



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 1876 OF 2017

WILLIAM AGANDE WERE.....CLAIMANT

VERSUS

INTERCONTINENTAL NAIROBI.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent in the Chief Magistrates Court in 2009 and the suit was subsequently transferred to this Court by the order of Rika J. on 24th July 2014. The Claimant averred in his claim that the Respondent summarily dismissed him from employment on or about the 29th October 2004 on allegations of forgery. He was charged at the Kibera Law Courts in Cr. Case No. 2467 of 2004 and was acquitted under Section 210 after hearing. He sought 3 month's salary in lieu of notice, general damages and interest on the sums claimed at court rates as well as costs of the suit.

2. The Respondent in its defence denied that the Chief Magistrates Court had jurisdiction to handle the suit and averred that the Claimant's suit did not disclose a cause of action.

3. The Claimant testified on 25th September 2017 and stated that he was employed by the Respondent from 20th December 1997 and worked for the Respondent until 30th October 2004 when he was dismissed. He recalled the 28th September 2004 when he was given some dollar bills to change for a staff who had been given tips. He stated that the dollars were cashed by the hotel cashier and banked and three days later he was called by the security officer and a Anti-Fraud officer and taken to Commerce House then to Langata Police Station and later to Kileleshwa Police Station and charged with having foreign currency. He testified that he went back to the Respondent and was informed that the currency had been altered from 5 dollars to read 50 dollars. He stated that he had received the cash from Mudenyo and he was suspended on 13th October 2004 and given a summary dismissal a few days later. He testified that there was no disciplinary hearing. He referred to the CBA in place between the Kenya Association of Hotel Keepers and Caterers and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) and stated that if there is a case pending in court of law or under investigation by police the suspension is delayed until the outcome of the case or investigation. He stated that he incurred expenses of Kshs. 25,000/- paid to Okulo & Co. Advocates in the defence of the criminal case and that he suffered a lot. He testified that his children left school and he was chased from his house and thus he sought general damages.

4. In cross-examination, he testified that the letter of suspension was dated 13th October 2004 and that there was indication that there were internal investigations. He admitted that he took dollars to Mr. Davis Muli a clerk at the front desk who gave him Kenya shillings in exchange. He stated that he was taken to police station and no investigations were undertaken. He testified that he was called to the office and at the office they wanted to know if Midenyo had given him the dollars. He stated that he gave the side of his story and that he was in custody for 4 days before being released on cash bail. He received the cash for days worked but not for years worked. He admitted to receiving all the items specified in his termination letter as well as a certificate of service. He testified that according to the CBA the employer had to wait for the investigation and finding before the termination or dismissal.

5. In re-examination, he testified that no investigations were undertaken and the Respondent did not respond to the demand letters after his summary dismissal. He stated that the CBA and the appointment letter indicated what was to be done.

6. The defence called Caroline Karanja the Assistant Human Resources Manager of the Respondent and she stated that from the documents in record, the Claimant was employed as an F&B cashier and he was dismissed for handling USD notes that had been forged. He was given an opportunity to record statement and he said he had received the money from a colleague and that the money was taken to the bank it was established to be forged and the Claimant was dismissed. She testified that the Claimant was suspended on 13th October 2004 and the summary dismissal dated 29th October 2004. He was paid for the 29 days worked in October and the 26 leave days and was given leave travelling allowance, 7 public holidays and refund of pension scheme as well as overtime was paid. He was issued with a certificate of service. She stated that the dismissal was in order.

7. In cross-exam, she testified that she was actually employed by the Respondent on 10th October 2004 in training department and was not in the HR department at the material time. She stated that investigations were conducted and that between the incident on 28th September 2004 and the suspension on 13th October 2004 investigations were undertaken. She testified that normally no memoranda are issued for investigations and that what they worked with are statements recorded. She admitted that the hotel was part of the CBA as it is industry wide. She stated that they abide by the Employment Act, the disciplinary procedure at work and CBA. She stated that the CBA changes every 2 years and what is normally changed are the wages. She testified that the CBA under clause 10 spoke of suspension and that it also provided that the employee would be summarily dismissed if investigations find culpability. She stated that the investigations undertaken internally led to suspension and that from the record on the file she did not see any record of a formal complaint to the police. She was not aware who the witnesses were for the prosecution and who charged the Claimant. She testified that the charge sheet had a part which was similar to the allegations made by the Respondent about the US dollars. She stated that Mr. Muraguri is the security manager of the Respondent and that the charge sheet indicated him as the complainant. She admitted that the outcome of the case was communicated to the Respondent and stated that the summary dismissal still stood.

8. At the time of penning the judgment only the Claimant's submissions are on the file. These were filed on 30th October 2017 and in the submissions the Claimant submitted that the dismissal was unlawful as the hearing he was accorded was after he had been charged and that this was unfair and failure to accord him fair administrative action. Reliance was placed on the case of **Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR** where Rika J. held that even in the previous regime of laws the CBAs incorporated substantive procedural justice in employment termination and that the concept of unfair termination was common in most workplace labour contracts. It was submitted that from the decision of Rika J. it was clear that the Respondent herein was subject not only to the Employment laws but also the CBA. The Claimant submitted that the Respondent was the complainant in the criminal trial and participated in the proceedings and that the provisions of clause 10 of the CBA should have been adhered to. The Claimant submitted that he was entitled to the damages sought and cited Section 44 (f) of the Employment Act cap 226 for the proposition that he could only be summarily dismissed if he had not been released on bail or bond or otherwise set at liberty within 14 days of being charged. He submitted that he was released on the third day when he was taken to court. He cited Sections 46 and 49 of the Employment Act and the case of **Moi University v Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers [2016] eKLR** where the court held that it had the power to order compensation or reinstatement. The Claimant thus submitted he was entitled to the prayers sought in his claim.

9. The claim is one whose anchor is the repealed Employment Act cap 226. Under the said Act, there was no elaborate *audi alteram* procedure as is set out under Section 41 of the Employment Act 2007. The parties herein had the CBA between the Kenya Association of Hotel Keepers and Caterers and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA). The clauses in the CBA made provision regarding the conduct of the parties in various scenarios and focal is clause 10 on suspension and interdiction. The Claimant was suspended on 13th October 2004 after he was suspected of having been involved in some criminal conduct. The provision of clause 10 are as follows:-

The employer reserves the right to suspend with full pay an employee from employment up to a maximum of 14 days pending investigations into alleged gross misconduct or other offences.

Should the employee be found to have committed gross misconduct or other offences, then he/she shall be summarily dismissed or terminated with effect from the date of the employer's decision upon completion of the investigations. Should the employee be found innocent of gross misconduct or other offences then he/she shall be reinstated forthwith.

Where the employee's case is under investigation by the Police or is pending before a court of law the employee's suspension shall be extended without pay until result of the Police investigation or the court action is known.

10. The Claimant placed great emphasis on this clause of the CBA. It is clear that if there is an investigation by the Police, the suspension is to last until the result of the police investigation or court action is known. In his case, the suspension was on 13th October 2004 after the incident on the night of 28th September 2004. Between the suspension and termination, investigations by police were undertaken and the Claimant was arraigned in court on 7th October 2004 alongside one Patrober Mindenyo. In reading the provisions of the CBA, the Claimant seems to read them selectively to suggest that he could not be dismissed before the conclusion of the criminal trial. Clause 10 reproduced above is one that permits the action the Respondent took. The threshold for a conviction in criminal trial is a beyond reasonable doubt while the Respondent had only to balance probabilities before termination. The Claimant committed an offence as per the finding of the management of the Respondent and paid the ultimate price which was loss of employment. In my view, the Claimant was entitled to receive a dismissal as he did and notably the dismissal was in accord with the CBA the said dismissal taking place slightly over 14 days after the suspension and upon conclusion of investigations. The claim is therefore dismissed but I will make no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 14th day of December 2017

Nzioki wa Makau

JUDGE