



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 441 B OF 2014

PASCAL MWAMBURI MWANDAWIRO.....CLAIMANT

VS

1. THE BOARD OF MANAGEMENT ST. MARY'S HIGH SCHOOL

2. MICHAEL MAGHANGA

3. MR. MWANGEMI LABAN M.....RESPONDENTS

JUDGMENT

Introduction

1. The claimant's claim is contained in the Amended Memorandum of Claim filed on 6.7.2015. It is for his employment terminal dues plus compensation for unlawful termination of his employment contract by the respondents on 27.7.2012. The respondents have denied liability for the alleged unlawful termination and avers that the claimant was lawfully dismissed for his misconduct after being accorded a hearing. The claim against the 2nd and 3rd respondent was however withdrawn before the trial.

2. The suit was heard on 23.5.2016 when all the documentary evidence was produced by consent. The claimant testified as Cw1 while the respondent called Laban Mwangemi and Michael Maghanga who testified as Rw1 and 2 respectively. Thereafter both parties filed written submissions.

Claimant's case

3. Cw1 stated that he was employed by the respondent in February 2001 as a Security Guard and his starting salary was kshs.2920, kshs.1800 House Allowance plus kshs 375 Medical Allowance. On 25.7.2011 he fell sick and after attending hospital the doctor recommended to him a sick off. That he then called his colleague guard, Mr. Hillary and told him that he was not going to attend work due to his sickness and Hillary promised to notify the office. That on the following day, he was called to the school and on arrival he was told there was vandalism of the school bus and theft of.

4. Cw1 and other guards were then arrested and charged with theft and failure to prevent a felony in criminal case no. 377 of 2011. In the meanwhile, he was served with letter dated 27.8.2011 suspending him from work indefinitely for the same offence. That after the trial, he was acquitted and reported back to work but Rw1 told him to avail the court proceedings and stay at home until further notice.

5. On 27.7.2012, he was invited to a hearing by the respondent where he was taken through a questions

and answer session. Afterwards he was served with a dismissal letter dated 27.7.2012 but no dues were paid to him. He therefore prayed for the dues and compensation as prayed in the suit.

6. On cross examination Cw1 admitted that he never reported to the employer that he had been given a sick off by the doctor. He further admitted that before the dismissal he was asked questions about the criminal case by the respondent Board on 27.7.2012. He contended that his contract provided for 3 months notice before termination, that he never went for his leave in 2005 and 2011, and that he had no personal phone number for the Principal and his Deputy. He concluded by stating that Hillary admitted in the Criminal proceedings that he called him to notify him of his sickness.

Defence case

7. Rw1 is the Principal and Secretary of the respondent. He admitted that Cw1 was employed as guard by the respondent but he was dismissed for absenting himself from duty without permission from the school management on 25.8.2011 as a result of which a theft took place. That the claimant was habitually misconducting himself by attending work while drunk and also absenteeism as a result of which he had been warned severally. That on 27.7.2012 Cw1 was called to a disciplinary hearing for his misconduct and he was found guilty and dismissed. Rw1 denied the claimant's claim and prayed for the suit to be dismissed.

8. On cross examination, Rw1 did not prove by leave records that Cw1 took all his leave days. He admitted that the claimant was acquitted of the criminal charges in respect of the crimes committed on 25.8.2011. He further admitted that after suspension Cw1 ought to have been paid half salary until the determination of his criminal case and then be paid the arrears if acquitted. He however maintained that Cw1 was not working during the suspension and as such he was not entitled to any salary. He further maintained the dismissal was lawful because Cw1 absented himself from work.

9. Rw2 stated that Cw1 absented himself from work without permission on 25.8.2011 as a result of which a theft occurred in which the power steering pump was stolen from the Isuzu Bus Registration KBN 241G. That had Cw1 notified the management of his absence, an alternative guard could have been hired to stand in for him.

10. Rw2 explained that the claimant was suspended from work for the said misconduct by letter dated 27.8.2011 and on 27.7.2012, the Board invited Cw1 for a disciplinary hearing and dismissed him the same day. He contended that Cw1 had previously misconduted himself and warned.

Analysis and Determination

11. There is no dispute that the claimant was employed by the respondent as a security guard until 27.7.2012 when he was dismissed. The issues for determination are:

(a) Whether the dismissal was unlawful.

(b) Whether the relief sought should be issued.

Unlawful termination

12. 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. In this case the reason for termination was not stated in the dismissal letter.

13. The claimant stated in his testimony that he did not know the reason why he was dismissed. However, the defence witnesses maintained that he was dismissed for absenting himself from duty without permission on the night of 25.8.2011. To them there was gross misconduct and the claimant had previously been warned about the same.

14. The claimant has admitted that he was absent without permission from the school management. That after getting a sick off from the doctor he just called his fellow guard Mr. Hillary to notify him that he was sick and he would not attend work that night. Under section 44 (4) (a) of the Employment Act absenting oneself from work without permission amounts to gross misconduct which entitles the employer to terminate the employee summarily. Consequently, I find that the respondent had a valid and fair reason to dismiss the claimant summarily. The contention that, the claimant had been acquitted of the offence is dismissed because an acquittal does not render an employee immune from internal disciplinary action by employer.

Procedure

15. The respondent invited the claimant to a disciplinary hearing on 27.7.2012 and the claimant has not denied that fact. He admitted that he attended the hearing and was taken through a session of questions and answers about the criminal case he had been acquitted. That thereafter he was served with a termination letter. His Lawyer has submitted that the procedure followed was unfair because the claimant was not told the reason for meeting in advance; and he was not advised to be accompanied by anybody or an officer of Labour to the hearing.

16. The invitation letter dated 25.7.2012 states as follows:

“Dear Sir

RE: MEETING THE B.O.G. ST MARY’S HIGH SCHOOL

ON 27.7.2012 AT 11.00AM

You are hereby invited to attend the above meeting without fail.

Yours faithfully,

MWANGEMI LABAN M

PRINCIPAL, SECRETARY

B.O.G/P.T.A

17. It is very clear from the foregoing that the agenda for the meeting between the claimant and the respondent was never notified to the claimant in advance. It is also clear that it never advised the claimant that he was attending a disciplinary hearing and that he had a right to be accompanied by a shop floor of his union or a fellow employee of his choice. Section 41 of the Employment Act provides that before the employer terminates the employment of his employee, he must explain to the employee the reason for the intended dismissal. The explanation must be in a language of the employee’s understanding and it must be done in the presence of another employee or shop floor union representative of his choice. The said provision does not require that the employee be notified in advance but during the hearing itself. The provision also does not require that a Labour officer should attend the proceedings in whatever capacity. However it is obvious that the right to be accompanied by another person must be explained in advance.

18. After careful consideration of the evidence and submissions, I agree with the claimant that he was not accorded a fair hearing as provided under section 41 of the Employment Act. The letter dated 25.7.2012 merely invited to a meeting with the respondent and it did not notify him that he was attending a disciplinary hearing which could lead his dismissal for misconduct. That the letter also did not notify him to choose a fellow employee or shop floor union official to accompany him to the hearing. Consequently, I find and hold that the respondent has failed to prove on a balance of probability that he accorded a fair hearing to the claimant as required by Law.

Reliefs

19. In view of the foregoing finding that the claimant was not accorded a fair hearing, I make declaration that the termination of his employment was unfair and therefore unlawful as prayed.

Notice and Compensation

20. Under section 49 of the Employment Act, I award three months salary in lieu of notice being kshs.24,960 because the letter of appointment provided for a notice of 3 months before termination. I will however award him only 3 months salary being kshs. 24960 as compensation for the unfair termination, because he contributed to his termination through his said misconduct.

Salary during suspension

21. There is no dispute that the claimant was suspended from work from 27.8.2011 until 27.8.2012 when he was dismissed. The respondent alleges that because the claimant rendered no services, he should not be paid. The question that arises from that contention is whether it is the claimant who refused to render services. It is trite that, suspension from duty by the employer does not mean termination of employment. In fact during such period, an employee is still bound by the terms and he cannot terminate the same without the requisite notice. The employer must therefore pay the salary for the period of suspension after the employee is found innocent unless otherwise agreed mutually. In this case the claimant remained in employment until he was terminated by the letter dated 27.7.2012. He is therefore awarded salary for 12 months of his suspension being kshs.99,840.

Leave

22. The claimant claims leave for 2005 and the period of suspension. I will not grant him this claim because, the claim for leave for 2005 is statute barred. It ought to have been brought within 12 months next after termination of the employment. As regards the leave for 2011-2012 I decline the same because he was not working during that period.

Disposition

23. For the reason stated above, I enter judgment for the claimant in the sum of **kshs. 149,760** plus costs and interest.

Signed, dated and delivered at Mombasa this 9th day of December 2016.

O.N. MAKAU

JUDGE