



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 1834 OF 2013

DERICK PIUS KAUNDA OKARI.....CLAIMANT

VERSUS

KENYA KAZI SECURITY SERVICES LTD.....RESPONDENT

JUDGMENT

1. The claimant pleaded that he was employed by the respondent to work at the USA Embassy on 23rd September, 2002 and worked until 22nd July, 2013 when he claimed he was unlawfully terminated out of discrimination, victimization and false malicious allegations from the respondent.
2. According to him he has always been a disciplined worker and had never been issued with any warning letter. He further averred that he had a good relationship with fellow employees which resulted in the employees electing him to join in the Collective Bargaining Agreement negotiation between his Union and the respondent which culminated in cause no. 1449 of 2011 in which the Court awarded the employee's salary increment.
3. According to him the respondent developed bad blood between itself and the claimant because of the Court award and had always sought a way of terminating his services.
4. On 10th July 2013, he averred that without any good reason the respondent maliciously alleged that he had posted a message to his Facebook account which amounted to misconduct and suspended him from work. The claimant further complained that on 10th July, 2015 the respondent wrote to him to show cause and on 19th July, 2013 he was called to the office for disciplinary action at which he was not given an opportunity to be heard nor was he shown the alleged offensive Facebook messages. He denied writing any insightful message on social media.
5. The claimant further averred that the Court award he participated in was to take effect from 1st June, 2012 and run for two years to 31st May, 2014 and that he was to benefit from the award from 1st June, 2012 to July 2013 when his services were terminated.
6. The respondent on its part pleaded that the claimant who was assigned duties as a security guard and whose position required utmost trust and responsibility breached that through activities which were detrimental to the respondent's operations and image and contrary to the terms of the contract of service and his legal obligations under the Employment Act.

7. According to the respondent, the claimant posted on social media Facebook, comments that were detrimental to the image of the respondent. The comments were in one way or the other intended to incite the claimant's colleagues.
8. In his evidence in Court the claimant testified that he was employed on 23rd September, 2003 at a salary of Kshs.10,400/=. At the time of exit his salary was Kshs.15,400/=. It was further his evidence that he was elected as a shop steward to represent the mobile response team. He confirmed that he was accused of inciting his colleagues but he denied doing so. According to him he was dismissed for seeking the implementation of the award.
9. It was further his evidence that upon dismissal he was not paid all his dues. He stated that he did not go on leave for two years (2009-2010) because they were told that there was a lot of work. They were paid in lieu.
10. Regarding Facebook, he stated that he used to post on his page for friends and never posted anything against the respondent.
11. In cross-examination he stated that his contract could be terminated by one month's notice on either side. He further stated that he did not attend the disciplinary hearing but was asked to write a letter. He stated that he had Luhya colleagues and most of his colleagues were friends on Facebook. He denied hate speech in his Facebook posts. On his posts, he said he was addressing his colleagues to attend Court and the colleagues he addressed were not at work on the material day having worked the previous night.
12. The claimants 1st witness Mr. Ombati stated that he was the Chief Steward at the material time and that the claimant was a member of the mobile response crew. The claimant was appointed by the union as a representative although in cross-examination he stated that he had nothing in Court to show the claimant was a union's representative.
13. The respondent's witness Mr. Frankline Muyendi stated that he was the respondent's head of operations. It was his evidence that he received complaints about the claimant's social media activities and called him and shared the concerns. The claimant was subsequently suspended from work to allow for investigations. He later issued the claimant with a show cause letter. According to him, the claimants comments boarded on hate speech. He stated that the claimant was invited for a disciplinary hearing but did not attend instead he sent a statement.
14. Regarding the claimants allegations of being a union representative, he stated that a shop steward is elected by the union and the employer notified in writing. The respondent did not receive any such notification. Regarding the Facebook post, he stated that the claimant referred to KK US Embassy guards to appear in a place which was not their place of work. According to him it was wrong to mobilise colleagues to attend Court during working hours.
15. The Employment Act requires an employer to have a valid or justifiable reason prior to dismissing an employee. The burden of proving the validity or justifying the reason for dismissal rests with the employer and failure to discharge the burden would lead to a finding that the dismissal was wrongful or termination unfair. The test is usually whether a reasonable employer would dismiss for the reasons presented. If the answer is in the affirmative, the dismissal will be upheld. The standard of proof is of course on a balance of probability.
16. The claimant herein was dismissed as a result of his social media posts which the respondent felt were inciteful and bordered on hate speech. The extracts of the posts were exhibited in Court as evidence. The Court has reviewed the said social media posts and one that is close to the accusations leveled against the claimant was posted on May 26. It read:-

“ALL KK Embassy on SOS on ngt shift, 2morrow we converge at Outside NSSF building 4 a word b4 Court commences”

17. This apparently is in reference to cause no. 1449 of 2011. It was the claimant's evidence that the colleagues he addressed in this post were those who worked in the previous night and would not be required at work. If the Court understands the short message service jargon correctly, this seem to be corroborated by the message reproduced above.

18. To speak of the posts in their entirety, they were private communication between the claimant and his social media friends. They did not directly concern the respondent save for the one reproduced above. They were what the Court could describe as the ranting and ravings of a person excited over social media. If at all anyone was incited as against the respondent as a result of these messages no evidence was led to that effect. The mere posting of a message perceived to be insightful is not enough. A person or persons must be incited for the author to be held responsible. People react differently to messages and it cannot be said with exactness that they would be incited if no overt act of incitement takes place. In the circumstances the Court finds the reason for dismissing the claimant has not been sufficiently proved and the Court therefore finds his termination unfair.

19. The Court therefore awards him as follows:-

- (a) Eight months salary for unfair termination of services.
- (b) One month's salary in lieu of notice of termination.
- (c) Costs of the suit.

20. This award shall be less any amount which has been paid to the claimant on account of his terminal dues and further his benefits as covered by the order of the Court in cause number 1449 of 2011 will be paid to him for the period he was in the respondents employment as so far as applies to him up to the time of termination.

21. It is so ordered.

Dated at Nairobi this 23rd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge