



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 46 OF 2013
GILBERT OCHIENG' SAMBA CLAIMANT
VERSUS
SOCIAL SERVICE LEAGUE
M.P. SHAH HOSPITAL 1ST RESPONDENT

Mr. Bosire for claimant

Mr. Molenje for respondent

JUDGMENT

1. By an amended memorandum of claim filed on 8th December 2015, the claimant prays for award of:
 - i. one month salary in lieu of notice Kshs.49,600;
 - ii. service pay for five (5) years kshs.248,000;
 - iii. salary for December 2013 Kshs.41,600;
 - iv. maximum compensation for unlawful termination of employment;
 - v. provision of certificate of service; and
 - vi. costs

2. The claim is opposed vide a memorandum of defence filed on 28th March 2013 in response to the initial memorandum of claim filed on 16th January 2013. The amendment added additional reliefs of notice pay and maximum compensation. The respondent dealt with the additional claims in the respondent's supplementary submissions filed on 26th February 2016. Both parties filed written response and did not call any witnesses. The suit will therefore be determined based on the pleadings, annexures thereto and the written submissions.

Facts of the case

3. The claimant was employed by the respondent as a staff nurse by a letter dated 18th October 2007 at a

salary of Kshs.29,094 per month. He worked continuously until 4th December 2012 when the claimant was summarily dismissed for the offence of assaulting a senior member of the management M/S Achebe on 5th November 2012 within the Hospital premises and caused malicious damage to hospital property.

4. At the time of dismissal the claimant earned a monthly salary of Kshs.49,600.

5. The claimant was issued a notice to appear for a disciplinary hearing on 23rd November 2012. The notice was issued on 12th November 2012. The notice advised the claimant to bring a colleague of choice to assist him in the conduct of the hearing in terms of section 41 of the Employment Act, 2007. The claimant was given time off from work from 12th November 2012 till the hearing date. On 15th November 2012, it was clarified to the claimant that he could bring a fellow employee or a union shopsteward to the hearing. The hearing was by a letter dated 23rd November 2012 rescheduled to 27th November 2012 at 9.00 a.m. the postponement was said to be due to *'interference from external sources.'*

6. The claimant had requested for more time to prepare his defence and had raised concern on the composition of the disciplinary committee by a letter dated 24th November 2012. The claimant was asked to appear before the committee on 29th November 2012 at 9.00 a.m. following the concerns he had raised by a letter dated 26th November 2012.

7. On 29th November 2012, the claimant did not appear at the hearing and the disciplinary hearing proceeded in the absence of the claimant.

8. The committee found the claimant guilty of serious gross misconduct for physically assaulting a superior and causing malicious damage to the employer's property. The summary dismissal was in terms of section 44 of the employment Act, 2007.

9. The respondent in the letter of dismissal offered to pay the claimant his final dues up to the date of dismissal and to grant him a certificate of service.

10. Determination

The issues for determination are;

- i. Whether the summary dismissal was for a valid reason; and
- ii. Whether the summary dismissal followed a fair procedure;
- iii. What remedies are due to the claimant

Issue i

11. The onus of demonstrating that a wrongful dismissal took place is placed on the claimant in terms of section 47 (5) of the employment Act, 2007. The respondent has a burden in terms of the same section to justify the reason for the dismissal.

12. In the present case, the documentary evidence which is not in dispute shows that the claimant was charged with the offence of physically assaulting a female superior at the work place and causing malicious damage to the respondent's property.

13. In the statement of claim, claimant does not deny at all that the said assault took place but instead challenges the procedure leading to the decision to summarily dismiss him from employment.

14. The respondent placed on record documents showing that the claimant was duly charged with the offence and was given notice to appear before a disciplinary committee to answer the charges.

15. On the first and second occasion the disciplinary process did not take place due to concerns raised by the claimant. However, on the 29th November 2012, the claimant failed to appear before the disciplinary committee and the committee made a decision to summarily dismiss him for serious gross misconduct aforesaid.

16. The claimant chose not to testify in court or call any witness in support of his case. The claimant having not denied that he had physically assaulted a female employee who was his senior at the work place has failed to prove on a balance of probability that the summary dismissal was wrongful. On the other hand, the respondent placed before court sufficient documentary evidence, attached to the pleadings to demonstrate that it had a justifiable reason to summarily dismiss the claimant. The court makes a finding that the summary dismissal of the claimant was justified and in terms of section 43, 44 and 45 of the Employment Act, 2007.

17. The claim for payment of notice pay and an award of compensation have no merit and are therefore dismissed.

18. With regard to the claim for service pay for five (5) years served, the claimant has to prove that his contract of service provided for payment of service gratuity or that his employer did not register him with the National social Security Fund (NSSF) or any other pension scheme in terms of section 35 of the employment Act, 2007 to justify payment of service gratuity.

19. The payslip produced by the claimant shows that he was registered with NSSF and dues were duly deducted. The claimant also contributed to a pension fund in terms of the payslip. The contract of service produced has no provision for payment of service gratuity. Accordingly, the claim for payment of service gratuity lacks merit and the same is dismissed.

20. With regard to the claim for payment of the salary for December 2012 at Kshs.49,600, the letter of summary dismissal shows that the claimant was summarily dismissed with effect from 4th December 2012. This means that the claimant is only entitled to payment of four (4) days salary for the month of December 2012 in the sum of Kshs.9,926 inclusive of leave days and overtime. The court awards the claimant accordingly.

21. The final orders of the court are that, the claimant is awarded;

- i. Kshs.9,926 being four (4) days salary for December, 2012 inclusive of leave and overtime.
- ii. The rest of the suit is dismissed for want of proof;
- iii. The respondent to provide the claimant with certificate of service;
- iv. The award of Kshs.9,926 be paid with interest at court rates from date of filing suit till payment in full for failure to remit same to his account.
- v. The respondent to pay costs of the suit.

Dated and delivered at Nairobi this 2nd day of December 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE