



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2103 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 2nd March 2016)

CHARLES SANDE NAGATSO.....CLAIMANT

VERSUS

SECURITY GROUP KENYA LIMITED RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed his Memorandum of Claim on 17.10.2012 in person. Later on the firm of Mageto Njau & Company Advocates came on record for the Claimant.
2. The Claimant's case is that he was employed by the Respondent on 1.4.1995 as a car commander in Cash in Transit Department as per his Appendix 1.
3. On 12.4.2011, he fell seriously sick and went to Kenyatta National Hospital for treatment (Appendix 2). On 19.4.2011, he reported to work after getting 7 days off-duty which the management of the Respondent refused to acknowledge. They denied him entry to work insisting that the letter from Kenyatta National Hospital was fake.
4. On 9.5.2011, they summarily dismissed him as per Appendix 3 and the letter indicated that the medical documents were suspected not to be genuine and were put under investigations which revealed that the letter from one Dr. John Kamau (Appendix 2) did not originate from the hospital. They indicated that they had lost faith in him and they resolved to dismiss him under Section 44 (a) and (g) of Employment Act.
5. The Claimant indicated that prior to going to Kenyatta National Hospital he had send a message to his immediate supervisor of Cash in Transit Department Mr. Khalid Adhumani. He avers that he was not given any opportunity to be heard as provided under Section 41 of Employment Act.
6. He was also not given his terminal benefits. It is also his claim that he was underpaid for the period he worked and therefore seeks to be paid for the same plus severance pay and 12 months salary as compensation for loss of employment.
7. He annexed his payslip showing he was earning basic pay of 8,149/= and a house allowance of 1,922.35 plus Kshs.950/= travelling allowance.
8. The Claimant avers that the letter he produced from Kenyatta National Hospital was not a forgery and that he had worked for the Respondent for 16 years.
9. In cross examination the Claimant said in 2011, he was earning about 23,000/= as per his last payslip of March 2011. He stated that he didn't inform his union when he was dismissed. He

- avers that he was paid as per the Collective Bargaining Agreement his union had with his employer.
10. He avers further that he was treated in a private clinic and brought a card to show the same but the treatment notes remained at the clinic. He also confirms that Kenyatta National Hospital wrote stating that the letter dated 27.5.11 didn't come from them.
 11. He stated in re-examination that he was treated at Kenyatta National Hospital Counseling Clinic and the document he produced in Court was authentic. He also states that he was underpaid by 9,732.45 and 9,375.35/=.
 12. The Respondents filed response on 15/11/2012 through the firm of T.K. Kariba Mbabu and Company Advocates. It is their response that the Claimant was its employee but denies employing him on 1.4.1995.
 13. They also stated that on 12.4.2011, the Claimant was assigned duties as a car commander but he failed to turn up for duty as expected and remained absent until 19.4.2011 when he produced a letter from Kenyatta National Hospital purporting to have been given 7 days bed rest with effect from 12th April 2011. That they suspected the letter was not genuine and commenced investigations by visiting Kenyatta National Hospital. The investigations were concluded on 29.4.2011 and they revealed that the purported letter did not originate from Kenyatta National Hospital.
 14. The Respondents stated that on the basis of the said investigations, the Claimant was summarily dismissed vide a letter dated 9.5.11 after being given a chance to explain himself which he failed to convince the Respondents why he had to give a forged letter.
 15. The Claimant appealed against his summary dismissal but the appeal was dismissed.
 16. The Respondent also avers that they wrote to the Chief Records Officer at Kenyatta National Hospital on 27.5.2011 requesting Kenyatta National Hospital to verify the letter produced by the Claimant allegedly from Kenyatta National Hospital.
 17. The Respondent was told that the letter was not genuine as the outpatient Number 51-013-1-7 did not exist and that email on the letter for Kenyatta National Hospital was incorrect and neither did Kenyatta National Hospital have a physician by the name Dr. John Kamau who purportedly signed the letter.
 18. The Respondents contend that the Claimant was working in a very sensitive department as a driver in Cash in Transit (CIT) Department and it was not expected that a driver would not turn up to work without informing his supervisor to make alternative arrangements.
 19. I have considered the evidence and submissions of both parties. The issues for consideration are:
 1. **Whether there were valid reasons to warrant summary dismissal of the Claimant.**
 2. **Whether due process was followed.**
 3. **Whether the Claimant is entitled to prayers sought.**
 20. On the 1st issue, the reason given by the Respondent in terminating the Claimant is that they had lost faith in him and resolved to dismiss him under Section 44(a) and (g) of the Employment Act Laws of Kenya.
 21. Section 44(4) (a) and (g) of Employment Act Laws of Kenya states as follows:
 - a. ***without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;***

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

a. *deals with absenteeism from work whereas (g) deals with committal of a criminal offence.*

22. It is therefore incumbent that the Respondent proves these reasons did exist.

23. Under Section 43 of the Employment Act:

1. *In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*
2. *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

24. The issue of absenteeism from work has been explained by the Claimant that he was unwell and had gone for treatment at Kenyatta National Hospital. The Respondent cannot in this respect unilaterally determine he lied and state that the document he presented in Court is a forgery. There is no evidence from a document examiner or from Kenyatta National Hospital to explain that the document is a forgery.

25. It was therefore imperative that the Respondent would have done an honourable thing by subjecting the Claimant to a disciplinary hearing to authenticate or otherwise disapprove his claim before deciding to summarily dismiss him. This reason of dismissal on account of absenteeism is therefore not proved.

26. On the next issue, is the requirement on due process. Due process is provided for under Section 41 of Employment Act which states as follow:

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

27. It is apparent that this process was not followed in the case of the Claimant.

28. This Court makes a finding that the dismissal/termination of the Claimant by the Respondent was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:

2. *A termination of employment by an employer is unfair if the employer fails to prove:*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason:-*
 - i. *related to the employee's conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*

c. *that the employment was terminated in accordance with fair procedure.*

29. I now award the Claimant the following:

1. *1 months' salary in lieu of notice = 12,222/= (salary, House allowance, travelling, risk and cleaning allowance).*
2. *12 months salary as compensation for damages for unlawful and unfair termination = 12,222 x 12 = 146,664/=*

TOTAL = 158,886/=

Plus costs

30. Claim for service pay or severance pay is not payable as the Claimant was a member of NSSF and this was not a redundancy situation.

31. Overtime was also paid as seen on Claimant's payslip and therefore this prayer is denied.

Read in open Court this 2nd day of March, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musyoki holding brief for Miss Babu for Respondent – Present

Claimant – Present