



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 934 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 7th April 2016)

DANIEL WARINDA.....CLAIMANT

VERSUS

KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Daniel Warinda filed this Claim on 4.6.2012 through the firm of Omulele and Company Advocates.
2. The Claimant's case is that he was employed by the Respondent in 1996 to 2009 as per his letter of Appointment DW1. He was appointed as a subordinate staff. He avers that he served the Respondents diligently and with honesty until 15.4.2009 when he was dismissed from service vide letter Appendix 2 stating that he was dismissed as per their HR Policy Manual M4(e) and the Employment Act 2007 Part VI 44(4) (g). Both provisions deal with summary dismissal and Section 44(4) (g) deal with commission of a criminal offence to the substantial detriment of his employer or his employer's property.
3. The Claimant avers that his services were terminated upon fabricated charges of attempted fraud a case which he avers that he was charged, found innocent and acquitted by Court as he had no case to answer.
4. At the time of his termination the Claimant was an Accountant earning a gross salary of 24,125 per month as per his Appendix DW 2.
5. The Claimant avers that he was dismissed unfairly and unjustly and claims for his terminal benefits including 1 months salary in lieu of notice, days worked and not paid for prorata leave, damages for unfair termination, illegal deduction from 2.5.2007 to 15.4.2009, all totaling 611,168/=, certificate of service plus costs of this suit.
6. The Respondents opposed this claim. They filed their Memorandum of Reply on 27.9.2012. The Respondents contend that the Claimant worked for them for as stated but that he was lawfully and procedurally dismissed on 17.6.2009 and deny the Claimant's claim. It is their assertion that the Claimant was paid all his dues and that his claim is baseless.
7. The Respondents also aver that the Claimant has a similar suit pending in Court being High Court Petition No. 61/2010 at Nairobi. The Respondents therefore pray that his suit be dismissed accordingly.

8. The parties agreed to proceed by way of written submissions.

9. I have considered the pleadings filed by the parties plus their respective submissions, the issues for determination are as follows:

1. Whether there were valid reasons to terminate the Claimant.

2. Whether due process was followed before Claimant's termination.

3. What remedies if any the Claimant is entitled to.

10. On the 1st issue, the Respondent avers that the dismissal is due to the fact of committing a criminal offence. This reason is not stated in the dismissal letter but can be discerned from the wordings of the dismissal letter which refers to Section 44 of Employment Act.

11. Section 43 of Employment Act states as follows:

“(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.

12. The law therefore not only requires that the reasons must be stated but must be proved. There is no reason the Respondent have set out and proved that led to the termination of the Claimant.

13. On issues of due process, the Respondent also failed. Section 41 of Employment Act states as follows:

(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.

14. Failure to give reasons and to follow due process before dismissal of Claimant makes the dismissal unfair and unjust as provided for under Section 45(2) of Employment act which states:

“(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 employees 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.

15. In the circumstances I find for Claimant and I award him as follows:

1. 1 months salary in lieu of notice = 24,125/=

2. 12 months salary for unlawful termination = 12 x 24,125 = 289,500/=

3. Leave as pleaded = 8,042/=

Total = 321,667/=

4. Issuance of a Certificate of Service.

5. Costs of this suit.

Read in open Court this 7th day of April, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mumbo holding brief for Miss Waibara for Claimant – Present

No appearance for Respondent