



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 273 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS & ALLIED WORKERS UNION CLAIMANT

-Versus-

MERRYLAND HOTELS LIMITED..... RESPONDENT

J U D G E M E N T

This case has been filed by the Kenya Hotels and Allied Workers Union, the Claimant on behalf of the its member Geoffrey Otieng'no and Elijah Nyagowa Rapemo Akumo who were summarily dismissed by the Respondent, an hotel operating within Kisumu City.

The case of Elijah Nyagowa Rapemo was withdrawn by the Claimant and the case proceeded only in respect of Geoffrey Otieng'no Akumo, hereinafter referred to as the Grievant.

Background

The Claimant Union filed a dispute against the Respondent on recognition. The dispute registered as Cause No.197 of 2013 was fixed for hearing on 16th June, 2014 and the Grievant was issued with witness summons to attend court on that day as a witness for the union. The hearing proceeded on 16th June, 2014 then it was rescheduled for mention on 17th September, 2014.

On 17th September 2014 the Grievant reported for work then left the workplace at 8 am to attend court for the mention. He was back at work by 10.00 o'clock. However while in court he was called by his supervisor who asked where he was. He informed the supervisor that he was in court. The Human Resource Manager also attended Court with the Claimant.

Later on the same date the Claimant received a letter from the General Manager of the Respondent in the following terms;

GEOFREY OTIENG'NO

ID 22634415

RE: ABSENTEESM

On 17th September, 2014 you reported to work and later left your work station without permission from the authority. This happened between 8.00 A.M to 10.00 A.M.

You are therefore required to explain in writing within one (1) working day from the date of receipt of this letter and show cause why disciplinary action should not be taken against you.

GENERAL MANAGER

The Grievant responded to the letter on the same day and continued working until 23rd September, 2014 when he was called to the office of the General Manager and issued with a letter of dismissal. The grounds for dismissal are as follows;

1. Refusing To Obey Lawful Instruction - You deliberately refused to carry out lawful and reasonable instruction given by authority.

2. Insolence - You deliberately insulted, used abusive language and became arrogant towards authority, i.e. that you were being witch hunted and that plans to dismiss you were discussed in a pub.

3. Negligence/Gross Negligence With Regards Performance Of Duties - You wilfully, carelessly and improperly neglected to perform your duty. i.e. cleaning dirty windows and dust in rooms in Block C.

The Grievant testified that the first ground of dismissal was not true. On the second ground of dismissal the Grievant testified that he did not use abusive language against authority. He testified that there was a day the accountant found him working and asked why the place was dirty. He told the accountant that he was working alone in 26 rooms and was not yet through with the cleaning. He further told the accountant that the Respondent should add more workers. That was what the accountant who was only two months old at the time, considered to be abusive language which it was not. On the third ground the Grievant testified that it was not true. He testified that if he was negligent he would not have worked for the Respondent as long as he did and that he had been working alone in 26 rooms and had not had any discipline issues with the Respondent other than the incident with the new accountant.

The Respondent's witness Chrispine Ochieng Oduor testified that the Grievant who was a room steward in Housekeeping department was working well until later when there were disciplinary issues. He testified that he was aware about the cause No.197 of 2013 filed by the Claimant Union against the Respondent regarding recognition. He testified that the Claimant and other employees were given a day off to attend court on 16th June, 2014 and that on 17th September 2014 the Claimant was not given permission to attend court. Mr. Oduor testified that on 16th September 2014 the Claimant was called for a disciplinary hearing to defend himself on two issues being absentism and unsatisfactory performance of work. That when the claimant was asked why he did not respond to the Respondent's letter dated 5th September 2014 he started using abusive language and became unruly to the panel which consisted of the General Manager, the Head of Housekeeping, the Accountant and the Head of Human Resource. Mr. Oduor testified that the Claimant was present with a witness Mr. Constantine Mudonyi. He testified that the Grievant accused the Respondent of compromising his witness. That it was that meeting which resolved to dismiss the Claimant and the dismissal letter was issued to the Claimant on 23rd September, 2014.

Issues for Determination

In the Memorandum of Claim filed on 8th October, 2014 the Claimant avers that the summary dismissal of the Claimant was unlawful, capricious and illegal. It is the Claimants case that the Respondent's decision to dismiss the grievant is a clear testimony of intimidation of the grievant because of his support for the union in a court matter, that the grievant satisfactorily responded to the Respondent's letter on absenteeism on 17th September, 2014 where he stated he was attending court. The union submitted that the Grievant denied that he was given a hearing on 16th September, 2014 and the Respondent failed to prove that such hearing took place. The Claimant pointed out that one of the reasons for dismissal was absenteeism on 17th September, 2014 without being heard. The Claimant submitted that the Respondent had failed to prove that there was a hearing.

The Claimant relied on the case of **Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015]eKLR** and the case of **GMV v Bank of Africa Kenya Limited [2013]eKLR** both of which dealt with the issue of unfair termination of the Claimant after being ambushed by the Respondent in meetings without prior notification of the purpose of the meeting.

For the Respondent it was submitted that it had valid reason for termination of the Grievant and that he was subjected to a fair disciplinary procedure in compliance with the law. The Respondent relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014]eKLR**.

I have considered the evidence and submissions by both parties and the cases cited. Section 41 of the Employment Act provides for procedural fairness while section 43 provides for validity of reason.

The Claimant denied having been called to a disciplinary hearing. The Respondent was unable to prove that such a hearing took place by providing the letter through which the grievant was invited to such meeting or the minutes of the meeting. The burden of proof according to section 41 is on the Respondent.

The Claimant also denied the grounds for dismissal and stated that he was dismissed for participation in union activities. The Respondent did not disprove the Claimant's denials. None of the grounds in the letter of summary dismissal were proved. The dismissal was therefore both procedurally and substantively unfair,

Remedies

The Claimant prayed for the following:-

- (a) Declaration that the summary dismissal was unlawful.
- (b) General Damages.
- (c) Reinstatement and or payment of all dues, benefits and salaries up to time of judgement of Court.
- (d) Costs.

During the hearing the Claimant testified that he was underpaid, did not take leave and worked on public holidays. The Respondents witness testified that the Grievant took leave from 13th September to 22nd October 2010, 11th October 2011 to 15th November 2011, 16th October to 20th November 2012 and from 15th October to 18th November 2013. No records were produced to prove this. Mr. Oduor also testified that all employees who worked on public holidays were given an alternative day off but again there were no records to prove the same. The Respondent's witness did not say anything else in relation to the rest of the prayers of the Grievant meaning that the prayers are uncontested. Section 10 and 74 of the Employment Act provide for the records to be kept by employers. Section 10(6) and (7) specifically provide that;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period

of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

I find that there is no proof that the Grievant took annual leave or was given an alternative rest day when he worked on public holiday. The Respondent did not contest or even make reference to the tabulation of the Grievant's claims as filed in court on 25th September, 2015 in the further documents bundle of the same date. I have looked at the tabulation and find it to be in compliance with the law.

Having been unfairly dismissed, the Claimant is entitled to payment of salary for days worked up to 24/9/2014 being the operative day in his letter of summary dismissal. He is also entitled to one months Salary in lieu of notice and compensation as provided in section 49(1) of the Employment Act.

The Grievant had worked for 10 years for the Respondent having been employed on 2nd March, 2004 and summarily dismissed on 24th September, 2014. His last salary was Shs.11,248.10 according to the general order although he was paid Shs.6,000. Taking into account the length of service and the circumstances under which he was summarily dismissed, it is my opinion that he is entitled to maximum compensation.

I therefore make the following final orders:-

1.The summary dismissal of the Grievant is declared unfair.

2.The Grievant is awarded the following:-

(i) 1 months salary in lieu of notice shs.11,248.10 based on the statutory minimum wage of 2013 of Shs.9,780.95 plus 15% house allowance.

(ii) Salary for days worked up to 24/9/2014 Shs. 8,998.50

(iii) Annual Leave for 4 years Shs. 27,386.70

(iv) Public Holidays for 3 years Shs. 10,759.00

(v) Underpayments of Salary

2011 - April - 2012 Shs. 33,624.00

May 2012 - April 2013 Shs. 48,432.00

May 2013 to August 2014 Shs. 66,348.00

(vi) Compensation Shs.134,977.20

Total Shs.341,773.50

3. Costs of Shs.50,000 all inclusive.

Dated and signed and delivered this 21st day of July, 2016

MAUREEN ONYANGO

JUDGE