. He confirmed in his written testimony that the claimants were employed by the respondent as security guards and were later on dismissed. He further stated that the second claimant had his first appointment terminated for misconduct but he was reappointed in August 2010. He prayed for the suit to be dismissed on allegation that they lacked employment records to prove their case. He contended that the letter of appointment produced by the first claimant was produced by the first claimant was unreliable because it had been materially tampered with.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimants were employed by the respondent as security guards until 8/5/2011 when they were dismissed for gross misconduct. The issues for determination are:

- a. Whether the termination of the claimant service was wrongful/unfair.
- b. Whether the reliefs sought should be awarded to the claimants.

Unfair/wrongful termination

7. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent termination letter dated 27/4/2011 cited poor performance, insubordination and attending work under the influence of alcohol as the reasons for terminating the services of the claimants. No evidence in the form of performance appraisals has been adduced by defence to prove poor performance on the part of the claimants. Likewise, the testimony by the respondent's landlord Mr. Redon Sikave Muyele that the claimants never attended work drunk has not been rebutted by the defence witness who filed his testimony and as such the allegation by the defence that the claimants attended work under the influence of alcohol is not proved and it is dismissed.

8. However the offence of insubordination by the claimants has been proved on a balance of probability. In his own testimony the claimants witness Mr. Redon Sikava Muyela confirmed that the claimant had objected to the manner in which the school was being managed and especially when student were send to fundraise during class time. Whereas the claimants may be right morally to mind about the manner in which the students were spending their school time, it was not within their right under the contract of employment to challenge their employer in her managerial discretion. By so doing the claimants committed the offence of insubordination which under Section 44(4) of the Act entitles the employer to dismiss the employee summarily. Consequently, I find and hold that respondent had proved that there existed a valid and fair reason that led her to terminate the services of the claimants on 8/5/2011.

9. As regards the procedure, the claimants produced termination letters indicating that they were dismissed after some meetings in which they had been called to discuss their behavior. However the burden of proving that the claimants were accorded a fair hearing before dismissal for the misconduct lies with the employer. The written testimony by the respondent did not mention that the claimants were invited to any hearing akin to the one prescribed by Section 41 of the Act. The said section requires in mandatory terms that before terminating the contract of service of an employee on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he

understands and in the presence of a fellow employee or shop floor union official of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representations for consideration before the dismissal is decided. Failure to accord the claimant such mandatory fair hearing rendered their termination unfair and wrongful and I so find.

Reliefs

10. Under Section 49 of the Act, I award each claimant three months salary as compensation for unfair termination plus one month salary in lieu of notice. In awarding the small compensation I have considered the fact that the claimants contributed to their termination through misconduct. I also award each claimant overtime at the rate of 3 hours per day for 26 days per month. The claim for off days is dismissed because it is not possible for human being to work for 20 years without any off day. The claim for public holidays worked is also dismissed for lack of particulars and evidence. The claim for “unpaid leave” is also dismissed for lack of particulars and legal basis.

11. The summary of the award for each claimant is outlined as follows:

First claimant (Charo Konde)

Noticeskh.7200
Compensation21600
Overtime (140/8 x3 x12 x4).....131040
159,840

Second claimant (Ernest Sonje)

Noticeksh. 7725
Compensation23175
Overtime (257/8 x 3 x 12 x 1).....30069
60,969

DISPOSITION

12.For the reasons of unfair termination, I enter judgment for the claimant in the aggregate sum of ksh.220,809 plus costs and interest.

Dated, signed and delivered this 17th November 2017

O N Makau

Judge