



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1685 OF 2013**

**ABDALLA MOHAMED ABDALLA.....CLAIMANT**

**VS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT**

**AWARD**

**Introduction**

1. The Independent Electoral and Boundaries Commission (IEBC), the body charged with midwifing elections in Kenya appears to have been caught up in a stalemate of a different kind; this time with its former employee, Abdalla Mohamed Abdalla. Abdalla who is the Claimant in this case worked for IEBC and its precursor, the Interim Independent Electoral Commission (IIEC) from 21st July 2009 until 22nd March 2013 when his employment was terminated. He brought this action by way of a Statement of Claim dated 22nd October 2013 and filed in Court on even date, seeking relief for unlawful dismissal.

2. IEBC filed a Memorandum of Defence on 27th March 2014 and the matter was heard between 21st April 2014 and 23rd January 2015. The Claimant testified on his own behalf and the Respondent called Sergeant Bernard K. Rono, Paul Juma Otiende and Peter Moru Ibare.

**The Claimant's Case**

3. The Claimant was employed as a driver on 21st July 2009 and was confirmed in his appointment on 21st July 2010. He was assigned to Dr. Yusuf Nzibo, one of the IEBC Commissioners. On 20th March 2013 at 6.00 pm while in the company of Commissioner Nzibo's bodyguard, Sergeant Bernard K. Rono the Claimant dropped Commissioner Nzibo at his home in Nairobi South C. The usual routine was for the Claimant to drop the bodyguard home and then drive to the police station or government administrative office nearest his home where he would park the official motor vehicle overnight.

4. The Claimant states that on this particular day, he was unwell and he therefore left the motor vehicle at the Commissioner's home, handing over the keys to the bodyguard. He then proceeded to a clinic in Nairobi West where he was given first aid. On 21st March 2013, the Claimant sought treatment at Nairobi Hospital and was given three days sick off. When he went back to work on 25th March 2013, he was issued with a termination letter. The termination was backdated to 22nd March 2013 and the reason thereof was stated as insubordination and desertion of duty. The Claimant's appeal against the termination was declined.

5. The Claimant pleads that the termination of his employment was unlawful and unfair. He therefore

claims the following:

- a) A declaration that the termination of his employment was unfair and unlawful
- b) Reinstatement without loss of benefits
  - c) 3 months' salary in lieu of notice.....Kshs. 132,399.00
  - d) Salary for March 2013.....Kshs.44,133.00
  - e) Leave pay for 2013.....Kshs.44,133.00
  - f) 1 month's basic salary as leave allowance in respect of each 5 years of service.....Kshs.220,665.00
  - g) Gratuity @ 31% of total salary paid under the life of the contract (September 2009-March 2013).....Kshs.1,897,719.00
  - h) 12 months' salary in compensation for unfair termination.....Kshs.529,596.00
  - i) Release of pension contributions under the Respondent's Retirement Benefits Scheme
  - j) Costs and interest

### **The Respondent's Case**

6. In its Memorandum of Defence filed on 27th March 2014, the Respondent states that the Claimant was employed by its predecessor, IIEC on a 12 months' contract from 21st July 2009 at the end of which he was paid his gratuity amounting to Kshs. 76,679.

7. On 20th April 2011, the Claimant drove the Respondent's motor vehicle registration number GKA 203E negligently and without authorisation and caused an accident along Loitoktok-Amboseli Road. Following this incident, the Claimant was issued with a show cause letter.

8. On 20th March 2013 at 15.00 hours, the Claimant abandoned his duty of driving one of the Respondent's Commissioners forcing the Commissioner to drive himself. The Claimant did not report to work the following day nor did he notify the Respondent of his whereabouts.

9. It is the Respondent's case that the Claimant's action was in contravention of Section 44(c) and (e) of the Employment Act, 2007, Section 10.2.5.2 of the Respondent's Human Resources and Administration Policies and Procedures Manual as well as Part III Section 9 of the Public Officer Ethics Act, 2003.

### **Findings and Determination**

10. The following are the issues for determination in this case:
- a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
  - b) Whether in effecting the termination the Respondent followed due procedure;
  - c) Whether the Claimant is entitled to the remedies sought.

## **Reason for Termination**

11. Section 43(1) of the Employment Act, 2007 requires an employer facing a claim arising out of termination of a contract of employment to prove the reasons(s) leading to the termination.

12. The Claimant's termination letter dated 22nd March 2013 states in part:

*“The Commission has noted with great concern that on 20th March 2013, you refused to drive one of the Commissioners and threw the car keys to the bodyguard, shouting that you do not require the Commission job any longer.*

*It has further been noted that since 20th March 2013 after leaving the vehicle without any driver in south C Area, within Nairobi, you deserted duty and your whereabouts are unknown, which amounts to gross misconduct.*

*Your actions as noted above are contrary to Section 44(c) and (e) of the Employment Act which states that it is gross misconduct for an employee to willfully neglect to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

*It goes on to state that an employee who knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer commits gross misconduct.*

*This is contrary to section 10.2.5.2 of the Independent Electoral and Boundaries Commission Human Resources and Procedures Manual.*

*Your actions therefore were in contravention of Section 44(c) and (e) of the Employment Act, section 10.2.5.2 of the Independent Electoral and Boundaries Commission Human Resources and Procedures Manual, and Part III section 9 of the Public Officer Ethics Act, 2003.*

*Your services as a driver of the Commission are therefore terminated with effect from 22nd March, 2013, the date of this letter on account of insubordination and desertion of duty.*

*OJH OSWAGO*

*CHIEF EXECUTIVE OFFICER/COMMISSION SECRETARY”*

13. From this letter, it is apparent that the reason for termination of the Claimant's employment was insubordination and desertion of duty. The Claimant's and the Respondent's accounts of the circumstances leading to the Claimant's termination are similar; barring minor details which the Court did not consider material.

