



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI

CAUSE NO. 172 OF 2014

JOHN S. OTIDO CLAIMANT

VERSUS

MR. FRED SIMIYU 1ST RESPONDENT

THE KENYATTA INTERNATIONAL

CONVENTION CENTRE 2ND RESPONDENT

Mr. Madala for claimant

M/S Nyonje for respondent

JUDGMENT

1. The suit is premised on further amended memorandum of claim dated 3rd June 2014 and filed on even date plus attached documents which include a witness statement dated 23rd June 2014 and filed on 24th June 2014.

2. The 1st and 2nd respondents filed a response to the further amended memorandum of claim on 17th June 2014 and relies on attached documents thereto and respondents' bundle of documents filed on 31st July 2014.

Facts of the case

3. The claimant was employed by the 2nd respondent as a security and safety assistant manager, operations division on 26th December 2007. He worked continuously until 6th January 2014 when he was summarily dismissed from employment.

4. On 6th January 2014, the claimant received a letter of suspension on allegations that he had allowed a stranger to lease space at KICC. At the time the claimant was on leave. The claimant states that he was not given opportunity to answer the charges levelled against him. That he remained in suspension until

he eventually came to court.

5. The letter of dismissal was granted when the matter was pending in court. The claimant was not paid any salary while on suspension.

6. The claimant's monthly salary at the time was Kshs.179,600.00 as per attached payslips.

7. No disciplinary hearing was conducted. At the time KICC did not have a board of directors which had the authority to dismiss him in terms of the human resource policy of the 1st respondent. The committee that dismissed him did not have authority therefore to do so.

8. The 1st respondent wrote an adverse letter to the Parliamentary Service Commission which prevented him from getting hired as deputy sergeant at arms.

9. The claimant prays for;

(i) declaration that the summary dismissal was unlawful and he be reinstated to his job without loss of benefits;

(ii) in the alternative, the suspension and subsequent summary dismissal be held to have been unlawful and the claimant be awarded twelve (12) months' salary compensation in the sum of Kshs.2,155,200.00;

(iii) the claimant be paid Kshs.538,800.00 being three (3) months salary in lieu of notice;

(iv) that the claimant be paid punitive, exemplary and aggravated damages for loss of career prospects assessed at Kshs.189,600 per year for the remaining years to retirement at sixty (60) years (17 more years) in the sum of Kshs.3,053,200.00;

(v) payment of unpaid salary for the months of January and February 2014 at Kshs.179,600.00 per month;

(vi) leave allowance of Kshs.110,000.00;

(vii) service pay of Kshs.179.60 per year for six (6) years;

(viii) certificate of service be issued to the claimant;

(ix) costs and interest.

Response by 1st and 2nd respondents

10. 1st respondent pleads that he has been wrongfully, unlawfully and maliciously enjoined in these proceedings and sought leave to have his name struck out.

11. The 2nd respondent denies the particulars of claim as set out in the further amended memorandum of claim.

12. That the 2nd respondent paid the claimant's salary for January 2014 pursuant to the court order dated 18th February 2014. That the PAYE of Kshs.31,912 was lawfully deducted from the claimant's salary of Kshs.126,600.00; Kshs.34,161.50 being loan deductions, Kshs.18,006,118.00 being a loan taken from KICC Sacco development and Kshs.16,666.50 in respect of a salary advance of Kshs.200,000.00 paid to the claimant on 22nd April 2013 to facilitate retrieval of the claimant's degree certificate from his learning institution.

13. The deductions were lawfully done in January 2014 since claimant was still an employee of the 2nd respondent. The claimant was then deducted a total of Kshs.68,834.48 and was paid a salary of Kshs.25,853.52 vide cheque dated 21st February 2014.
14. 2nd respondent admits that the claimant was suspended from employment on 23rd December 2013 until he was summarily dismissed on 10th February 2014 upon completion of investigations.
15. That the claimant received the letter of summary dismissal on the 12th February 2014 a day before he filed this suit.
16. The 2nd respondent denies the particulars of claim as unfounded. The claimant was given opportunity to appeal the decision to suspend him within 48 hours from receipt of the letter of suspension. The claimant was absent from duty without authority on the day the letter was issued on 23rd December 2013 until 6th January 2014 when he alleges to have received the letter.
17. The claimant appealed the suspension on 7th January 2014 and the appeal was refused.
18. The claimant committed gross misconduct by unlawfully letting out KICC premises contrary to policy and thereby exposing KICC to grave security threats.
19. That the claimant had previous disciplinary cases and had been issued with warning letters. That the claimant was negligent, lax and indisciplined in his duties.
20. That it is a fact, that an Iranian national was found to have settled in one of the stores for a period of one month. A mattress, a blanket, assorted personal clothes, electric heater, a sufuria and assorted utensils surrounded by new seats which were being sold during Iranian exhibition were found in the room. The stranger had been assigned to take care of the Iranian exhibitor's assets which had been taken to the store house despite prohibition of such conduct by management. There was no contract in place to allow residence in a commercial store at KICC and no revenue was gotten by the 2nd respondent in that regard. This was a serious security lapse.
21. KICC hosted about five state functions over the period the stranger was resident in a store room unlawfully including the president of the Republic of Kenya in breach of state security.
22. The internal security assistant, the stranger and the claimant recorded statements with the police on the matter. The stranger admitted he lived in the store with the knowledge of the claimant.
23. The claimant could not be trusted and his summary dismissal was lawful.
24. The 2nd respondent prays that the suit be dismissed with costs.
25. On procedure, the committee was set up to investigate the matter and a report with recommendation was made. The committee recommended summary dismissal of the claimant having considered his representation to the committee.
26. The main reason for the dismissal was failure to handle security matters at the KICC.

