



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1299 OF 2014

SAMUEL DANIEL WAFULA CLAIMANT

VERSUS

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 15th November 2000 as a Senior Security officer and his last gross salary was kshs.67, 788.00 per month. The Claimant was terminated on 15th November 2010 following a disciplinary hearing. He appealed against the dismissal and the same was concluded on 5th September 2012 and the summary dismissal was confirmed. The dismissal was on the reasons that the Claimant participated and or failed to prevent student unrest at the university on 18th and 29th March 2009; that he conducted himself in a scandalous and disgraceful manner rendering himself unfit to hold office with the respondent; and that pursuant to section 44(4) of the Employment Act, on reasonable ground the actions of the Claimant was suspected to amount to criminal offence.
2. The claim is also that on 18th and 29th March 2009 there were student unrests that led to the closure of the Respondent University. Following the unrests, on 11th August 2009 the Claimant was alleged to have participated which he denied in his letter of response dated 18th August 2009; on 21st August 2009 the Claimant was sent on compulsory leave pending hearing of his case. On 7th October 2009 the Claimant was told to exhaust his 242 off days while he was still on leave. On 28th October 2009 the Claimant was advised to exhaust all his accumulated off days. On 12th October 2010, the Claimant informed the Respondent that he had exhausted his off days. On 29th October 2010 the Claimant was invited to a disciplinary hearing scheduled for 3rd November 2010. The hearing proceeded where the Claimant was present and was heard in his defence. On 15th November 2010 the Claimant was informed that he had been dismissed from his employment with the Respondent.
3. The Claimant was aggrieved, and he lodged appeal on 2nd December 2010. On 13th August 2012 the Claimant was invited to appear before the respondent's Staff Appeals board on 16th August 2012 and on 5th September 2012 he was informed that his appeal was not successful.
4. On 24th August 2009 the Respondent wrote to the Claimant advising him to appear before the Parliamentary committee, research and technology on 26th August 2009 and the committee upon hearing all the matters recommended that all staff be reinstated as there was no prove of involvement in the unrest.
5. The claim is also that the summary dismissal of the Claimant was malicious. The reasons for such

malice is that the Claimant was sent on compulsory leave before hearing; the compulsory leave was substituted and he was directed to take off days that were due at 242 days; the disciplinary hearing took 3 years to conclude; the Claimant was not informed of the charges against him; and the failure to be reinstated as directed by the parliamentary committee. Other grounds of malice are that the Respondent failed to take into account the evidence of the claimant's immediate supervisor the chief security officer; failing to consider that the Respondent vice-chancellor had personally singled him out for praise due to his role during previous strikes; the disciplinary hearing committee failed to present accusers against the Claimant so that he could examine them; and failing to present the Claimant with the special senate committee report that the Claimant had requested for.

6. The claim is also that as a result of the malice he has suffered great loss, mental and psychological anguish and damage. He attended training abroad in 2011 with a view to serve as a private security contractor and after the trainings he awaited deployment with the American Missions in Afghanistan but was informed that he could not be taken as he had left the Respondent employment dishonourably. The Claimant has also been blacklisted for failing to service his loan with Equity bank Limited. The Claimant was overlooked for a junior position at the Meru University College and remains unemployed due to the dishonourable discharge by the Respondent. His children education has suffered greatly for lack of a job as he has been unable to finance their education.

7. The claim is also that the Respondent has refused to make good the claimant's demands and the unlawful summary dismissal should be overturned by the court. The Claimant is seeking reinstatement and payment of salaries, allowances and benefits from the date of dismissal to the date of such reinstatement. In the alternative, the Claimant is seeking compensation for 12 months; 3 months' notice pay; general damages; certificate of service; interest on the paid dues and costs of the suit.

8. In evidence, the Claimant testified that upon employment by the Respondent as Senior Security Officer he served diligently until November 2010 when he was dismissed. In August 2009 he was issued with a letter stating that he had incited students to violent demonstrations. That on 29th March 2009 the Claimant was involved in student's unrest which led to the death of a student at the university. The Claimant was accused of leaking security information and was absent from duty.