14. The Claimant told the Court that on the evening of 20th March 2013 after dropping Commissioner Nzibo home, he went to seek medical attention at a clinic in Nairobi West, leaving the official motor vehicle at the Commissioner's home. This was not the usual arrangement. After receiving first aid at Nairobi West, the Claimant went to Nairobi Hospital the following day on 21st March 2013 where he was given three days' sick off.

15. The Claimant testified that he notified the Commissioner and his bodyguard, Sergeant Bernard Rono that he was unwell. In addition, he informed the Respondent's Transport Officer, Paul Juma Otiende informing him that he was on sick off. Both Rono and Otiende denied the Claimant's claim in this regard. In fact according to Otiende, the Respondent did not know the whereabouts of the Claimant from 21st to 25th March 2013.

16. Section 43(2) of the Employment Act, 2007 gives the standard of the burden placed upon an employer

as far as proof of reasons for termination of employment is concerned. In *Jessy Olukutukei Vs Feed The Children Kenya & Another [2014] eKLR* this Court held that the burden imposed on an employer by Section 43 is to establish a valid reason that would cause a reasonable employer to terminate employment of an employee.

17. The duty of the Court is not to substitute the decision of the employer with the decision it would have taken if it was in the employer's place. The duty of the Court is to examine the reasonableness of the employer's decision in light of the obtaining circumstances and the applicable law.

18. The Court found no reason to doubt the Claimant's testimony that he was actually unwell on 20th March 2013 when he left the official motor vehicle under his care at Commissioner Nzibo's home. What the Court could not understand was why the Claimant failed to notify the Transport Officer who was his supervisor immediately he felt unwell.

19. Employees are allowed sick off as may be determined by a medical officer of health. However, notification of their being admitted to sick off must be sent to the employer as soon as practically possible. There was no evidence that the Claimant was too ill to notify his supervisor that he was unwell and in light of the sensitive nature of his work, the Court finds that the Claimant acted without due care and the Respondent had a valid reason for terminating his employment.

### **Termination Procedure**

20. I will now examine the procedure adopted by the Respondent in effecting the termination. Section 41 of the Employment Act, 2007 establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

21. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

22. The Court was referred to Clause 10.2.5.2 of the Respondent's Human Resources and Procedures Manual on disciplinary procedure for cases of gross misconduct. According to this provision, an employee facing disciplinary proceedings for gross misconduct is entitled to an opportunity to present their defence which is to be considered before disciplinary action is taken.

23. Upon examination of the procedure adopted by the Respondent in terminating the Claimant's employment, the Court finds that the Respondent failed to adhere to both the provisions of Section 41 of the Employment Act, 2007 as well as the Respondent's own internal disciplinary rules. The termination of the Claimant's employment was therefore unfair for want of procedural fairness and he is entitled to compensation.

### **Remedies**

24. The Claimant claims reinstatement. Reinstatement is a premiere remedy uniquely available in this court to be granted in very exceptional circumstances. In *Dr. Joseph Maingi Maitha vs the Permanent Secretary Ministry of Medical Services and Another [2015] eKLR* this Court held that reinstatement or re-engagement is not available to an employee with a negative employment record.

25. I have no reason to change my mind on this score and having examined the Claimant's employment

record and informed by my finding that the Respondent in fact had a valid reason for terminating the Claimant's employment, the prayer for reinstatement is declined. I however award the Claimant four (4) months' salary in compensation. I also award him one (1) month's salary in lieu of notice as well as his salary for the days worked in March 2013. I further award him prorata leave pay for the months worked in 2013.

26. The Claimant admitted having been paid gratuity for the period covered under his initial letter of appointment dated 4th September 2009. With regard to his subsequent appointment from 21st July 2010, the Claimant was admitted to the Respondent's Retirement Benefits Scheme and was consequently not entitled to gratuity for this latter period. The claim for gratuity thus fails and is dismissed. The claim for leave allowance was not proved and is also dismissed.

27. Finally I make an award in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation for unfair termination...Kshs. 176,532.00
  - b) 1 month's salary in lieu of notice.....Kshs.44,133.00
  - c) Salary for days worked in March 2013 (44,133/30x20).....Kshs.29,422.00
  - d) Prorata leave pay for 2013 (44,133/30x1.75x2).....Kshs.5,149 .00
- Total.....Kshs.255,236.00**

28. The award amount will attract interest at court rates from the date of the award until payment in full.

29. I further direct the Respondent to facilitate release of the Claimant's pension contributions under the Retirement Benefits Scheme.

30. The Respondent will bear the costs of this case.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MARCH 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyende for the Claimant

Mr. Kariuki for the Respondent