Determination

27. The issues for determination are;

- (i) whether the claimant was summarily dismissed for a valid reason;
- (ii) whether the dismissal was effected in terms of a fair procedure;

(iii) whether the claimant is entitled to the relief sought.

Issue i

28. A careful analysis of the facts of the case presented by the claimant *vis a vis* the version by the 2nd respondent has led the court to the following conclusions of fact;

(i) the claimant was in charge of the security of KICC a state corporation with serious strategic interest to the state.

(ii) that the claimant allowed an Iranian national to take residence in an exhibition store at the KICC for a period of about one month without lawful authority of senior management of KICC and by doing so placed the KICC building at great security risk and exposed many persons who attended high level conferences at KICC, visitors and staff to high risk.

(iii) that the conduct by the claimant was in breach of the contractual obligations between himself and the 2nd respondent which breach constitutes a valid reason for the summary dismissal of the claimant.

29. The claimant has consequently failed to prove on a balance of probability that the summary dismissal was wrongful and not justified by his conduct as an employee of the respondent.

30. On the contrary, the 2nd respondent has discharged its onus under section 43(1) as read with section 47(5) by demonstrating that the claimant had committed gross misconduct by allowing a grave security lapse in the course of his employment which placed KICC at great security risk and therefore the summary dismissal was for a valid reason in terms of section 45(2)(a) of the Employment Act, 2007 and the court so finds.

Issue ii

31. The claimant recorded a statement with the police on the events leading to his dismissal. A committee was set up to investigate the matter while the claimant was placed under suspension. The committee took into account the explanation given by the claimant in arriving at the decision that the security lapse caused by the claimant deserved to be punished by summary dismissal. The technical issues regarding when and how he received letters of suspension and letter of summary dismissal did not negate the due process applied in the course of disciplining the claimant. The court finds that the 2nd respondent did not violate section 41 of the Employment Act, 2007 in the manner it dealt with the claimant. The claimant was given opportunity to appeal the decision to summarily dismiss him from the employ of the 2nd respondent and the dismissal was upheld by the management in place at the time. The fact that there was no Board in place at the time meant that the claimant reported to the management of KICC in place at the time, the same management that had employed him to oversee security affairs at the KICC. The summary dismissal was valid and procedural notwithstanding the absence of a Board of Directors at the time.

32. The court finds therefore that the summary dismissal was procedurally fair.

Issue iii

33. The claimant has sought various remedies set out herein before in this Judgment. The finding in issue (i) and (ii) above disentitles the claimant to reinstatement or payment of compensation and the punitive damages sought.

34. The claimant was paid for days worked up to the date of dismissal following the orders of this court. The court also finds that the deductions made on his salary were lawful and were therefore properly made.

35. An employee who is summarily dismissed is not entitled to payment in lieu of notice. The court has found that the summary dismissal was lawful and fair and therefore the claimant is not entitled to any payment in lieu of notice.

36. With regard to payment in lieu of leave days not taken,. The leave forms produced by the 2nd respondent show that the claimant had sixteen (16) days leave balance as at 17th January 2014. See “RS-21”.

37. The claimant was summarily dismissed on 10th February 2014. The claimant was entitled to take fourteen (14) days leave from 1st January to 17th January 2014 in terms of the leave forms aforesaid. The court is satisfied the leave form is valid and the claimant is entitled to payment in lieu of sixteen (16) days leave in the sum of Kshs.95,786.00 and the court awards him accordingly.

38. The claimant had worked for six (6) years and claims service gratuity for the period.

39. The court finds that the claim has not been adequately proved, the claimant having not shown that the payment was in terms of a clause in his contract of employment or in terms of section 35(5) of the Employment Act, 2007. The payslip of the claimant indicates that he was registered with the National Social Security Fund (NSSF) and the social security dues were remitted.

40. The 2nd respondent also had KICC Pension scheme and the claimant was a contributing member. The prayer for payment of gratuity lacks merit and same is dismissed.

41. The court directs the 2nd respondent to provide the claimant with a certificate of service.

42. In the final analysis, the court makes the following orders in favour of the claimant as against the 2nd respondent;

- (i) payment of Kshsh.95,786.00 in lieu of sixteen (16) days leave not taken;
- (ii) grant of certificate of service within thirty (30) days from date of Judgment;
- (iii) interest at court rates from date of filing suit till payment in full;
- (iv) costs of the suit.

Dated and delivered at Nairobi this 10th day of June, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE