



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE NO. 387 OF 2014

THOMAS NJUMWA.....CLAIMANT

VERSUS

THE KENYA WILDLIFE SERVICES.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal damages and compensation for unfair termination of the claimant's employment contract by the respondent on 1.2.2012. The respondent denies liability for unfair termination and avers that the claimant stole money from her and after awarding him a fair hearing, dismissed him from employment.
2. The suit was heard on 21.4.2015 and 24.9.2015 when CW1 testified and the respondent called Mr. Welson Mulwa, Asha Churo, Mwadumbo Mwinyi and Peter Kinuthia as RW1, 2, 3 and 4 respectively. At the start of the hearing the parties produced all their documentary evidence by consent and after the close of the hearing their counsel filed written submissions.

Summary of Claimant's Case

3. CW1 explained that he was employed by the respondent in 1992 as a Ranger and worked until February 2012 when he was dismissed for alleged theft of money from the employer. The money he was accused of stealing was part of revenue collected as Park Entry fee from visitors. He denied offence but after Orderly Room proceedings (disciplinary hearing) he was dismissed from the service and was paid Kshs.285,744 as his terminal dues from respondents Pension Scheme.
4. CW1 however appealed successfully to Disciplinary Appeals Board and after the hearing he was found innocent. The procedure followed in his dismissal was also found to be unfair and he was reinstated. The reinstatement was however on condition that he accepts within 30 days of the letter to forfeit all his salary for the period between his dismissal and the reinstatement.
5. The letter for reinstatement was dated 10.2.2014 but he received it on 31.3.2014 after the lapse of the 30 days given to accept the conditional reinstatement. He never the less reported to the respondent's Mombasa office but he was told that the offer letter had already lapsed.

Defence case

6. RW1 is the Human Capital Officer for the respondent. He was the Secretary to Disciplinary Appeals Board which heard the claimant's appeal. He admitted that after the hearing, the Board allowed the claimant's appeal on ground that the procedure followed was unfair and defective and

- recommended for his reinstatement on the same terms he enjoyed before he was dismissed. He was however to accept that the period of his dismissal be treated as unpaid leave.
7. The respondent's Director approved the decision by the Board and a reinstatement letter was written on 10.2.2014. RW1 then called CW1 to go for the letter and sign the acceptance so that he could be placed in the payroll. CW1 never showed up as he had promised prompting RW1 to post the letter to the claimant's last known address being respondent's Mombasa Office. He also enclosed a yellow note to avert the limitation period stated in the reinstatement letter.
 8. As regards the Kshs.285,744 paid to the claimant after dismissal rw1 clarified that it was his contribution to respondent's Pension Scheme while the employers contribution was withheld until the claimant reached 50 years as required under the Retirement Benefits Act.
 9. RW 2 is an investigations officer for the respondent. She investigated the alleged theft by CW1 in September 2011 and later testified against him in the Orderly Room proceedings. She admitted that no stolen money was recovered from CW1. She further admitted that revenue was being collected by the customer care officer and the claimant was not working in the customer care office.
 10. RW3 is the Assistant Warder, Security Operations at the Mombasa Marine National Park. On 23.9.2011 he was appointed by the Senior Warder to preside over Orderly Room Proceedings in which CW1 and Joan, the customer care Assistant were charged. He however disqualified himself and closed the file after CW1 objected to the manner in which he was conducting the proceedings.
 11. RW 4 is an Assistant Warder II. He was appointed to preside of the Orderly Room Proceedings against the claimant by letter dated 3.10.2011. He conducted the proceedings on diverse dates between 13.10.2011 and 15.11.2011 but CW1 refused to give any evidence in his defence but only said that he had left written submissions at the Sentry Box and refused to go for it. RW4 therefore closed the hearing and rendered his decision on 16.11.2011 recommending for the dismissal of the claimant and forwarded the file to his seniors to pass the sentence. He admitted that CW1 was supposed to be at the Provincial Headquarters Mombasa and not at the park sentry.

Analysis and Determination

12. There is no dispute from the pleadings and evidence that CW1 was employed by the respondent until February 2012 when he was dismissed for gross misconduct. That after the dismissal he was paid his pension dues and removed from the payroll. That he successfully appealed and was reinstated on ground that the procedure followed to dismiss him was defective and flawed. That the reinstatement was on condition that he accepts within 30 days from 20.2.2014 to forfeit his salary for the period he was dismissed but the letter reached him on 31.3.2014 after the conditional offer had lapsed. That he still reported to work but he was turned away.
13. The issues for determination are:
 - a. ***Whether there was a valid and fair reason for the dismissal of the claimant.***
 - b. ***Whether fair procedure was followed before the dismissal.***
 - c. ***Whether the dismissal was unfair.***

(d) Whether the reliefs sought out to issue.

