



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 282 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 15th July, 2015)

SYLVESTER WAFULA WEKESACLAIMANT

VERSUS

SECURITY GUARDS SERVICES LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed this Memorandum of claim on 21/2/2014 in person. The Claimant averred that the issue in dispute is the wrongful and unfair termination of his services and failure by the Respondent to pay his terminal benefits.
2. The Claimant stated in his evidence that he was employed by the Respondent, a Security Company as a guard earning a monthly pay of Kshs.10,912/= . His Appendix 1 is a letter from the Respondents addressed to NSSF confirming that he is their employee. His employment commenced on 27/3/2010 and he avers that he served with loyalty and diligence until 14/10/2013 when he was wrongfully and unlawfully terminated.
3. The Claimant's claim is for payment of his dues amounting to 37,748/= as particularized in paragraph 5 of the claim and compensation for unlawful termination of employment.
4. The Respondents filed their Statement of Response on 25/4/2014 through the firm of P.M. Kamaara & Associates Advocates. It is their averment that the Claimant was employed with effect from 13/2/2011 and not from 2010 as stated. It is also their position that the Claimant had been cited for misconduct and disciplinary action taken against him.
5. They annexed some documents called warning orders as Appendix 2 and 3 showing that the Claimant had been issued with warnings on 3/10/2013, 5/9/2013 and 10/3/2013 which the Claimant on his part denied knowledge off and denied signing.
6. They also annexed a letter (Appendix 5) written by Claimant on 19/9/2013 apologizing for not carrying his club and in another letter dated 9/10/2013 where he apparently wrote apologizing for refusing to take up a new assignment. The Claimant denied Appendix 2 and 3 on Respondents list of documents but admitted writing the letter dated 9/10/2013 after being tortured.
7. The Respondents aver that the Claimant was summarily dismissed because he had been given a 3rd warning within a period of one year. They aver that the 2nd warning was not signed by the Claimant as he refused to do so.

8. It is also the Respondents position that they paid the Claimant all his terminal dues and that they held a disciplinary meeting where Claimant was allowed a witness – a brother. When Respondents witness was cross examined on 1st warning letter, he admitted that it was unsigned but was valid. He denied it was a forgery. He also admitted the 2nd and 3rd warning letters were having ineligible signatures and signed by a person who was not an Inspector respectively.

On the apology letter of 9/10/2013 the witness accepted that it was done after the Claimant had been terminated on 7/10/2013 and it is also unsigned. The Respondents further avers that the cash 16,000/= payable to Claimant was not paid as the Claimant refused to take it.

9. I have considered the evidence of both parties and their respective submissions, the issues for determination are as follows:

1. ***Whether there were valid reasons to terminate the Claimant's services.***
2. ***Whether due process was followed before Claimant's termination.***
3. ***What remedies if any the Claimant is entitled to.***

10. On the 1st issue, reasons given for the termination are indiscipline ranging from failing to carry a rungu – a club, refusing to take up an assignment and refusing to wear a uniform.

The Respondents contend that the Claimant had received various warnings on this behavior and had even apologized about the said behaviour.

The Claimant denied ever receiving the alleged warning letters and the RW1 also duly acknowledged that one was unsigned and another had been issued by an unqualified person. In essence what remains is that the alleged warning letters are a sham.

11. In respect of the apology letter admitted by the Claimant he averred that he was assigned work at a very far distance and he couldn't go due to lack of fare. That alone could not warrant a summary dismissal.

Under Section 45 (1) and (2) of the Employment Act:

1. ***No employer shall terminate the employment of an employee unfairly.***
2. ***A termination of employment by an employer is unfair if the employer fails to prove:***
 - a. ***that the reason for the termination is valid;***
 - b. ***that the reason for the termination is a fair reason:-***
 - i. ***related to the employee's conduct, capacity or compatibility; or***
 - ii. ***based on the operational requirements of the employer; and***
 - c. ***that the employment was terminated in accordance with fair procedure.***

12. The reasons warranting summary dismissal are also set out under Section 44(4) of Employment Act. There is no proof that the Claimant did commit any of these acts or omission. It is therefore this court's finding that there was no reason to warrant termination of Claimant's services.

13. On the 2nd issue, the procedure envisaged before termination are set out under Section 41 of Employment Act:

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

14. The Respondents avers that they accorded the Claimant a hearing where he came with his brother. The Claimant stated that he was dismissed verbally. The Respondents have not exhibited any minutes of the alleged disciplinary hearing which hearing the Claimant avers never took place.

It is therefore this court's finding that due process was not accorded the Claimant before the termination.

15. Having found as above, this court finds that the termination of Claimant was unfair, as provided under Section 45 of Employment Act and I declare it so.

The Claimant is therefore entitled to the following remedies as prayed:

1. *1 month salary in lieu of notice = 10,912/=*
2. *Leave for 1 year 21 days = 7,638/=*
3. *Salary arrears for September and October 2013 = 19,198/=*
4. *12 months salary as damages for unlawful termination of employment = 12 x 10,912 = 130,944/=*

TOTAL = 168,692/=

5. *The Respondent will pay costs of this suit.*

Read in open Court this 15th day of July, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjala for Claimant

Sagini for Respondent