



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

CAUSE NO. 80 OF 2013

KENYA NATIONAL PRIVATE SECURITY

WORKERS UNION

CLAIMANT

V

K.K. SECURITY GUARDS LTD

RESPONDENT

JUDGMENT

1. Leonard Letting (grievant) was employed by Kenya Kazi Services Ltd (part of KK Security Group of companies-(Respondent) and was confirmed as a security guard through a letter dated 10 November 2008.
2. On or around 2 August 2010, the Respondent wrote to the Grievant informing him that he had been summarily dismissed following an incident on 31 July 2010 (he had allegedly been found asleep at work).
3. The Grievant, a member of the Kenya National Private Security Workers Union (Claimant) consulted the Claimant and it reported a trade dispute to the Minister for Labour. Attempts to resolve the dispute failed and the Conciliator issued a Certificate of Disagreement on 9 December 2010, leading to the Claimant instituting the present legal proceedings.
4. The Cause was heard on 25 November 2014.

Claimant's case

5. The Claimant's pleaded case is that the Grievant was wrongfully dismissed on the reason that he was found asleep on 31 July 2010. According to the Claimant, the reason was cooked up by the Grievant's supervisor to get rid of him, and that the Respondent did not comply with the provisions of sections 41 of the Employment Act, 2007.
6. The Grievant testified. He stated that he was assigned to Raiply Ltd on night shift and that on 31 July 2010, his supervisor came to his place of work and forced him to sign a cautionary letter, allegedly because he was found asleep.
7. He further stated that on 2 August 2010, he was issued with a summary dismissal letter. He denied that he was found asleep and stated he is the one who opened the gates for the supervisor. He stated he is seeking reinstatement.
8. In cross examination, the Grievant admitted he had received warning letters on 4 May 2009, 3 September 2009, 7 January 2010, 8 March 2010 and 15 July 2010. He also admitted recording a statement on 31 July 2010, but stated he was forced to sign it.
9. In re-examination he stated that he was not given a hearing before dismissal.

Respondent's case

10. The Respondent filed a Reply to Claim on 23 April 2013. It denied the averments in the Memorandum of Claim and put the Claimant to strict proof. It was also pleaded that the Grievant was involved in unprofessional and criminal activities to the detriment of the Respondent and that the Grievant was found asleep in the work place on 31 July 2010, and was thus lawfully dismissed for breach of contractual and statutory terms of employment
11. The Respondent called two witnesses. The first witness was the Grievant's supervisor.
12. He stated that prior to dismissal, the Grievant was issued with warning letters on 4 May 2009, 7 January 2010, 8 March 2010 and 15 July 2010, and most of the warnings related to the Grievant being found asleep at work.
13. On the dismissal, the witness stated that the Grievant was given a final warning on 15 July 2010 and that on 31 July 2010, he conducted checks on the guards under him. During the first check, the Grievant was alert but a spot check conducted later in the company of a trainer found the Grievant asleep. The Grievant wrote a statement concerning the incident and was not forced to write the statement.
14. In cross examination, the first witness stated that he was based at gate B of the Raiply Ltd compound and that they did not confiscate the Grievant's work uniform/tools because of the way he was dressed and that the Grievant wrote a statement at 2.00am.
15. The Respondent's second witness was a trainer. He stated he was on duty together with the Respondent's first witness and that at about 2.00am they found the Grievant asleep at the power plant.
16. According to this witness, the Grievant wrote a statement voluntarily.
17. He also stated that Raiply compound has one fence with 2 gates and that the Grievant did not have keys to any of the gates and it was not his responsibility to open the gates as he was at the power plant and not the gates.
18. On cross examination, the witness stated that the Respondent has a disciplinary code and that the Grievant was given a summon to attend the Respondent's offices and he was given time before dismissal.

Issues for determination

19. The Court has considered the pleadings, documents, testimony and submissions filed on 3 December 2014 (Claimant) and on 22 January 2015 (Respondent) and identified the issues arising for determination as, whether the dismissal of the Grievant was unfair/wrongful, and if so, appropriate remedies.