Reason for the dismissal

14. The respondent alleged that CW1 stole money from the respondent's revenue collections at the Mombasa Marine Park. However no eyewitness testified against him either herein or in the Orderly Room Proceedings. In addition no recoveries were made from him and the RW2 who investigated the offence confirmed that the claimant's duty did not involve collection of revenue. That such duty was for the customer care officer and CW1 was not in the customer care office. That RW4 confirmed that CW1 was the night sentry at the Provincial Headquarters Mombasa but according to the witnesses he called during the Orderly Room Proceedings, he was at the Voyager Collection Point on the morning of 14.9.2011.
15. CW1 however denied that the offence by his witness statement filed herein on 25.8.2014. He explained that from 10th to 16th September 2011 he was assigned night shift duties at the Head

Quarters Mombasa. That on 14.9.2011, he went to the Human Resource Office to collect some documents which were required for his Tourism Course at the Mombasa Polytechnic. That he left at 10.15 am and met Joan Jemtahi who was in charge of customer care collecting revenue at Voyager and left to meet his family at the beach. That later he was told by Joan that there was plot to frame him with the offence of theft of money and from that time he was not assigned any more duty. The said Joan was never called to testify in this case to explain that money was lost and under what circumstances.

16. After considering the evidence placed before the Court, I find that the respondent has not discharged her burden of proving the reason for the dismissal of the claimant under section 43 and 47 of the Employment Act (E A). The said sections of the law provide that the employer has the burden of proving and justifying the reason for terminating his employee, in any legal proceedings challenging the termination. Consequently I find that there was no valid and fair reason for dismissing the claimant from his employment.

Procedure followed

17. The claimant contended that he was never given a chance to defend himself or to call any witness. RW4 maintained that he gave the claimant a chance to cross examine witnesses, and to defend himself and he said that he left his written submissions at the sentry box. That he gave him the chance to bring the same but CW1 refused. He however admitted that after the hearing CW1 asked for some documents and he endorsed in the file that he should give.
18. The Disciplinary Appeals agreed with the claimant that his dismissal was done after a defective and unfair procedure and reinstated him. I need say more on whether or not the procedure followed was unfair because the proceedings by the Appeals Board say so on page 8. The Appeals Board while admitting that unfair procedure was followed observed that :

“...it was unprocedural to have been denied the opportunity to defend himself together with his witnesses to testify in his case contrary to the KWS (Armed wing) Disciplinary Code, 1990”.

19. Under section 41 of the E.A, just like the said KWS Disciplinary Code, an employer is barred from dismissing an employee before first explaining the offence to him in the presence of a fellow employee of his choice and then inviting the two to air their defence for consideration before the dismissal is decided. The said procedure was not followed during the Orderly Room Proceedings. I therefore find and hold that the dismissal of the claimant was not done after following a fair procedure.

Unfair termination

20. Under section 45 (2) of the Employment Act, termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. I have already found herein above that the respondent has failed to prove the reason for dismissing the claimant and that a fair procedure was not followed in doing so. Consequently the answer to the third issue for determination is that the termination of the claimant's employment contract by the respondent on 1.2.2012 was unfair and unjustified.
21. Under section 49 (1) of the Employment Act, the Court has power to award compensation after making a finding that the terminal of the employees service was unfair or unjustified. I have done so above and I proceed the claimant the maximum award of 12 months gross pay for the unfair and unjust termination. His gross pay according to the payslips for January 2012 was Kshs 30800. He will therefore get Kshs 369 600. In making the said award I have considered the length of the period served by the claimant being 19 years. I have also considered the fact that the claimant did not secure any alternative employment for over 12 months since his dismissal on 1.2.2012.

Gratuity

22.The claim for gratuity for the 19 years' service under the Respondent's Staff Superannuation Scheme is dismissed for lack of particulars and evidence. According to the RW1, CW1 was paid back his pension contribution under the Retirement Benefit Authority regime while the rest will be paid to him once he reaches 50 years. The Court agrees with the evidence by RW1 and directs the claimant to claim his pension once he reaches the age of 50 years if he has not yet attained that age.

Accumulated Salary after dismissal

23.This prayer is also dismissed because, granting the said prayer will be tantamount to reinstating the claimant to the employment or awarding him salary for work not done which is not only unlawful but also against the public policy.

Loss of future earnings

24.This prayer is also dismissed for the reasons stated above that granting it would amount to reinstating the claimant to employment or for granting him payment for work not done.

Loss of Further Education

25.This prayer is likewise dismissed for being vague and untenable.

Paid leave for 2012, 2013 and 2014

26.This pray is also dismissed because it relates to the period after the dismissal. Granting the prayer mean that CW1 continued to earn leave after dismissal which cannot be the case.

Disposition

27.For the reasons stated above, judgment is entered for the claimant against the respondent in the sum of Kshs 369 600 plus costs and interest.

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

ONESMUS MAKAU

JUDGE