



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

CAUSE NO. 40 OF 2016

(Originally Nakuru CMCC No. 1016 of 2010)

CHARLES WALANDO WAFULA

CLAIMANT

v

YUNIS MALIK t/a CRATER

SECURITY SERVICES

RESPONDENT

JUDGMENT

1. This Cause has been in the judicial docket for 6 years and when it came up for hearing on 6 October 2016, the Respondent made strenuous attempts to secure an adjournment. The Court declined the attempts.
2. In fact, the Cause had initially been scheduled for hearing on 20 September 2016 when Mr. Masese holding brief for Mr. Gekonga for the Claimant successfully applied for an adjournment on the ground that Mr. Gekonga who had conduct of the case was bereaved.
3. Both the Claimant and Respondent gave sworn testimony.
4. The parties had on 4 July 2016 filed agreed issues which the Court will now proceed to examine in light of the evidence presented by the parties.

Whether Claimant was an employee of the Respondent

5. Although framed as an issue for determination, the Respondent in his testimony admitted that the Claimant was his employee.

Unlawful suspension

6. The Claimant's case is that he was suspended unfairly and the suspension had not been lifted by time of hearing, and on the circumstances leading to the suspension he stated that around 11 June 2009 at about 8.00pm, he was reassigned to a new duty station to provide guarding services but he could not report to the assignment because the Respondent did not show him the location of the assignment or cause a Supervisor to take him to venue of the assignment to introduce him to the new client.
7. As a result of the failure to report to the new assignment, he was suspended through a letter dated 5 April 2009, and directed to collect his wages on 8 April 2009, and that a demand letter was written to the Respondent on 11 June 2010.

8. The Respondent filed a 5 paragraph Statement of Defence consisting of no more than bare denials of the Claimant's assertions in the Statement of Claim.

9. When the Respondent took to the witness stand, he contended that the Claimant was dismissed through a letter dated 21 May 2009 after several warnings and meetings involving a Union which the Claimant allegedly belonged to.

10. The warnings related to the Claimant being found asleep on the job (Claimant denied receiving any of the warning letters).

11. According to the Respondent, the Claimant walked out from one of the meetings involving the Union, and never returned to work.

12. In cross examination, the Respondent confirmed that the Claimant did not sign/acknowledge the warning letters.

13. For a suspension without pay in employment under the common law, to be lawful, it should have either a contractual or statutory basis {see *Mckenzie v Smith* (1976) IRLR 345 and *McClory v Post Office* (1993) IRLR159}.

14. There is nothing placed before Court by the Respondent to suggest that the suspension was anchored on either a contractual or statutory provision.

15. The Court would therefore find that the suspension was not only unlawful, but also unfair in terms of Article 41 of the Constitution.

Dismissal?

16. The Respondent however contended that the Claimant was dismissed, and he produced a copy of a dismissal letter.

17. A dismissal/termination of employment under the Employment Act, 2007, can only pass legal muster if it is preceeded by a hearing as contemplated by section 41 of the Act, and where an employer proves the reasons for termination as valid and fair in term of sections 43 and 45 of the Act.

18. The Respondent, upon whom the obligation rested by virtue of the 2 sections did not even inform the Court the exact date a hearing was conducted or who was present.

19. Even the precise allegations against the Claimant were not disclosed.

20. In the Court's view, reference to conduct in respect of which a penalty had been made in the form of warning letters could not and cannot substitute for the process envisaged under section 41 of the Employment Act, 2007.

21. As to the validity and fairness of the reasons, none were set out in the dismissal letter, and the Court therefore, cannot vouch for the reasons stated in Court, and which reasons were not even pleaded to meet the requirements of sections 43 and 45 of the Employment Act, 2007.

22. The Court would therefore find that, if this was a case of dismissal as contended by the Respondent, the same was unfair in terms of sections 35, 41, 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Reinstatement

23. Due to time lapse, reinstatement would not be an appropriate remedy.

Unpaid wages from April 2009

24. The Claimant pitched for an award of Kshs 45,000/- on account of unpaid wages, but he did not lead any evidence as to the time in respect of which he computed the same.

25. The head of relief is therefore declined.

Terminal benefits

26. In the alternative, the Claimant sought terminal benefits but he did not give any particulars either in the pleadings or testimony.

Compensation

27. Compensation is one of the primary remedies where the Court finds unfair termination of employment, and the Court has found as much here and considering that the Claimant served the Respondent for some 12 years or so, the Court would award him the equivalent of 12 months gross wages as compensation (wage at time of separation was Kshs 3,500/- but in terms of Legal Notice No. 70 of 2009, the minimum prescribed wage for a watchman outside Nairobi, Mombasa and Kisumu was Kshs 5,655/- which the Court will adopt to compute the compensation).

Conclusion and Orders

28. The Court finds and holds that the suspension of the Claimant was unlawful and unfair, and that if indeed he was dismissed, the dismissal was unfair and awards him and orders the Respondent to pay him

(a) Compensation **Kshs 67,860/-**

29. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 18th day of November 2016.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kiberenge instructed by Gekonga & Co. Advocates

For Respondent Mr. Katithi instructed by Hari Gakinya & Co. Advocates

Court Assistant Nixon/Daisy