9. The Claimant testified that he defended himself against the allegations made on him on the grounds that he did not incite students to unrest or demonstrations. His evidence was that he is the one who alerted the Respondent about a looming insecurity and advised that the Anti-Riot Administration Police should be called to reassure students that there was enough security at the Respondent premises. It cannot therefore be a case of him inciting students to violence as alleged.

10. The Claimant also testified that he was manning the main gate on 29th March 2010, while on duty at 6.30pm he saw students at the flyover linking the university/Respondent to the main highway, shouting "uwa Wafu, Uwa Wafu" [kill Wafu] using the Claimant nickname of 'Wafu' instead of 'Wafula'. The students were headed to the main gate where the Claimant was stationed and started throwing stones and forcing him and his colleagues to run for safety. The armed security at the gate managed to shoot in the air and dispersed the students. The Claimant ran to his house to change clothes so as to disguise himself and in the process met Prof. Karagu who was also fleeing from the marauding students. The Claimant then went to his office to pick the office radio where he found the KUSA offices on fire and there were gun shots sounds in the air. He decided to run to the football pitch to monitor events but the radio controller switched off communications as word was that the students were heading to the security office to harm the security officers. With his phone switched off and being on low power radio, the Claimant opted to take refuge in the chapel for the night.

11. The Claimant also gave evidence that the events of the day had gone well, he had been instructed to ensure that only paid up students had access to the Respondent premises. There had been a previous unrest and some students had been suspended. The Claimant was directed not to allow the suspended students back to the Respondent premises. He requested for an accountant to be at the gate so that the students who required to pay and get access could do so. A makeshift office was put up for this purpose. However, one student who had been suspended was at the gate inciting others not to pay and a crowd was

forming at the main gate. The Claimant dispersed them but the student, Eric Ojwang was adamant and to diffuse the crowd, he arrested him at the security office. The student became violent and bit the finger of the DVC. The student was taken to Kahawa Sukari Police Station and later the DVC ordered that he should be released. The next day, 29th March 2009 the admitted students started streaming out of the Respondent premises with their luggage as there were rumours of a strike and security information was that the arrested student, upon his release was planning to cause harm to the Claimant. As the Claimant remained stationed at his work station, the departing students were forming a crowd outside the main gate and at the flyover leading to the calls to kill the Claimant.

12. The Claimant also testified that upon his response with regard to accusations against him, he was sent on compulsory leave on 21st August 2009 but while on leave he was directed to take all his rest days – 242 days, and this was notwithstanding the fact that he was on an undefined compulsory leave. On 11th October 2010 the Claimant had exhausted his rest days and therefore wrote to the Respondent seeking to be advised on what to do next.

13. On 29th October 2010 the Claimant was called to the disciplinary committee for hearing of his case that was held on 3rd November 2010. Upon hearing, on 15th November 2010 the Claimant was served with a letter of summary dismissal. He lodged an appeal and was called for hearing on 16th August 2012 but on 5th September 2012 the appeal was rejected and the dismissal confirmed.

14. The Claimant also testified that his dismissal was malicious and has caused him mental torture, psychological distress, harm and damage. The disciplinary process took 3 years to complete; he was called by a parliamentary committee hearing the case which recommended that he should be reinstated but this was not done; at the hearing by the disciplinary committee no evidence was called against the claimant; and after leaving the Claimant he has been unable to secure new employment as his record is that he had left the Respondent dishonourably. That the Claimant has been forced into great hardship, his children were not able to finish school and have been caused irreparable damage and his wife enjoyed a medical cover under the Respondent but is unable to since he was dismissed and her health has greatly deteriorated. The Claimant had a loan with Equity bank Ltd and was unable to pay and has accumulated and this has led to his being blacklisted.

15. The Claimant is seeking to be reinstated back into employment with the Respondent without loss of benefits or payment of terminal dues set out in the claim. He is also seeking costs.

Defence

16. In response, the Respondent admit they had employed the Claimant but was summarily dismissed on 15th November 2010 for gross misconduct. Following student unrest on 29th March 2009 the Respondent conducted careful and extensive investigations which revealed that the Claimant had facilitated the strike by providing information on security to students. The Claimant was absent from his work station at the time of the unrests. This amounted to a fundamental breach of his terms of contract pursuant to section 44(3) and (4) of the Employment Act which warranted summary dismissal. On 11th August 2009 the Claimant was informed of allegations against him and he gave his responses further to which he was sent on compulsory leave to allow for investigations. At the time the Claimant had 242 rest days which he was asked to take. The Claimant was called to a disciplinary hearing where he was heard in his defence but did not give satisfactory responses. He was thus dismissed as a result. The Claimant was allowed to appeal, he was called to argue his appeal but this was rejected as nothing new was raised different from his earlier defence.

17. The defence is also that the allegation of malice by the Respondent against the Claimant have no basis or supported by any evidence and should be dismissed. Where the Claimant suffered any loss or damage, such was as a result of breaching his contractual obligations to the Respondent.

18. The defence is also that the claim is time-barred by virtue of section 90 of the Employment Act and jurisdiction is denied. As such the claim should be dismissed with costs.

19. In evidence, the Respondent had two (2) witnesses, Nderitu Gikaria and Johnson Kiplagat Chelelgo.

20. Mr Gikaria testified that he is the human resource manager of the Respondent and was at the disciplinary hearing of the Claimant. The Claimant as the Senior Security officer of the Respondent at the material time had the responsibility to protect Respondent property; staff and students; investigate and be present at the premises so as to prevent any form of insecurity incident. This was important for the Respondent as the university has students ranging from 20 to 25 years old who are active and require follow up to protect them and the property of the Respondent. At the time there were over 80,000 student and staff population with 50,000 of such population being based at the main campus where the Claimant was based. Security is an issue of priority for the Respondent who recruit highly trained and experienced officers and ensure availability of all the necessary tools for ease of communication, mobile phones, radio and in addition to the internal security the Respondent has hired 30 armed administration police officer to beef up internal security.

21. Mr Gikaria also testified that on 29th March 2009 there were student's unrest and he was on campus this night. It was expected that the Claimant was to be available to guide the armed security and be present to help external support that came in to guard the student. The police called to give security support at the respondent premises had nobody with internal security details to guide them in the absence of the Claimant. The police from Kasarani Police station could not navigate within the campus without the help of internal staff of which the Claimant was the chief Security Officer. On this day and night, the Claimant was absent from his duty station and could not be reached on phone or radio as both were switched off. He was only traced the following day. His defence was that he had run away for his life, but the Claimant is an experienced trained officer and he knew the standing orders and should not have run away from action. All the other security officers were present save for the Claimant. There was no reason to be fearful as the Respondent had called for external support from the police. Sammy Ruto, a colleague of the Claimant was forced to temporarily leave his work station but came back after a short time. The Claimant took the option to be away all night. The chapel where the Claimant said he was hiding at is 30 meters away from the security base. The students were also running to the chapel and the Claimant could not have been with the student he allegedly was running away from. Even where the Claimant was at the chapel hiding, he only needed 5 minutes to go back to his work station which he failed to do.

22. Mr Gikaria also testified that due to the student's riots the Respondent suffered massive loses. 3 buildings were burnt which included the student centre, the computer laboratory and hostels. These were sensitive areas where the Claimant was required to guide the external police to guard. One student died as a result of the riots and an inquest was opened at Makadara Magistrates Court. Due to the claimant's inaction there was loss of life.

23. The Claimant was issued with a show cause notice upon investigation. it took the Respondent over 5 months to investigate the reasons behind the students unrest that involved so many students. After the unrests the students went home and investigations involved the evidence of 163 interviews which were not complete until after 5 months. Some students were scared of giving information fearing victimisations from those behind the unrests. The delay was reasonable so as to build confidence with those interviewed. The students revealed that they got information from the Claimant. He was in constant communication with them and leaked information.

24. The Claimant replied to the show cause and was then called for hearing but he did not give a satisfactory defence on the charges against him. The disciplinary committee found sufficient evidence that the Claimant was at fault and he was away from duty station which he admitted. The charges against him were serious in light of the consequences as such absence from duty led to loss of life. The Claimant was therefore dismissed. He was informed of his right of appeal which was filed but was dismissed as the Claimant had no new evidence to warrant a review.

