



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2053 OF 2015

CALEB OMONDI RADIDO.....CLAIMANT

VERSUS

EAST AFRICA SPECTRE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Caleb Omondi Radido against his former employer, East Africa Spectre Limited. The claim is as contained in a Memorandum of Claim dated 12th November 2015 and filed in Court on 18th November 2015.

The Respondent's defence is contained in a Reply dated 27th January 2015 and filed in court on 11th February 2015.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its General Manager, Hudson Chitala. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 11th October 2002, in the position of Safety and Security Officer. On 15th July 2015, he was suspended from duty on half pay. The suspension was extended for a further 30 days with effect from 20th August 2015.

4. The Claimant states that after the extension of suspension, he did not receive any further communication from the Respondent. He deems this as constructive dismissal. He now claims the following:

- a) A declaration that his indefinite suspension amounts to unlawful and unfair dismissal
- b) 12 months' salary in compensation.....Kshs. 888,000
- c) Lost pension benefit.....240,000
- d) Damages for premature termination of contract.....7,104,000
- e) General and exemplary damages

f) Costs plus interest

The Respondent's Case

5. In its Reply dated 27th January 2015 and filed in court on 11th February 2015, the Respondent denies dismissing the Claimant and states that his name still appears on its payroll.

6. The Respondent further states that following a theft incident in the security department, where the Claimant was in charge, a decision was made to place him on a 30 day suspension to pave way for investigations. Prior to the suspension, the Claimant was questioned over the incident but his response was unsatisfactory.

7. The Claimant's suspension was extended for a further 30 days. While on suspension, the Claimant earned half salary and full house allowance, which was fully paid, save for the months the Claimant was absent from work.

8. The Respondent denies extending the Claimant's suspension indefinitely and states that after the suspension ended on 23rd September 2015, the Claimant went to the office on 24th September 2015 and asked for permission to attend to a personal matter. Having been allowed to be away in the morning of 24th September 2015, the Claimant did not return.

9. The Respondent pleads that a show cause letter was prepared but was not served on the Claimant as he had deserted work. A second show cause letter prepared after 7 days was also not served on the Claimant.

Findings and Determination

10. There are two issues for determination in this case:

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

11. On 15th July 2015, the Claimant was issued with a suspension letter stating as follows:

"CALEB OMONDI RADIDO

C/O East Africa Spectre Ltd

Box 78050-0507

NAIROBI

RE: SUSPENSION FROM DUTIES

As per your job description, among other duties you are supposed to:

- use all means to stop theft*
- investigate all theft cases and present to management for necessary disciplinary action*
- check on any issues which hinder security after working hours*
- recruit, supervise and train security personnel.*

It is Management's observation that you willfully neglected these duties leading to security breaches that have led to loss of Company's property.

You have also been un-procedurally and constantly absent from office leading to lack of proper supervision of your staff.

You are hereby suspended from performing your duties for Thirty days effective today, due to negligence of duty. This suspension is subject to review and is renewable if necessary. You are advised to hand over to the General Manager all responsibilities you are currently handling, immediately.

During this period, you will be on half pay as per company rules and regulations.

(Signed)

DR. IDA B. ODINGA

MANAGING DIRECTOR”

12. The suspension was extended by an interoffice memo dated 20th August 2015 stating as follows:

“This is to bring to your attention that your Suspension has been extended for another 30 days. During this period, management may summon you for the purpose of getting more information about your working.

(Signed)

HUDSON B. CHITALA

GENERAL MANAGER”

13. The Claimant told the Court that upon expiry of the extended suspension period, he reported to work on 24th September 2015 but was told by the Respondent’s General Manager, Hudson Chitala that he would be called back after consultation with the Managing Director.

14. On his part, Chitala testified that the Claimant indeed reported to work on 24th September 2015 but asked for permission to go and attend to a personal matter, never to return. It is the Respondent’s position therefore, that at the end of the suspension period, the Claimant deserted duty.

15. In *Teresia N. Peter v Kitui Teachers Savings & Credit Society Ltd [2014] eKLR* this Court stated that:

“ Suspension does not imply that any misconduct has taken place but is a neutral act where an employee is asked to stay away from work to enable the employer to conduct investigations into allegations made against the employee.

An employee on suspension remains innocent until proved otherwise. In addition, such an employee has a legitimate expectation that they will be given an opportunity to respond to any adverse findings out of investigations conducted by the employer. Suspension by its nature creates a fair amount of suspense for both the employee and the employer and should not therefore be unduly prolonged.”

16. I have looked at both the suspension letter dated 15th July 2015 and the extension thereof dated 20th August 2015 and find that the suspension slapped on the Claimant was punitive and not neutral. Further, there was no indication that there would be any investigations into the allegations made against the Claimant. What emerges is that by the time the decision to suspend the Claimant was reached, his

culpability had been determined. This, in my view, amounted to an unprocedural disciplinary action against the Claimant.

17. Regarding the events after the end of the suspension period, I have this to say; the Respondent wants the Court to believe that an employee who had just completed a 60 days' suspension period, was casually allowed to go and attend to a personal matter, never to return. Then the Respondent decided to post a show cause letter addressed to the Claimant to itself allegedly because it had no way of reaching the Claimant.

18. It was not lost on the Court that the Respondent itself produced a record of the Claimant's personal file data, including his postal address and details of his next of kin. Chitala also admitted that the Respondent had the Claimant's telephone contact. If indeed the Respondent wanted to get in touch with the Claimant, there was adequate means to do so. What is clear is that no real effort was made to reach the Claimant. In fact, I find that the failure to serve the show cause letter was a deliberate mockery of due process.

19. The Court therefore rejects the Respondent's line of defence and adopts the Claimant's testimony with regard to the circumstances leading to the termination of his employment. Overall, I find that the Respondent's action amounts to an unlawful and unfair termination of the Claimant's employment and he is entitled to compensation.

Remedies

20. Flowing from the foregoing findings I award the Claimant twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

21. No basis was laid for the claims for lost pension benefit, general and exemplary damages which therefore fail and are dismissed.

22. In the end, I enter judgment in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation.....Kshs. 780,000
- b) 1 month's salary in lieu of notice.....65,000

Total.....845,000

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant will have the costs of the case.

25. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF NOVEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Onyony for the Claimant

Miss Ouko for the Respondent