



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE NO. 43 OF 2015

GEORGE ODHIAMBO ASIYO.....CLAIMANT

VERSUS

BOMBULULU WORKSHOPS & CULTURAL CENTRE.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 30.9.2014. The respondent denies liability for unfair termination and avers that the claimant was dismissed for absenting himself from work without permission due to intoxication. She further avers that she gave him a fair hearing to him before termination and as such the dismissal was fair.

2. The suit was heard on 29.9.2015 and 25.2.2016 when the claimant testified as CW1 and the respondent called Concodius Deche, Jared Agan, Moses Achayo and Stephen Ondaro as RW1, 2, 3 and 4. Thereafter the counsel filed written submissions.

Claimant's Case

3. CW1 was employed by the respondent on 2.7.2007 as a Security Guard. He was earning a basic monthly salary of Kshs 12,030 and the employer provided a residential house valued at 20% of the basic pay.

4. On 13.9.2014, CW1 was on duty at night until 6.00 am of 14.9.2014 when he signed out to report back at 6 pm for the night shift. He however over slept and woke up at 8.30 pm when his cousin called to report that his wife had become mentally sick and need CW1 to assist him take her to hospital. CW1 therefore never reported to work and rushed to assist his cousin. He however reported to work on 15.9.2015 at 6 pm but the supervisor told me to go back home because the duty Roaster had been changed. That he was also directed to report to the Personnel's office on 16.9.2014 at 9.00 am.

5. CW1 went to the Personnel's office as directed and held a meeting with the personnel and the works committee where he was asked to explain why he absented himself from work on 14.9.2014. He explained that he was overcome by sleep and also that he went to assist the sick wife of his cousin. After the hearing a decision was reached that CW1 was to be served with a letter of Reprimand.

6. The Reprimand letter was served on him on 17.9.2014 and directed to stay at home. The letter also

asked him to show cause why disciplinary action should not be taken against him for absenting himself from duty due to excess intoxication. CW1 responded to the reprimand letter on 17.9.2014 and served it on 18.9.2014. On the same day he was served with a suspension letter followed by the summary dismissal letter dated 30.9.2014.

7. The reason cited for the dismissal was absence from work due to drunkenness. CW1 denied the alleged drunkenness and appealed against the dismissal. The appeal was however dismissed and he brought this suit praying for his terminal dues as prompted in the collective Agreement (CBA). He maintained that the CBA barred the employer from terminating him before serving him with 3 prior warning letters.

8. On cross examination, CW1 admitted that he never attended work on 14.9.2014 when it was his duty to do so. He further admitted that he never sought permission from the employer before absenting himself from duty. He also admitted that his contract of employment allowed the respondent to summarily dismiss him for absenteeism and drunkenness.

Defence Case

9. RW1 is a security Guard at the respondent. He described CW1 as a good employee. He explained that on 14.9.2014 at 5 pm he was at the respondent's gate when CW1 was brought to the gate by strange people. That CW1 was being carried because he could neither stand nor walk by himself because he was drunk. RW2 then carried him to his house. He signed off duty at 6 pm and left without seeing CW1 who was to be on duty that night.

10. RW2 is also a security guard at the respondent. On 14.9.2014 at 5 pm, he saw CW1 being carried to the respondent's gate by strange people. CW1 could neither stand nor walk because he was drunk so he carried him to his house and laid him on his bed. RW3 then recorded the incidence in the OB and he signed off at 6 pm. That by the time he left work, CW1 had not reported to work.

11. RW3 is the Supervisor of the respondent's Security Guards. On 14.9.2014 he saw CW1 being brought to the respondent's gate drunk and unable to stand or talk. He then instructed RW2 to take CW1 to his house. CW1 never reported to work that evening as required. He later attended a disciplinary hearing against CW1 before the management and works committee. RW1 however admitted that CW1 had the right to drink when he was off duty.

12. RW4 is the Respondent's Operations Manager and he also the Head of Personnel and security dockets. He learned from the OB and RW3 that CW1 absented himself from duty on 14.9.2014 and he send RW3 to call him on 15.9.2014 but again CW1 was nowhere to be seen. That CW1 however went to see him on 16.9.2014 and a disciplinary hearing was conducted before the works committee as per the provisions of the CBA. That after the hearing the committee was not happy and recommended for a Reprimand letter to be issued.

13. RW4 served CW1 with the Reprimand letter dated 16.9.2014 and he responded on 17.9.2014 apologizing for his absence from work on 14.9.2014. RW1 then suspended him on 18.9.2014 and served him with a dismissal letter on 30.9.2014. Thereafter CW1 appealed to the management but the appeal was dismissed on 7.10.2014. He maintained that the dismissal was justified because both the CBA and the Appointment letter allowed for summary dismissal for the offence committed by the CW1 on 14.9.2014.

14. On cross examination, RW4 admitted that a Reprimand was a warning and in this case it was served on CW1 for absenting himself from duty without permission on 14.9.2014. RW4 further admitted that the claimant's union was not happy with the dismissal because CW1 was dismissed before hearing. That RW4 however met with the union on 21.10.2014 and after explaining to them what happened they were satisfied.

Analysis and Determination

15. There is no dispute that the claimant was employed by the respondent as a Security Guard earning Kshs 12,030 as his monthly basic salary. There is further no dispute that he was dismissed from the employment on 30.9.2014 for gross misconduct. The issues for determination herein are :

(a) Whether there was valid and fair reason for dismissing the claimant.

(b) Whether a fair procedure was followed before the dismissal.

(c) Whether the dismissal was unfair.

(d) Whether the reliefs sought should be granted.

Reasons for Dismissal

16. The reason cited in the dismissal letter is absence from duty due to intoxication. CW1 denied the alleged drunkenness and contended that he just overslept while he was day off. That when he finally woke up at 8.30 pm, he rushed to assist take his wife to the hospital for mental sickness. He admitted that he never sought permission before absenting himself.

17. After considering the testimonies of the defence witnesses especially RW1, 2 and 3 I am satisfied that CW1 absented himself from work due to intoxication. That although CW1 had right to drink beer while off duty, he had no right to miss work without permission. Even if CW1 never drunk on 14.9.2014, he admitted by his letter dated 17.9.2014 and also by his testimony herein that he absented himself from work on that day and never sought permission to be absent. Under section 44 (3) and (4) (a) of the Employment Act (E A), the offence he committed constituted a valid and fair reason for his summary dismissal.

Procedure Followed

18. Under section 41 of the E A, it is a mandatory requirement that before an employer terminates the services of his employee on ground of misconduct, he must explain the reason for the intended termination to the employee in the presence of a fellow employee or shop floor union representative of his choice. The proceedings must be in a language that the employee understands, and then invite the employee and his chosen companion to air their defence for consideration before the dismissal is decided on. In this case the foregoing procedure was not followed. Although the claimant was invited for a hearing RW4 never gave him the option of calling any other employee or shop floor union representative to accompany him during the hearing. He was just called to appear before the Works Committee which comprises representatives from management and union, representatives. Even if the Court was to excuse the foregoing commission and treat the union representatives in the committee as proper representation of the claimant's interests, the Court still faults the procedure followed to dismiss the claimant.

19. The reason for the foregoing finding is that the decision of the works committee which was to be executed by the RW4 was that a Reprimand letter (warning) be served on the claimant. That since the said decision was not appealed from by the respondent, RW4 had no authority to suspend the claimant and demand that he shows cause why he should not be punished for the same offence that had already been resolved by the works committee under the CBA. Like-wise the claimant should not have been summarily dismissed on 30.9.2014 because that amounted to double jeopardy. The procedure followed to dismiss CW1 summarily after the resolution of the dispute by the Works Committee under the CBA was unknown to both section 41 of the E A and the CBA and it was not just and equitable but unfair.

Unfair termination

20. Under section 45 of the E A, termination of employment is unfair if the employer fails to prove that the dismissal was founded on a valid and fair reason and that the same was done after following a fair procedure. In this suit just as required under section 43 and 47 of the E A, the employer has proved and justified the reason she relied upon to dismiss the claimant being absent from duty due to intoxication.

However, the respondent has failed to prove that she followed a fair procedure before dismissing the claimant as provided for under section 41 and 45 (2) (c) of the E A. Consequently, the default to follow a fair procedure rendered the summary dismissal unfair.

Reliefs

21. In view of the foregoing finding that the dismissal was done without following a fair procedure, I make a declaration that the termination of the claimant's contract of employment by the respondent on 30.9.2014 was unfair.

Notice

22. The claimant has relied on the CBA to claim for 3 months' salary in lieu of notice. CW1 worked for over 7 years before the termination. Under clause 7 any employee who is terminated after serving more than 4 years but less than 10 years is entitled to a notice of 2 months or salary in lieu of such notice. I therefore award to the claimant Kshs 24060 being 2 months' salary in lieu of notice.

Compensation

23. The claimant prayed for 12 months' salary in lieu of notice. I however award him 6 months' salary being Kshs 72180. In making the said award I have considered that the claimant had served for a fairly long period. The reason for not awarding the maximum compensation is that the claimant contributed to the termination through misconduct.

Certificate of service

24. This is a statutory right provided for under section 51 of the E A and as such the respondent is directed to issue the certificate forthwith to avoid the penal consequences of defaulting to issue the same.

Disposition

25. For the reason stated above judgment is entered for the claimant declaring his dismissal unfair and awarding to him Kshs 96,240 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 15th day of July 2016.

ONESMUS MAKAU

JUDGE