25. Pending hearing, the Claimant was sent on compulsory leave to facilitate investigations. It was then discovered that he had so many pending rest and off days which he was directed to take. This was procedural.

26. The second witness, Mr Chelelgo testified that he is the Deputy Director Security of the Respondent for the last 9 months. He was not in the employment of the Respondent at the material time subject to this case and has reviewed all statements and records in the file. He testified that he is a trained and commissioned army officer [Retired Major] and has served in various missions locally and abroad. From the records, the Claimant on 29th March 2009 at 6.30pm lost command of his station, he said that he went to his house to collect the radio but does not say when he used the radio to stop and deal with the unrest. He was not in control and neglected duty which is scandalous for an officer charged with security to act as the Claimant did. A security officer is required at times of crisis. To hide in the chapel was contrary to what duty dictated the Claimant to do. Such conduct was a reflection of incompetence. The remedy for reinstatement cannot apply as the character of the Claimant reflected at the time of crisis he does not meet the standard to serve as a security officer for there over 70,000 student and staff population of the Respondent University. It would be impossible to work with the Claimant as a security officer.

27. Upon cross-examination, Mr Chelelgo testified that as a trained military officer he has training to deal with civil unrest. Since he joined the Respondent he has undertaken his duties diligently and there has been not student's unrest. The Claimant as a former Administration officer had sufficient training to deal with the situation but was negligent and acted contrary to call of duty.

Submissions

28. At the close of the hearing, both parties agreed to file their written submissions. Such were filed on 5th February 2016 and 29th February 2016 for the Claimant and Respondent respectively.

29. The Claimant submit that the facts surrounding the dismissal of the Claimant are not in dispute. It is true that the Claimant was on duty together with other security officer at the main gate of the university on 29th March 2009. Students were streaming in after there had been a previous unrest and were required to confirm payments at the gate. The suspended students were agitating violence and the Claimant alerted the Respondent of a looming unrest and requested for reinforcement which arrived at 5pm. But the officers left after some time upon which students charged and commenced destruction of property. Fearing for his life, the Claimant took cover within the chapel. His means of communication was radio and phone and both were low on battery. The Claimant was only able to leave his hideout the next day.

30. The Claimant also submit that he was not given a fair hearing. Investigations that the Respondent had information against the Claimant on the unrest were never submitted to him at the hearing and no witness was called for his cross-examination. While investigations were ongoing the Claimant was sent on compulsory leave and then sent on rest days. The standards applied did not meet the required threshold to warrant the dismissal. The hearing was a sham as held in the case of **Pelecium Olum versus Export Processing Zones [2014] eklr**. That the Claimant was not facilitated at the hearing by a call of witnesses for his examination as held in the case of **Mwendwa Maluli versus Kenya Power & Lighting Co. Limited [2014] eklr**.

31. The Respondent failed to submit any evidence of an investigations conducted in the matter and the summary dismissal was therefore not justified. As a result the Claimant was not removed from office for a valid reasons and is entitled to the remedies set out.

32. The Respondent submit that the claim is statute barred. The claim was filed on 7th August 2014, 4 years after the termination of employment which is contrary to section 90 of the Employment Act which require claims to be filed within 3 years from the date the cause of action arose and as held in the case of **Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eklr**. On this basis, the claim is filed out of time and should be dismissed with costs.

33. The Respondent also submit that the application of section 90 of the Employment notwithstanding, the Claimant was dismissed for a justifiable reason by application of terms and conditions of service which required the Claimant to undertake and perform his duties well but he was in gross misconduct when he failed to act as required and absented himself from duty without justifiable reason. Section 44 of the Employment Act thus applied where the Claimant was in fundamental breach of his contract and

warranted summary dismissal. By his own admission, the Claimant testified that when the students surged and called out his nickname seeking to harm him, he had run away to his house and then to the chapel. That he did not want to confront the students and thus went to the chapel. However, such evidence was challenged by the Respondent noting the chapel was 30 metres from the main gate where the Claimant was supposed to be at work; he had his phone and radio off and could not be reached the entire night.

34. The proceedings thus with regard to failure to attend duty, abandoning duty and work station which in its nature was for the Claimant to attend to was acts of gross misconduct. The sanction of summary dismissal was justified.

35. The Respondent also submit that they complied with the requirements for the hearing of the Claimant in his defence and also allowed him to file appeal and was called for hearing. the Court in **Mary Kiptui versus Kenya Pipeline Ltd [2014] eKLR** held that even where an employee has committed serious acts of gross misconduct that warrant summary dismissal under section 44, they are entitled to a hearing pursuant to the provisions of section 41 of the Employment Act. The Respondent followed the law to the letter and invited the Claimant for hearing and also allowed and heard his appeal.

36. The dismissal was therefore justified and no remedies are due. The claim should be dismissed with costs.

Determination

Whether the claim is time barred by virtue of section 90 of the Employment Act;

Whether the summary dismissal was lawful or unlawful; and

Whether the remedies sought are due.

37. The Respondent has cited the provisions of section 90 of the Employment Act and submitted that the suit is time barred. The gist of section 90 of the Employment Act is to ensure that all employment and labour disputes are filed in Court within 3 years from the date the cause of action arose. However, my reading of section 90 of the Act is that, such mandatory provisions cannot be read exclusively and must be seen in the whole and in context of the entire Act. Where an employee is allowed to lodge an appeal challenging termination or dismissal from employment pursuant to section 45(5) of the Employment Act and such an appeal is allowed by the internal policy of the employer such as the Respondent, where such an appeal is filed and is under consideration, its term must be put into account. The appeal in its essence is to ensure that a separate body is able to independently consider the same and give a verdict, which may reject or allow the appeal. Where the appeal is allowed, the subject of termination or dismissal becomes mute while where the appeal is rejected, the termination or dismissal is confirmed. The appeal process therefore becomes a vital process for consideration in view of the provisions of section 90 of the Employment Act especially with regard to time running. Where an appeal is under consideration, and such an appeal is allowed by the employer, the matter has not closed. Upon the verdict at appeal, section 90 of the act comes into motion.

38. The Claimant was dismissed on 15th November 2010 and he immediately lodged his appeal. The appeal was heard on 16th August 2012 and was rejected on 5th September 2012. With such rejection of the appeal, time started running in accordance with section 90 of the Act. The cause herein was filed on 6th August 2014 Which I find to be within the 3 years rule set out in law.

39. It is not in dispute that the Claimant was dismissed from his employment with the Respondent vide letter dated 15th November 2010 for the reason of gross misconduct. Section 44 of the Employment Act has laid out clearly the matters which if committed by an employee would attract summary dismissal. Of relevance to the issue at hand is Section 44 (3) and (4) (a) and (c) which provides that an employee may be dismissed summarily if;

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- b. ...
- c. an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

40. However, before invoking the provisions of Section 44 (3) or (4) of the Employment Act, an employer is under a statutory obligation pursuant to Section 41(2) to give an audience to the employee who is subject to the dismissal so that the employee can Make representations and which representations the employer should consider before making a decision to dismiss the employee. This is what this court has established to be fair procedural requirements in that before the harsh sanction of a dismissal from employment is taken against an employee, the employer has heard the nature of defence the employee may have and put it into account before the dismissal. Such fairness is defined in the case of **Elizabeth Washeke & Others versus Airtel Networks Ltd & Another, Cause No.1972 of 2012** to be;

The Act or the Court has not defined what fairness is but we can borrow from other jurisdictions with similar results. In the South African Case of Council of Mining Unions vs. Chamber of Mines of SA (1985) 6 ILJ 293 (IC) held;

When granted the its ‘unfair labour practice’ jurisdiction, the Court decided not to define precisely what it understood by the concept of ‘fairness’ or its acronym, ‘equity’. What it did say, however was that fairness was something more than lawful. This meant that even though conduct was lawful, it was not necessarily fair.

41. It is therefore mandatory under section 41(2) that for an employer who wishes to terminate the services of an employee under the provisions set out under section 44 of the Act to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct.

42. In this case, the Claimant confirmed that on 3rd November 2010 he was heard by the disciplinary committee of the Respondent and on 15th November was issued with a letter of summary dismissal. He was invited to appeal against the decision which he did and was called for a hearing of his appeal on 16th August 2012 but on 5th September 2012 the appeal was rejected and the summary dismissal confirmed.

43. With regard to provisions of section 45 of the Employment Act, I find the summary dismissal of the Claimant was procedurally fair. The Respondent complied with all the statutory and mandatory requirements in this regard. Such cannot be faulted.

44. Where an employee is terminated or dismissed from employment, there is a right to challenge the reasons for termination of such dismissal. The legal burden placed upon an employee who complains of unfair termination or wrongful dismissal is found in section 47(5) of the Employment Act. The section provides that;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. [Emphasis added].

45. In the letter of dismissal, the reasons for dismissal are stated to be that the Claimant participated and or failed to prevent student unrest at the Respondent university on 18th and 29th March 2009; that he conducted himself in a scandalous and disgraceful manner rendering himself unfit to hold office with the respondent; and such acts were of gross misconduct and in breach of his contract of employment. The facts were that on the 29th March 2009 there were students unrest at the Respondent university where the Claimant, being the Chief Security Officer and stationed at the main gate failed to prevent the unrests, was absent from his work station and efforts to trace him were fruitless. In his defence, the Claimant testified that indeed there were student unrests on 29th March 2009 and due to the efforts he had taken to ensure there was security within the Respondent premises, some students unhappy with his intervention were keen to harm him and they went chanting and calling for him to be harmed or killed. The students started throwing stones at his office and duty station which prompted the Claimant to run away fearing for his life, he went home for a change of clothes and to disguise himself and when he made effort to return to his duty station, the violence had escalated and the students had burnt the student's centre. At this point the Claimant could not communicate with his superiors on the radio call as communication had been cut off and his phone had its battery low or was running low. The Claimant opted to take cover at the university chapel to pray and hide for the night.

46. The defence of the Claimant was found unsatisfactory by the Respondent and thus the dismissal from employment as Chief Security Officer. I have also perused the letter of appointment issued to the Claimant. Indeed his role was that of a Chief Security Officer. The Claimant also testified that he was employed by the Claimant due to his vast knowledge and training in security matters. He was a senior officer in charge of security at the Respondent entity. The events then on 29th March 2009 come into focus and how the Claimant conducted himself on the face of student's unrest with regard to his function as the Chief Security Officer. Where the Claimant had to run away from his duty station when the students unrest escalated, his evidence is that he went home for a change of clothes and to disguise himself. So what then was the purpose of such 'disguise'? I take it that this was with the intention and purpose to resume work and undertake his duties under cover of the 'disguise' and to be able to deal with the matters at hand as his duty required. Secondly the Claimant had his communication gadgets that are said to have been low on battery but he does not explain what efforts he took to ensure that while at his house or within the chapel or anywhere within the Respondent premises he made effort to communicate on his whereabouts so as to be of use to the Respondent with regard to his allocated duties. The Claimant just let things be! Thirdly, the Claimant, as a security officer entrusted with the role of ensuring security within the Respondent premises opted to take into hiding at the chapel to pray and lodge for the night. I find these actions to be of serious lapse of duty. Such lapse of duty and absence from his duty station without any reasonable cause is addressed under section 44 of the Employment Act as gross misconduct that warrant summary dismissal.

47. By the end of the day/unrest the Claimant remained absent from his duty station, was not in communication, and remained in hiding the entire night. This much the Claimant admitted in his defence before the disciplinary committee, in his evidence in Court and in his cross-examination. What then was the purpose of his role as the Chief Security Officer? I find the Claimant abdicated duty on purpose, he has no excusable explanation(s) for the same as his actions do not speak well with regard to the position he held with the Respondent and based on his training and requirements of his job.

48. The reasons for dismissal thus assessed, the sanction issued of dismissal, I find there were substantive reasons that went into the fundamental requirements under the claimant's contract of employment and in law that were breached. Absence from duty or failure to attend duty station without reasonable cause is a matter subject for summary dismissal. Such I find was fairly applied by the Respondent within the applicable law. The dismissal was therefore justified pursuant to section 47(5) of the Employment Act;

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

49. The circumstances of the claimant's case can clearly be differentiated from the case of **Mwendwa Maluli versus Kenya Power & Lighting Co. Limited [2014] eKLR** cited above where the employee was never given a hearing at all. The Claimant had the chance to respond to the show cause notice, attend hearing and make his appeal which was also heard. From the responses to the show cause, the hearing at the disciplinary committee and on appeal, the Claimant maintained that he was absent from his duty station the entire night of 29th March 2009. Such can therefore not be said required witnesses to confirm admissions already made by the claimant.

50. The Claimant has raised the matter of a parliamentary committee that had cleared him of any misconduct and directed the Respondent to reinstate him back to his position. However, in employment and labour relations, parties to an employment relationship or with a contract of employment are regulated by its terms and conditions or within the contest of the Employment Act or the Labour Relations Act for unionised employees. The actions of third parties in such a relationship are only persuasive and not obligatory. I find no bearing of any third party findings on the disciplinary process undertaken by the Respondent on the Claimant that I have established was lawful and fair.

51. On the allegations of malice set out by the Claimant, on the above findings, such has no basis. Where the dismissal met the threshold of fairness, the question of malice cannot find basis.

52. The Claimant also testified that he has since dismissal by the Respondent undertaken Training in Jordan in 2011 but was unable to secure employment with the American Mission in Afghanistan. That the potential employer looked at his background and established that he had left the Respondent employment dishonourably and as such he has suffered damage and mental anguish as a result and is unable to secure new employment with any other employer. The Claimant also gave the example of Meru University College that hired a junior instead of hiring him due to the same past record. However, as at 2011 when the Claimant was sourcing new employment, he had since been dismissed by the Respondent. What was pending was his appeal that was heard on 16th August 2012. In this regard, section 51 of the Employment Act only requires a former employer to issue a Certificate of Service and not a letter of recommendation. Section 51(2) requires that;

(2) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.

53. The prayers sought in the Memorandum of Claim include that of issuance of a Certificate of Service. Section 51 of the Employment Act requires that when issuing a termination or dismissal letter, a certificate of service should also issue unconditionally. However, a certificate of service is not equivalent to a letter of reference. What has happened to the Claimant after leaving employment with the Respondent cannot be the fault of the Respondent. The previous records of employment are matters of fact which do not go into a certificate of service as a point or reference for a recommendation. There is the record of summary dismissal and the reasons are stated. The Claimant had a previous record of misconduct that forms part of his employment record with the Respondent. Such are records required to be kept by an employer and put into account by the Court in assessing the requirements as to whether a dismissal or termination of employment was fair or unfair as set out under section 45 of the Employment Act. At section 45(5) the Court must be satisfied that;

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(f) the existence of any previous warning letters issued to the employee.

54. Before conclusion, the Claimant gave emphasis to his claim that he was wrongly sent on compulsory leave and while on such unprocedural leave was directed to take all his rest days of 242 days. In the case of **Rajab Barasa & Others versus Kenya Meat Commission, Cause No.2262 of 2015**, the Court held;

... Taking of annual leave is a legal requirement under the provisions of section 18 of the Employment Act. The employer is required to ensure that in every 12 months an employee takes their annual leave and this should not extend to beyond 18 months. The purpose is to ensure that each employee takes a paid break and the rationale is that rest cannot be postponed. To fail to give an employee a rest or break is to start eating on their energy which lead into burnout and reduction in productivity. Therefore, taking of annual leave is not punishment and in any case the duty is upon the employer to ensure each employee takes their annual leave when due. There is therefore nothing like ‘forced leave’ where an employee has earned such leave.

55. Therefore, where the Claimant had earned rest days, section 27(2) of the Employment Act put into account, such should have been taken as directed. In any event the accumulation of such days to 242 was not healthy. Such rest days should have been taken after every seven (7) days of work. In this regard, the compulsory leave and the direction to take all rest days due is not unlawful.

Conclusion

In the penultimate, I find no merit in the claim in its entirety. There are no remedies due in this case. Though costs are claimed, in the interests of justice, all factors put into account, it is fair and just that such are not awarded to any party.

The claim is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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