Whether the dismissal was unfair

Procedural fairness

20. There are two limbs to fairness in the termination of the employment relationship in Kenya. The first is anchored on section 41 of the Employment Act, 2007 and relates to the process followed by an employer prior to dismissal (procedural fairness). The ingredients or elements of procedural fairness are straightforward.
21. In *Edward Shabaya v K.K. Security Ltd* (2014) eKLR, this Court observed that *procedural fairness under section 41 of the Employment Act, 2007 envisages WHAT, WHEN, WHO and HOW questions..... The What question relates to what is the employee charged with, the When aspect relates to when the hearing will/took place, the Who question turns on who heard the disciplinary case and lastly, the How question relates to how the hearing took place. The WHAT, WHEN, WHO and HOW become particularly germane when an oral disciplinary hearing is held.*
22. The employee should be informed of the charges or allegations the employer is considering using to terminate the contract. The employee should thereafter be granted an opportunity to make representations on the allegations. The employee is further entitled to have a colleague or union representative present, as may be applicable.
23. If it is a case of summary dismissal, the employer is under a statutory obligation to consider the

- representations made by the employee.
24. In the instant case, it is not disputed that the Grievant wrote a statement on the material night. The statement was addressed to the Respondent's Operations Manager. In the statement, the Grievant stated that he had made a mistake but explained it away by stating he had been denied his off duty. The statement was made at 2.00am.
25. In Court, the Grievant asserted that he was forced to write the statement.
26. But can the statement taken on its own, demonstrate that the Respondent complied with its obligations under section 41 of the Employment Act, 2007.
27. The answer is no. The Respondent has not demonstrated through evidence that the Grievant was informed his dismissal was under contemplation at 2.00am when he was making the statement.
28. Further, the Court was not told of what the reasons for contemplated disciplinary action were, when and who informed the Grievant. It is equally not clear how the hearing was conducted. Was it an oral hearing and if so, who sat in the panel or heard the Grievant or was it conducted through correspondence?
29. In the view of the Court, the statement recorded by the Grievant on the night of 31 July 2010 was investigative in nature or was to establish the facts, and it was preliminary to the hearing expected by section 41 of the Act.
30. The Court therefore finds that the summary dismissal of the Grievant was procedurally unfair.
31. Because of the conclusion reached, it is not necessary for the Court to discuss the reasons for the dismissal, and whether the Respondent has proved the reasons as valid and fair reasons.

Appropriate relief

Reinstatement

32. Reinstatement is one of the primary remedies where the Court reaches a conclusion that termination of employment is unfair or wrongful.
33. But the Court is also obligated to consider that specific performance should be granted only where there are exceptional circumstances, subject to the 3 year restriction.
34. The Claimant did not demonstrate to Court the existence of any exceptional circumstances. Reinstatement would therefore not be an appropriate remedy in the present case.

Salaries for period out of employment

35. The Claimant has not laid out any legal or contractual foundation for this relief. In lieu, the Court considering the pleadings were drawn by laymen will treat this as a plea for compensation for wrongful/unfair termination.

Compensation

36. The Claimant did not expressly seek compensation pursuant to section 49(1) (c) of the Employment Act, 2007. The Court has however found the dismissal procedurally unfair.
37. In the view of the Court, this is a fit case to make an award of compensation. The award is discretionary and the statute has set out the factors the Court ought to consider.
38. The Grievant served the Respondent for a relatively short period of time. The Grievant was also paid Kshs 8,674/- as final dues.
39. Considering these factors, the Court awards the Grievant the equivalent of three months gross wages assessed as Kshs 19,119/- as compensation based on the remuneration in the confirmation letter.
40. The Court also awards the Grievant costs assessed at Kshs 15,000/-.
41. The Court has not considered the extra prayers introduced by the Claimant in its submissions.

Delivered, dated and signed in open Court in Nakuru on this 6th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant/Grievant
Security Workers Union

Mr. Matete, Organising Secretary, Kenya National Private

For Respondent
Advocates

Mr. Kamau instructed by Waruhiu, Kowade & Nganga