



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.107 OF 2014

ERICK JUMA ODHIAMBO CLAIMANT

VERSUS

MARS SECURITY GUARDS LTD RESPONDENT

JUDGEMENT

1. The issue/s in dispute is not set out are required under Rule 4 of the Court (Procedure) Rules. In the prayers, the Claimant is seeking a declaration that his was a summary dismissal that was unlawful and compensation is due.
2. The claim is that on 8th June 2009 the Claimant was employed by the Respondent as a security guard at a monthly pay of Kshs.12, 714.00. On 28th August 2013 he was accused of stealing a metal bar while on assignment on 27th, the previous day, which allegations were proved to be false as investigations revealed that the Claimant was innocent and another guard Wilson Oduor was the one who had stolen the metal bar upon his admission. On 3rd September 2013 the Claimant was summarily dismissed without due process. The Claimant is that this dismissal was with malice; the Claimant was never given a chance to defend himself and despite the Respondent being aware as to who had stolen the metal bar subject of his dismissal.
3. The claim is for notice pay; compensation for leave not taken and damages for unfair and wrongful dismissal and costs.
4. In evidence the Claimant testified that on 27th August 2013 he was on duty in the day shift with another colleague Wilson Oduor. The Claimant was by the night guard at 6pm but Wilson Oduor had to wait for his reliever. On 28th August 2013 when the Claimant reported to work he found the supervisor Mr Irungu having gathered all the guards and wanted to know who had removed a metal bar from the wall where they were working. Wilson admitted to have taken the metal bar. After 2 days all the security guards, total 4 – 2 for the day and 2 for the night shift – were called to the office, the Claimant was told to remove his uniform and was issued with a memo and told to report after 2 days. Upon resuming duty the Claimant was issued with a letter of dismissal.
5. The Claimant also testified that he was never given a hearing and did not know what transpired when he was sent away for 2 days. He reaffirmed his claims.

Defence

6. In defence, the Respondent admit having employed the Claimant first on 8th June 2009 as a security guard on an annual contract. His last contract commenced on 10th November 2012 on a salary of Kshs.10, 912.00 and was issued with a contract.

7. The defence is also that the Respondent was providing security to several clients and on 27th August 2013 the Claimant was on duty at a client's premises when metal bars went missing and upon investigations it emerged that the Claimant was involved and was therefore suspended. A memo was issued on 2nd September 2013, he replied but was suspended again to 3rd September 2013 to allow the Respondent consider these responses and upon which a decision was arrived at to dismiss the claimant. This was after the Respondent ha considered the disciplinary record of the Claimant and his contract that was biding. Previously the Claimant had miscondacted himself;

- On 6th February 2013 the Claimant reported late for work causing great inconvenience to the respondent. a memo was issued where the Claimant responded that his phone had been lost and had to take his wife to hospital and a warning was issued;
- On 11th June 2013 a client complained that the Claimant had slept on the job, a memo was issued and a second warning letter; and
- On 20th June 2013 a client complained that the Claimant was asleep on the job, a memo was issued, he was suspended, and a third warning was issued.

8. That it was upon this background that the Claimant was summarily dismissed after the events and loss of metal bar on 27th August 2013. All final dues were paid all at Kshs.13, 614.00 and the claim is meant to abuse the Court process and should be dismissed with costs.

9. In evidence the Respondent called Jackson Orondo the Operations Manager who runs the daily affairs at the respondent. The Respondent had a client, Tononoka Co. who deal in metal and where the Claimant was placed. That on 27th August 2013 the claimant's supervisor reported that a metal was found missing and one guard had been apprehended. One guard was found with the metal– Wilson Oduor, who was dismissed. The client did not want the matter reported to the police as the Respondent has a contract on how to compensate the client.

10. On 2nd September 2013 a memo was issued to the claimant, to show cause and give an explanation. He was then given a hearing but noting his record and history he was dismissed. There had been 3 previous warnings, for sleeping on the job on 7th February 2013; for being asleep on the job on 11th June 2013; and another incident took place on 20th June 2013. The Claimant had 3 warding by 2nd September 2013. This warranted a summary dismissal. All dues owing were paid.

Determination

Whether the summary dismissal was wrongful and or unfair.

Whether there are any remedies due.

11. The provisions set out under section 41 of the Employment Act is the template for what is fair labour relations. Before termination of employment, an employer must give an employee a hearing and such a hearing must be in the presence of the employee's representative.

12. The above applies even where the employee has grossly misconducted himself and the employer intends to apply the provisions of section 44 where summary dismissal is allowed with less notice. The subject employee must be given a hearing the gross act of misconduct notwithstanding. This is what forms procedural fairness and without it, the resulting dismissal is flawed.

13. The other context that an employer must apply is the reason or reasons for the dismissal. Such reason/s must exist and must be valid and justified. Therefore an analysis is required as to what the

employee is alleged to have done leading to notification for hearing and or need for dismissal. Once a reason is found to exist that is valid, the employee must be given a hearing and his representative called. Then, only after following such procedures can the dismissal be said to meet substantive fairness.

14. In this case, the Claimant is said to have been dismissed on the basis that a metal got lost while he was on duty. He had 3 previous warnings relating to being found asleep on the job. Therefore, the instant issue that caused the dismissal is the missing metal that the Claimant challenged that indeed his colleague Wilson Oduor stole and admitted to the same and was dismissed and this was confirmed by the Respondent witness. So why was the Claimant dismissed?

15. The essence of a suspension letter is to enable an employer conduct investigations in the absence of an employee as of right. Once investigations are complete, then the employer is clear as to what misconduct has been committed and this must be set out to the employee to be able to respond. The responses that may have been made by an employee while on suspension are simply meant to facilitate the process of investigations as at this time, the employer has not framed the issue for termination or dismissal. The conclusion of investigations would as of necessity then allow the employer to issue a show cause letter as at this point the issues are crystallised and the employee is put on notice that they risk losing their employment if no satisfactory responses are given.

16. The issues as above were well set out in the case of **David Otunga Managi versus The Office of the Controller and Auditor General & Another, Cause No.933 of 2013**, and the Court held that;

... A suspension in itself is not an admission of guilt with regard to employment relations, such action is allowed to permit the employer to investigate the subject matter at hand whereupon the employee is then required to show cause where the investigations undertaken result in the finding that there is a good case made against the employee.

17. In the case of **Frederick O Owegi versus CFC Life Assurance Ltd, Cause No.1001 of 2012** and the Court held that;

... Once an employee is issued with a show cause the disciplinary process has begun and only then can the provisions of section 41 be pursued. Have a hearing in the presence of a union representative or where the employee is not unionised, before another employee of the employee's choice.

18. Therefore, only after these procedures have been followed, a suspension followed by a show cause letter, can an employee be said to know what charges/offence or misconduct he is supposed to respond to. This is summarised by the Court in the case of **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the Court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

19. In this case, the Claimant on 2nd September issued with a memo on the grounds that a metal bar had been stolen. On 27th August 2013 the Claimant had been sent off for 2 days to facilitate investigations on the missing metal. Within this time, his colleague Wilson Oduor admitted to having stolen the metal and was dismissed. What then existed as of 2nd September 2013 for the Claimant to respond to? I find no valid reason that was justified so as to require the Claimant as at 2nd September 2013 to respond to in his defence. At this point, the issue was the case of a missing metal that another employee had already admitted and sanctioned. To thus require the Claimant answer to the same, despite the investigations and

matters so far resolved was a double punishment to the wrong person/employee.

20. Where indeed the Respondent conducted investigations, such should have revealed the real culprit was far from the claimant. At this point, the previous poor disciplinary record of the Claimant should not have been an issue. As at 2nd September 2013 thought the Claimant had 3 warnings due to misconduct, he was still in the employment of the Respondent and where investigations revealed that indeed he had not stolen any metal, such previous record should not have been applied to his detriment. Such was to rely on a reason that did not exist, a reason that had no basis and lacked legitimacy.

21. In the letter of dismissal the Respondent states;

Summary dismissal

The management has noted with concern that on the 27/09/13 some items got stolen from your assignment. Trying to follow up it was established as a senior guard that you had left the premises with/under a new guard and went away. When we went through your file you had been issued with three warning letters and hence management hereby is summarily dismissing you from duty. ...

22. What then was the offence committed by the Claimant to warrant the summary dismissal? Some items got stolen and it was admitted to have been stolen by Wilson Oduor who was dismissed. The Claimant left new guard and went away, but the details are not given as to what role the Claimant failed to undertaken upon the close of his shift and or hours.

23. Thus under such ambiguous circumstances, the Claimant who had a poor record in employment, the Respondent found the opportunity to summarily dismiss him. this I find to be contrary to due process and lacking in procedural fairness and further that there existed no valid reason for the summary dismissal making it substantive unfair to so dismiss the claimant.

Reliefs

24. Notice pay is due where a summary dismissal is without justification and found to be procedurally unfair. The Claimant is awarded Kshs.12, 714.00.

25. Though leave pay is claimed, I find from the final dues paid by the respondent, 18 days leave were paid for. This is declined.

26. Upon the finding that there was no substantive reasons for dismissal and that there was procedural unfairness, compensation is due. This is awarded at 12 months' salary all being kshs.177, 996.00.

Judgement is hereby entered for the Claimant for kshs.12, 714.00 for notice pay and kshs.177, 996.00 as compensation. The Claimant is awarded costs.

Orders accordingly.

Delivered in open court at Nairobi and dated this 27th day of January 2016.

M. Mbaru

JUDGE